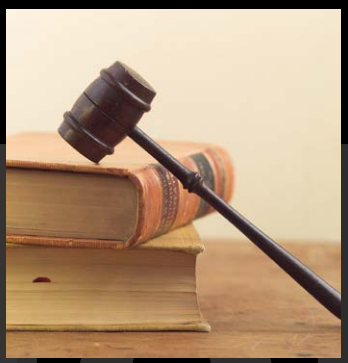
WORLD TRADE ORGANIZATION

ANNUAL REPORT FOR 2019-2020

APPELLATE BODY

July 2020



ANNUAL REPORT

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APPELLATE BODY MEMBERS: 2018

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WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
AFA	adverse facts available
ALADI	Asociación Latinoamericana de Integración/Associação Latino-Americana de Integração
ALOP	appropriate level of protection
B&O	business and occupation
BCI	business confidential information
Catalyst	Catalyst Paper Corporation
CEECAC	Central and Eastern Europe, Central Asia and the Caucasus
CKD	CKD Corporation
CLEEN	Continuous Lower Energy Emissions, and Noise
CU	Eurasian Economic Union as established in accordance with the Treaty on Eurasian Economic Union of 29 May 2014 (former Customs Union of the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation)
CVD	countervailing duty
DDSR	Digital Dispute Settlement Registry
Doha Declaration	Doha Declaration on TRIPS Agreement and Public Health
DORA	Disputes Online Registry Application
DSB	Dispute Settlement Body
DSS	dispute settlement system
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU Treaty	Treaty on the Eurasian Economic Union
EDB	economic development bond
ELSA	European Law Students' Association
EuroChem	JSC MCC EuroChem
FAA	Federal Aviation Administration
FBO	Russian Federal Budgetary Organization
FCTC	Framework Convention on Tobacco Control (2003)
FDNPP	Fukushima Dai-ichi Nuclear Power Plant
FSC/ETI	Foreign Sales Corporation/Extraterritorial Income
GATS	General Agreement on Trade in Services

Abbreviation	Description
GATT 1994	General Agreement on Tariffs and Trade 1994
GHW	graphic health warnings
GI	geographical indications
GOC	Government of China
HSBI	highly sensitive business information
ICIT	Ukraine's Intergovernmental Commission on International Trade
IP	intellectual property
IRB	industrial revenue bond
ITC	International Tobacco Control
Irving	Irving Paper Ltd
ITAR	International Traffic in Arms Regulations
IR&D	independent research and development
KCC	KCC Co., Ltd.
KTC	Korea Trade Commission
LCA	large civil aircraft
MEDT	Ministry of Economic Development and Trade of Ukraine
MLPA	minimum legal purchasing age
MOSF	Korea's Minister of Strategy and Finance
NTPPTS	National Tobacco Plain Packaging Tracking Survey
OCTG	oil country tubular goods
OFA	other forms of assistance
OTI	Korea's Trade Commission Office of Trade Investigation
Paris Convention (1967) -	Stockholm Act of the Paris Convention for the Protection of Industrial Property of 14 July 1967
PHP	Port Hawkesbury Paper LP
POI	period of investigation
PRC	People's Republic of China
RDT&E	research, development, test, & evaluation
Resolute	Resolute FP Canada Inc.
RPT	reasonable period of time
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIE	state-invested enterprise

Abbreviation	Description
SMC	SMC Corporation
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TIPRA	Tax Increase Prevention and Reconciliation Act
TMA Act	Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
TPC	TPC Mechatronics Corporation
TPP Act	Tobacco Plain Packaging Act 2011 (Cth)
TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade Related Aspects of Intellectual Property Rights
USDOC	United States Department of Commerce
USDOD	United States Department of Defense
VIF	variance inflation factors
WHO	World Health Organization
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

FOREWORD

This annual report covers the cases the Appellate Body completed during 2019 and the first half of 2020.

During this period, eight panel reports concerning seven matters were appealed.[1] Also before the Appellate Body during this period were 13 appeals that were carried over into 2019.[2] Altogether, 21 appeals were before the Appellate Body during this period, including six appeals for which the Appellate Body reports were circulated in 2019[3] and four appeals for which the Appellate Body reports were circulated in the first half of 2020.[4] The appeals that were pending before the Appellate Body during this period raised a wide range of issues under numerous covered agreements, including the GATT 1994, the GATS, the Anti-Dumping Agreement, the SCM Agreement, the Agreement on Safeguards, the TBT Agreement, the SPS Agreement, the TRIPS Agreement, the Customs Valuation Agreement, and the DSU.

Appeals completed by the Appellate Body during this period presented diverse and sensitive issues. These included issues arising from measures and under covered agreements that have frequently been subject to WTO dispute settlement, such as prohibited and actionable subsidies under the SCM Agreement (one case), anti-dumping and countervailing duty investigations and the imposition of such duties under the Anti-Dumping Agreement (two cases), and the SCM Agreement (two cases). In addition, sensitive issues relating to the protection of public health arose in two of the appeals completed by the Appellate Body in 2019 and 2020. *Korea – Radionuclides* involved import measures imposed by Korea on certain fishery products from Japan following the Fukushima Daiichi Nuclear Power Plant accident. Another highprofile dispute completed by the Appellate Body was *Australia – Tobacco Plain Packaging,* which raised, *inter alia*, issues concerning Members' rights to pursue public health policies consistently with their obligations under the TBT Agreement, the TRIPS Agreement, and the DSU. In addition, in *Russia – Railway Equipment,* the Appellate Body for the first time reviewed Members' obligations regarding their procedures for assessment of conformity with technical regulations or standards under the TBT Agreement.

Most appeals heard by the Appellate Body during this period were also notable for their complexity and size. The first dispute for which an Appellate Body report was circulated in this period was *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU),* which was an exceptionally large and complex dispute that required much of the Appellate Body and its Secretariat's resources during the beginning of 2019. In this appeal, the Appellate Body reviewed the compliance panel's findings regarding compatibility with the SCM Agreement of a large number of alleged subsidy measures, including procurement contracts, various tax measures, R&D measures, and measures related to government bonds. The last Appellate Body report circulated in this period concerned the appeals regarding *Australia – Tobacco Plain Packaging*, which were also exceptionally large and complex. They involved three participants and 35 third participants, and the panel record consisted of, inter alia, more than 1,300 exhibits, dozens of expert reports, and an

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[1] The following panel reports were appealed during 2019: *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines); Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II); US – Pipes and Tubes (Turkey); US – Differential Pricing Methodology; US – Renewable Energy; India – Export Related Measures;* and *EC and certain member States – Large Civil Aircraft (Article 21.5 – EU).* The number of appeals in 2019 also includes the panel report in *US – Carbon Steel (India) (Article 21.5 – India),* for which the United States notified its decision to appeal, but did not file a notice of appeal or an appellant submission because no Division of the Appellate Body could be established to hear the appeal (WT/DS436/22).

[2] The following appeals were pending at the start of 2019: *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU); 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); and India – Iron and Steel Products.*

[3] The following Appellate Body reports were circulated in 2019: *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU); Korea – Radionuclides; US – Countervailing Measures (China) (Article 21.5 – China); Korea – Pneumatic Valves (Japan); Ukraine – Ammonium Nitrate; and Morocco – Hot Rolled Steel (Turkey).*

[4] The Appellate Body reports for which the circulation dates fell in 2020 concerned the following panel reports: *Ukraine – Ammonium Nitrate; Russia – Railway Equipment; Australia – Tobacco Plain Packaging (Honduras); and Australia – Tobacco Plain Packaging (Dominican Republic).*

approximately 1,000page panel report. These appeals required a significant portion of the resources of the Appellate Body and its Secretariat throughout 2019 and 2020. In these appeals, the Appellate Body reviewed the Panel's findings concerning the compatibility with the TBT Agreement and with the TRIPS Agreement of Australia's measures requiring the plain packaging of Tobacco products.

In addition to the above two disputes, the Appellate Body worked on the completion of seven other Appellate Body reports involving as many matters, each of which presented unique and complex issues and challenges. For example, in *US – Countervailing Measures (China) (Article 21.5 – China)*, the Appellate Body reviewed the compliance panel's rulings concerning 12 countervailable subsidy determinations conducted by the investigating authority of the United States, including the panel's interpretation of "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement, and the determinations of benefit and specificity under Articles 14(d) and 2.1(c), respectively. In *Korea – Pneumatic Valves (Japan)*, the Appellate Body clarified, *inter alia*, the intricate relationships among the effects of dumping under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, and the causal relationship under Article 3.5. In *Ukraine – Ammonium Nitrate*, the Appellate Body reviewed the Panel findings regarding the consistency of the use of costs other than those based on records kept by the exporter/producer under investigation for purposes of determining the constructed normal values under Article 2.2.1.1 of the Anti-Dumping Agreement. The Appellate Body also clarified the relationship between Article 2.2.1.1 and Article 2.2 of the Anti-Dumping Agreement relating to the determination of dumping. Amidst this unabating work on the appellate proceedings, the Appellate Body Secretariat also assisted Arbitrator Ricardo Ramírez-Hernández in determining the reasonable period of time for implementation of the DSB rulings and recommendations in *Ukraine – Ammonium Nitrate*.

The Appellate Body's work during 2019 and the first half of 2020 coincided with the reduced number of the Appellate Body members. Specifically, the Appellate Body, which normally should consist of seven members, was composed of only three members during much of 2019.[5] Moreover, on 10 December 2019, the terms of office of Messrs Ujal Singh Bhatia and Thomas R. Graham as Appellate Body members expired. This resulted in the Appellate Body being reduced thereafter to only one remaining member, Madame Hong Zhao, below the required number of Appellate Body members (three) to serve on an appeal pursuant to Article 17(1) of the DSU. The selection processes for the appointment of new Appellate Body members continued to be discussed at the DSB meetings throughout 2019 and in 2020, but WTO Members were not able to reach consensus to launch and fill the outstanding vacancies.[6] In light of these developments, the Chair of the DSB stated at the DSB meeting held on 3 December 2019 that, with respect to the appeals pending as of that date in which the oral hearing had taken place (*Australia – Tobacco Plain Packaging* (DS435, DS441), Russia – *Railway Equipment* (DS499), and *US – Supercalendered Paper* (DS505)), the Divisions assigned to each of these appeals would continue its work until the completion of the appeals.[7] The Divisions for all other pending appeals communicated that they had decided to suspend their work on these appeals as of 10 December 2019 with the expiry of the terms of office of Messrs Bhatia and Graham. As a result of these developments, since 10 December 2019, the work of the Appellate Body has come to a halt except for the work on the Appellate Body reports circulated in the first half of 2020, and the Appellate Body has

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[5] In addition, Messrs Peter Van den Bossche and Shree Baboo Chekitan Servansing, whose terms of office as Appellate Body members expired on 11 December 2017 and 30 September 2018, respectively, continued to complete the disposition of the appeals to which they had been assigned before their terms expired pursuant to Rule 15 of the Working Procedures for Appellate Review (until the circulation of *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* on 28 March 2019 in the case of Mr Peter Van den Bossche and until the circulation of *Australia – Tobacco Plain Packaging* on 9 June 2020 in the case of Mr Shree Baboo Chekitan Servansing).

[6] In particular, no consensus could be reached to launch the selection processes at DSB meetings throughout 2019 and the first half of 2020 due to certain systemic concerns regarding the functioning of the Appellate Body. WTO Members discussed such systemic concerns throughout this period, including through the informal process conducted under the auspices of the General Council (GC) by Ambassador David Walker of New Zealand as Facilitator. In this regard, Ambassador Walker held various consultations and identified elements of convergence regarding the Members' concerns and the specifics of how to address such concerns in the GC meetings held in July (see WT/GC/M/179 and JOB/GC/220), October (see WT/GC/M/180 and JOB/GC/222), and December 2019 (see WT/GC/M/181 and JOB/GC/225). A draft GC decision regarding the functioning of the Appellate Body was prepared by Ambassador Walker based on these elements of convergence and introduced for adoption in the GC meeting on 9-10 December 2019. However, Members were not able to reach a consensus to adopt the draft decision (WT/GC/M/181).

[7] WT/DSB/M/437.

since been, and remains, unable to hear any pending or future appeals until the DSB agrees to initiate the selection process to fill the vacancies of the Appellate Body. Ten Appellate Body reports resolving as many appeals were circulated in 2019 and the first half of 2020 despite these extraordinary circumstances.

The work of the Appellate Body in 2019 and the first half of 2020 demonstrates the Appellate Body's continued commitment to the effective and efficient settlement of disputes even under the most challenging circumstances. The Appellate Body has been a key achievement of Uruguay Round. We remain confident that WTO Members will take account of that achievement as they discuss the way forward.

WORLD TRADE ORGANIZATION
APPELLATE BODY

ANNUAL REPORT FOR 2019-2020

1. INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2019 and the first half of 2020.

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: "[t]he 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".[8] 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 goods9, trade in services[10], and the protection of intellectual property rights[11], 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[12] 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.[13]

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.[14] 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.[15] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[16] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[17]

[8] Article 3.3 of the DSU.
[9] Annex 1A to the WTO Agreement.
[10] Annex 1B to the WTO Agreement.
[11] Annex 1C to the WTO Agreement.
[12] Annex 4 to the WTO Agreement.
[13] Appendix 1 to the DSU.
[14] Article 4 of the DSU.
[15] Article 6 of the DSU.
[16] Article 8.6 of the DSU.
[17] Article 8.7 of the DSU.

Panels shall be composed of well-qualified governmental and/or non-governmental individuals with expertise in international trade law or policy.[18] 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".[19] 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 single term, which can be extended for another term. 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 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 (Rules of Conduct).[20] 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.[21]

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 (Working Procedures)[22], 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.

[18] Article 8.1 of the DSU.

[19] Article 11 of the DSU.

[20] 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)

[21] 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).

[22] 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.[23] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding on 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 recommendations and rulings of the DSB. 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 recommendations and rulings of the DSB. 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.[24]

[23] Articles 16.4 and 17.14 of the DSU.

[24] 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.[25] 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.[26] Recourse to arbitration, including the procedures to be followed in such arbitration proceedings, is subject to mutual agreement of the parties.[27]

[25] Article 5 of the DSU.

[26] 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))

[27] 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 fouryear term.

In January 2019, the Appellate Body was composed of three members.[28] On 10 December 2019, the terms of office of two Appellate Body members, Messrs Ujal Singh Bhatia and Thomas R. Graham, expired. The selection processes for the appointment of new Appellate Body members were discussed at DSB meetings throughout 2019 and year-to-date 2020[29], but WTO Members were not able to reach a consensus to launch and fill the outstanding vacancies.

At all 11 regular DSB meetings held in 2019 and three regular DSB meetings during the first half of 2020 (up to and including the DSB meeting held on 29 June 2020), several revised versions[30] 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 WTO Members[31], 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 four vacancies that have been outstanding since the beginning of 2019 (these vacancies had arisen as a result of the expiry of the terms of office of Messrs Ricardo Ramírez-Hernández, Peter Van den Bossche, and Shree Baboo Chekitan Servansing, and the resignation of Mr Hyun Chong Kim). In addition, the fifth and sixth vacancies arose upon the expiry of the second terms of office of Messrs Ujal Singh Bhatia and Thomas R. Graham on 10 December 2019. The proposal regarding the processes for the selection of Appellate Body members introduced on 24 June 2019 and thereafter provided for selection processes to appoint Appellate Body members for Messrs Ujal Singh Bhatia and Thomas R. Graham in addition to the four outstanding vacancies. The proposals were made on behalf of a growing number of proponents, with 52 WTO Members supporting the first proposal at the DSB meeting on 22 November 2017, increasing to 71 Members at the DSB meeting on 28 January 2019[32], to 118 Members at the DSB meeting on 18 December 2019[33], and to 122 Members at the DSB meeting on 28 February 2020.[34] The proponents of the proposals stressed that the vacancies "seriously affect[] [the Appellate Body's] workings and the overall dispute settlement system against the best interest of [the] Members" and that "WTO Members have a responsibility to safeguard and preserve the Appellate Body, the dispute settlement and the multilateral trading system." 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 2019 and the first quarter of 2020. During that

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[28] The second term 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 for Appellate Review (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's last appeal under Rule 15 *(US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU))* ended with the circulation of the Appellate Body report on 28 March 2019.

The term of office of Mr Shree Baboo Chekitan Servansing expired on 30 September 2018. On 28 September 2018, the Chair of the Appellate Body notified by the letter the Chair of the DSB that, in accordance with Rule 15 of the Working Procedures for Appellate Review, 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. Mr Servansing carried out his duties under Rule 15 throughout 2019.

[29] See, for example, WT/DSB/M/425, WT/DSB/M/426, WT/DSB/M/428, WT/DSB/M/429, WT/DSB/M/430, WT/DSB/M/431, WT/DSB/M/433, WT/DSB/M/434, WT/DSB/M/436, WT/DSB/M/437, WT/DSB/M/438, WT/DSB/M/440, and WT/DSB/M/441 (29 June 2020).

[30] The revised versions of the proposal discussed during the DSB meetings in 2019 and the first half of 2020 are WT/DSB/W/609/Rev.7; WT/DSB/W/609/Rev.8; WT/DSB/W/609/Rev.10; WT/DSB/W/609/Rev.11; WT/DSB/W/609/Rev.12; WT/DSB/W/609/Rev.13; WT/DSB/W/609/Rev.14; WT/DSB/W/609/Rev.15; WT/DSB/W/609/Rev.16; WT/DSB/W/609/Rev.17; and WT/DSB/W/609/Rev.18.

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

[32] WT/DSB/M/425.

[33] WT/DSB/W/609/Rev.15.

[34] WT/DSB/W/609/Rev.17

period, Members also discussed a number of substantive and systemic concerns regarding the functioning of the Appellate Body, including through the informal process conducted under the auspices of the General Council by Ambassador David Walker of New Zealand as Facilitator.[35]

As a result of the above events, the Appellate Body was composed in 2019 of three members until the expiry of the second terms of office of Messrs Ujal Singh Bhatia and Thomas R. Graham on 10 December 2019. Thereafter, it was composed of one remaining member for the remainder of the year as shown in Table 1 below:

TABLE 1: COMPOSITION OF THE APPELLATE BODY DURING 2019 AND THE FIRST HALF OF 2020

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

* The terms of Ujal Singh Bhatia and Thomas R. Graham as Appellate Body members ended on 10 December 2019. Pursuant to Rule 15 of the Working Procedures, they were authorized to complete the disposition of those appeals that had been assigned to them while being members of the Appellate Body and for which hearings were held before their terms of office expired.[36]

On 12 December 2018, pursuant to Rule 5.1 of the Working Procedures, the members of the Appellate Body elected Madame Zhao Hong 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 December 2019.[37] On 13 December 2019, the Appellate Body communicated that Madame Zhao Hong has been elected to serve as Chair of the Appellate Body as of 1 December 2019 until 30 November 2020 pursuant to Rule 5.1 of the Working Procedures.[38]

Biographical information about the members of the Appellate Body is provided in Annex 3. A list of former Appellate Body members and Chairs is provided in Annex 4.

The Appellate Body receives legal and administrative support from the Appellate Body Secretariat, in accordance with Article 17.7 of the DSU. As of 31 December 2019, the Secretariat comprised 19 lawyers, 1 administrative assistant, and 4 support staff posts, and Werner Zdouc was the Director.

[35] The concerns discussed are contained in the following WTO documents: WT/DSB/M/425, WT/DSB/M/426, WT/DSB/M/428, WT/DSB/M/429, WT/DSB/M/430, WT/DSB/M/431, WT/DSB/M/433, WT/DSB/M/434, WT/DSB/M/436, WT/DSB/M/437, WT/DSB/M/438, WT/DSB/M/440, and WT/DSB/M/441 (29 June 2020). Reports of Ambassador Walker regarding the informal process on matters related to the functioning of the Appellate Body conducted under the auspice of the General Council are contained in the following WTO documents: WT/JOB/215; WT/JOB/217; WT/JOB/220; WT/JOB/222, and; WT/JOB/225. As a result of the informal process, a draft General Council decision regarding the functioning of the Appellate Body was prepared and introduced for adoption in the General Council meeting on 9-10 December 2019. However, Members were not able to reach a consensus to adopt the draft decision (WT/GC/M/181).

[36] On 3 December 2019, the Chair of the Appellate Body notified by the letter the Chair of the DSB that, in accordance with Rule 15 of the Working Procedures for Appellate Review, the Appellate Body had authorized Messrs Ujal Singh Bhatia and Thomas R. Graham to complete the disposition of the appeals to which they had been assigned before the expiry of their terms on 10 December 2019 and for which hearings had been held before that date. Subsequently, the participants and third participants in the appeals concerned were informed of the same.

[37] WT/DSB/77.

[38] WT/DSB/78.

3. APPEALS

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

Eight panel reports concerning seven matters were appealed during 2019 and the first half of 2020.[39] The Appellate Body's work on one appeal filed in 2017 was completed, and its work on three appeals filed in 2018 continued throughout 2019 and the first quarter of 2020. Four of the appeals filed during this period 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 two of the eight new appeals. Table 2 sets out further information regarding the appeals filed in and pending throughout 2019 and the first half of 2020. Further information on the number of appeals filed each year since 1996 is provided in Annex 5.

The percentage of panel reports that have been appealed from 1996 to the first half of 2020 is approximately 67%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 6.

TABLE 2: APPEALS PENDING

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant[b]	Document symbol
EU – Energy Package	21 September 2018	EU	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
India – Iron and Steel Products	14 December 2018	India	WT/DS518/8	Japan	WT/DS518/9
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	9 January 2019	Thailand	WT/DS371/27	---	---
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)	9 September 2019	Thailand	WT/DS371/30	---	---
US – Pipes and Tubes (Turkey)	25 January 2019	US	WT/DS523/5	Turkey	WT/DS523/6
US – Differential Pricing Methodology	4 June 2019	Canada	WT/DS534/5	---	---
US – Renewable Energy	15 August 2019	US	WT/DS510/5	India	WT/DS510/6
India – Export Related Measures	19 November 2019	India	WT/DS541/7	---	---

[39] This includes the Panel Report in *US – Carbon Steel (India) (Article 21.5 – India)* (DS436), for which the United States notified of its decision to appeal pursuant to Article 16 of the DSU on 18 December 2019 (WT/DS436/21). On 14 January 2020, India and the United Sates jointly communicated to the DSB that, despite the decision by the United States to appeal, the United States did not file a notice of appeal or an appellant submission because no Division of the Appellate Body can be established to hear the appeal at the time of the communication. For this reason, India and the United States jointly notified their understanding that the United States will submit a notice of appeal and an appellant submission once a Division can be established and that India may file its own appeal at that point of time (WT/DS436/22).

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant[b]	Document symbol
EC and certain member States – Large Civil Aircraft (Article 21.5 – EU)	6 December 2019	EU	WT/DS316/43	---	---
US – Carbon Steel (India) (Article 21.5 – India)	18 December 2019	US	WT/DS436/21	---	---

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

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

[c] The United States has notified of its intention to appeal the Panel Report in this case but did not file a notice of appeal or an appellant submission because at this time no Division of the Appellate Body can be established to hear this appeal (WT/DS436/22).

APPELLATE BODY REPORTS

Ten Appellate Body reports concerning nine matters were circulated during 2019 and the first half of 2020, the details of which are summarized in Table 3. As of the end of the first half of 2020, the Appellate Body had circulated a total of 169 reports.40

TABLE 3: APPELLATE BODY REPORTS CIRCULATED BETWEEN THE BEGINNING OF 2019 AND THE FIRST HALF OF 2020

Case	Document symbol	Date circulated	Date adopted by the DSB
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	WT/DS353/AB/RW	28 March 2019	11 April 2019
Korea – Radionuclides	WT/DS495/AB/R	11 April 2019	26 April 2019
US – Countervailing Measures (China) (Article 21.5 – China)	WT/DS437/AB/RW	16 July 2019	15 August 2019
Korea – Pneumatic Valves	WT/DS504/AB/R	10 September 2019	30 September 2019
Ukraine – Ammonium Nitrate	WT/DS493/AB/R	12 September 2019	30 September 2019
Morocco – Hot-Rolled Steel	WT/DS513/AB/R	10 December 2019	8 January 2020
Russia – Railway Equipment	WT/DS499/AB/R	4 February 2020	5 March 2020
US – Supercalendered Paper	WT/DS505/AB/R	6 February 2020	5 March 2020
Australia – Tobacco Plain Packaging (Honduras)	WT/DS435/AB/R	9 June 2020	29 June 2020
Australia – Tobacco Plain Packaging (Dominican Republic)	WT/DS441/AB/R	9 June 2020	29 June 2020

[40] Further details regarding the circulated Appellate Body reports, by year of circulation, are provided in Annex 8: Table II.

Table 4 below shows which WTO agreements were addressed in the Appellate Body reports circulated in 2019 and the first half of 2020.

TABLE 4: WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED BETWEEN THE BEGINNING OF 2019 AND THE FIRST HALF OF 2020

Case	Document symbol	WTO agreements addressed
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	WT/DS353/AB/RW	SCM Agreement DSU
Korea – Radionuclides	WT/DS495/AB/R	SPS Agreement DSU
US – Countervailing Measures (China) (Article 21.5 – China)	WT/DS437/AB/RW	SCM Agreement DSU
Korea – Pneumatic Valves	WT/DS504/AB/R	Anti-Dumping Agreement DSU
Ukraine – Ammonium Nitrate	WT/DS493/AB/R	Anti-Dumping Agreement DSU
*Morocco – Hot-Rolled Steel**	WT/DS513/AB/R	---
Russia – Railway Equipment	WT/DS499/AB/R	TBT Agreement DSU
US – Supercalendered Paper	WT/DS505/AB/R	SCM Agreement DSU
Australia – Tobacco Plain Packaging (Honduras)	WT/DS435/AB/R	TBT Agreement TRIPS Agreement DSU
Australia – Tobacco Plain Packaging (Dominican Republic)	WT/DS441/AB/R	

* *In Morocco – Hot-Rolled Steel*, the appeal was withdrawn, and the Appellate Body report describes the Panel's findings and summarizes the procedural history of the case, but it does not address the substantive legal issues raised in the appeal.

The findings and conclusions contained in the Appellate Body reports circulated during 2019 and the first half of 2020 are summarized below.

3.1 Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, WT/DS353/AB/RW

This case concerned the compliance dispute arising from a challenge brought by the European Union more than 10 years ago against subsidies provided by the United States to large civil aircraft (LCA), namely, Boeing LCA. The original panel and the Appellate Body ruled in favour of many of the claims by the European Union, and those reports were adopted by the DSB in March 2012. The United States was required to comply with those rulings by 23 September 2012. Following a complaint brought by the European Union, a compliance Panel found, in a report circulated on 9 June 2017, that the United States continued to cause adverse effects in the form of significant lost sales, and a threat of impedance, within the meaning of Articles 5(c) and 6.3(a)-(c) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the single-aisle LCA market in the post-implementation period (after September 2012). Specifically, the Panel made the following findings in its Report.

With respect to whether certain measures, and claims with regard to certain measures, are outside the Panel's terms of reference for purposes of Article 6.2 of the DSU or the scope of these compliance proceedings:

a. The European Union's claims under Articles 3.1(a)-(b) and 3.2 of the SCM Agreement, and under Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994), are within the Panel's terms of reference; but the South Carolina Phase II measures, and the Washington State tax measures, as amended by SSB 5952, are outside the Panel's terms of reference, owing to the failure of the European Union's panel request to meet the requirements of Article 6.2 of the DSU with respect to such measures.

b. The following measures are within the scope of these compliance proceedings:

   i. the Washington State business and occupation (B&O) tax credits for preproduction/aerospace product development including amendments thereto; the Washington State B&O tax credit for property taxes and leasehold excise taxes including amendments thereto; the Washington State sales and use tax exemptions for computer software, hardware, and peripherals; and the City of Everett B&O tax rate reduction;

   ii. United States Department of Defense (USDOD) procurement contracts funded through the 23 original research, development, test, & evaluation (RDT&E) programme elements;

   iii. USDOD procurement contracts HR0011-06-C-0073 and HR-0011-08-C-0044 SOW and assistance instruments HR0011-06-2-0008, FA8650-07-2-7716, and HR0011-10-2-0001 funded through the Materials Processing Technology Project of the Materials and Biological Technology programme element;

   iv. the provision of access to USDOD equipment and employees with respect to the post-2006 USDOD procurement contracts and assistance instruments funded under the 23 original RDT&E programme elements and the "additional" programme elements that the Panel found to be within the scope of these proceedings;

   v. the Federal Aviation Administration (FAA) aeronautics R&D measure; and

   vi. the South Carolina Project Gemini measures and Project Emerald measures.

c. The following measures are outside the scope of these compliance proceedings:

   i. the Washington State Joint Center for Aerospace Technology Innovation measure;

   ii. Air Force Contract F19628-01-D-0016 funded under the DRAGON Project of the Airborne Warning and Control System (PE 0207417F) programme element; Air Force Contract FA8625-11-C-6600 funded under the KC-46, Next Generation Aerial Refueling Aircraft (PE 0605221F) programme element; and measures funded under the MultiMission Maritime Aircraft (P-8A) (PE 0605500N) programme element, including Navy contracts N00019-04-C-3146, N00019-09-C-0022, and N00019-12-C-0112; and

   iii. the provision of access to USDOD equipment and employees with respect to the pre2007 NASA procurement contracts and USDOD assistance instruments funded under the 23 original RDT&E programme elements.

d. The European Union is precluded from bringing claims under Articles 3.1(a) and 3.2 of the SCM Agreement against the following four original Washington State tax measures enacted under HB 2294: (i) the Washington State B&O tax rate reduction; (ii) the Washington State B&O tax credits for

preproduction/aerospace product development including amendments thereto; (iii) the Washington State B&O tax credit for property taxes including amendments thereto; and (iv) the Washington State sales and use tax exemptions for computer software, hardware, and peripherals.

e. The European Union is precluded from bringing claims under Articles 3.1(b) and 3.2 of the SCM Agreement, and under Article III:4 of the GATT 1994, with respect to the following four original Washington State tax measures enacted under HB 2294: (i) the Washington State B&O tax rate reduction; (ii) the Washington State sales and use tax exemptions for computer software, hardware, and peripherals; (iii) the Washington State B&O tax credits for preproduction/aerospace product development including amendments thereto; and (iv) the Washington State B&O tax credit for property taxes including amendments thereto; as well as the Foreign Sales Corporation/Extraterritorial Income (FSC/ETI) measures.

f. The European Union is precluded from bringing claims under Articles 3.1(a)-(b) and 3.2 of the SCM Agreement, and under Article III:4 of the GATT 1994, with respect to: (i) the City of Everett B&O tax rate reduction, the tax abatements related to the City of Wichita industrial revenue bonds (IRBs), and the pre-2007 NASA Space Act Agreements and USDOD procurement contracts at issue in the original proceedings; and (ii) the pre-2007 NASA procurement contracts and USDOD assistance instruments at issue in the original proceedings, as amended by the respective Boeing Patent Licence Agreements.

With respect to whether the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement:

a. With regard to the pre-2007 NASA and USDOD aeronautics R&D subsidies that were the subject of the DSB recommendations and rulings, the European Union established that the modifications made by the United States through the Boeing Patent Licence Agreements to the terms of the pre-2007 NASA procurement contracts and USDOD assistance instruments do not constitute a withdrawal of the subsidy within the meaning of Article 7.8 of the SCM Agreement and that the United States, having taken no action with respect to pre-2007 Space Act Agreements, has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement.

b. With regard to the post-2006 measures of the United States challenged in these proceedings, the European Union established that the following measures involve specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and that by granting or maintaining these specific subsidies after the end of the implementation period, the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement:

    i. certain transactions between NASA and Boeing pursuant to the post-2006 NASA procurement contracts, cooperative agreements, and Space Act Agreements, with respect to which the Panel was unable to estimate the amount of the subsidy on the basis of the evidence on the record, but considered the United States' estimate of the amount of the financial contribution between 2007 and 2012 to be a credible estimate;

    ii. certain transactions between USDOD and Boeing pursuant to post-2006 USDOD assistance instruments, with respect to which the Panel was unable to estimate the amount of the subsidy on the basis of the evidence on the record, but considered the United States' estimate of the amount of the financial contribution between 2007 and 2012 to be a credible estimate;

iii. transactions pursuant to the FAA-Boeing Continuous Lower Energy Emissions, and Noise (CLEEN) Agreement with respect to which the Panel was unable to estimate the amount of the subsidy on the basis of the evidence on the record, but considered the European Union's estimate of the amount of the financial contribution between 2010 and 2014 to be a credible estimate;

iv. Washington State B&O tax rate reduction for the aerospace industry between 2013 and 2015;

v. Washington State B&O tax credits for preproduction/aerospace product development, as amended by section 7 of SSB 6828 between 2013 and 2015;

vi. Washington State B&O tax credit for property taxes, as amended by HB 2466 to include leasehold excise taxes between 2013 and 2015;

vii. Washington State sales and use tax exemptions for computer software, hardware, and peripherals between 2013 and 2015;

viii. City of Everett B&O tax rate reduction between 2013 and 2015;

ix. payments made by the State of South Carolina pursuant to commitments made in the Project Gemini Agreement to compensate Boeing for a portion of the costs incurred by Boeing with respect to the construction of the Gemini facilities and infrastructure through air hub bond proceeds;

x. the State of South Carolina property tax exemption for Boeing's large cargo freighters between 2013 and 2015; and

xi. the State of South Carolina sales and use tax exemptions for aircraft fuel, computer equipment, and construction materials between 2013 and 2015.

c. The European Union failed to establish that the following measures involve specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement, and therefore failed to establish that, by granting or maintaining these specific subsidies after the end of the implementation period, the United States has failed to withdraw the subsidy within the meaning of Article 7.8 of the SCM Agreement:

i. certain transactions between USDOD and Boeing pursuant to pre-2007 and post-2006 USDOD procurement contracts, on the grounds that, assuming *arguendo* that these measures were to involve financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement, they do not confer a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement;

ii. tax exemptions and exclusions under the FSC/ETI legislation and successor legislation, on the grounds that the European Union has failed to establish that Boeing actually received the FSC/ETI tax benefits after 2006, and that the measure therefore involves a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement;

iii. tax abatements provided through IRBs issued by the City of Wichita, on the grounds that these tax abatements are no longer specific within the meaning of Article 2.1(c) of the SCM Agreement and, as a result, the measure is no longer subject to the provisions of the SCM Agreement on actionable subsidies;

iv. the State of South Carolina's sublease of the Project Site, on the grounds that the European Union has failed to establish that the sublease involves a subsidy to Boeing;

v. the State of South Carolina's provision of Gemini and Emerald facilities and infrastructure, on the grounds that the European Union has failed to establish that these measures involve financial contributions within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement;

vi. the State of South Carolina's fee-in-lieu-of taxes (FILOT) arrangements, set forth in the Boeing FILOT Agreement and Project Emerald FILOT Agreement, on the grounds that these arrangements are not specific within the meaning of Article 2 of the SCM Agreement;

vii. the State of South Carolina's corporate income tax credits in connection with the designation of the Project Gemini and Project Emerald portions of the Project Site as part of the same multi-county industrial park (MCIP), on the grounds that the tax credits are not specific within the meaning of Article 2 of the SCM Agreement;

viii. the State of South Carolina's Income Allocation and Apportionment Agreement, on the grounds that the European Union has failed to establish that the agreement involves a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement; and

ix. the State of South Carolina's workforce recruitment, training, and development programme, on the grounds that the programme is not specific within the meaning of Article 2 of the SCM Agreement.

With respect to whether the United States has failed to take appropriate steps to remove the adverse effects within the meaning of Article 7.8 of the SCM Agreement:

d. The European Union failed to establish that the effects of certain aeronautics R&D subsidies and other subsidies are a genuine and substantial cause of significant lost sales, significant price suppression, impedance of imports to the United States market or impedance of exports to various third country markets, or threats of any of the foregoing, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement with respect to the A350XWB in the post-implementation period.

e. The European Union failed to establish that the original adverse effects of the pre-2007 aeronautics R&D subsidies with respect to the A330 and Original A350 continue in the post-implementation period as significant price suppression of the A330 and A350XWB, significant lost sales of the A350XWB, or a threat of impedance of exports of the A350XWB in the twin-aisle LCA market, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement in the post-implementation period.

f. The European Union established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of significant lost sales within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement of the A320neo and A320ceo families of LCA in the single-aisle LCA market, with respect to the sales campaigns for Fly Dubai in 2014, Icelandair in 2013, and Air Canada in 2013, in the post-implementation period.

g. The European Union established that the effects of the Washington State B&O tax rate reduction are a genuine and substantial cause of a threat of impedance of imports of the A320ceo to the United States single-aisle LCA market, and a threat of impedance of exports of Airbus single-aisle LCA in the United Arab Emirates third country market, within the meaning of Articles 5(c) and 6.3(a) and (b) of the SCM Agreement in the post-implementation period.

h. The European Union failed to establish that the effects of the pre-2007 aeronautics R&D subsidies and the post-2006 subsidies are a genuine and substantial cause of significant price suppression of the A320neo or A320ceo, impedance of imports of the A320neo or A320ceo to the United States market, or displacement and impedance of exports of the A320neo or A320ceo to the third country markets of

Australia, Brazil, Canada, Iceland, Indonesia, Malaysia, Mexico, Norway, Russia, and Singapore, within the meaning of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement, or threats of any of the foregoing, in the post-implementation period.

With respect to the European Union's claims under Articles 3.1 and 3.2 of the SCM Agreement, and Article III:4 of the GATT 1994, the Panel found that the European Union failed to establish that the subsidies are inconsistent with these provisions.

In light of the foregoing, the Panel concluded that, by continuing to be in violation of Articles 5(c) and 6.3(a), (b), and (c) of the SCM Agreement, the United States has 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". The Panel accordingly found that, to the extent that the United States has failed to comply with the DSB recommendations and rulings in the original dispute, those recommendations and rulings remain operative.

3.1.1 United States' claims relating to the Panel's terms of reference

On appeal, the United States requested reversal of the Panel's finding that its terms of reference included the European Union's claims that the USDOD procurement contracts were financial contributions that confer a benefit. The United States argued that the Panel erred in allowing the European Union to reassert in these compliance proceedings claims that had been rejected in the original proceedings. In particular, the United States argued that by not appealing in the original proceedings the panel's finding that the USDOD procurement contracts were purchases of services, the European Union bore responsibility for the failure to achieve a definitive resolution of the issue in the original proceedings. The European Union should thus not have been entitled to pursue the claims at issue in these compliance proceedings.

The Appellate Body noted that it had previously addressed limitations concerning the claims that may be asserted in compliance proceedings pursuant to Article 21.5 of the DSU. In particular, the Appellate Body highlighted the distinction drawn between *new* claims asserted for the first time in compliance proceedings and claims pursued in original proceedings and *reasserted* in compliance proceedings. With respect to claims reasserted in compliance proceedings, the Appellate Body recalled that compliance proceedings may not be used to "re-open" issues decided on the merits in the original proceedings, because that would allow a party a "second chance" to reargue a claim that has been decided in an adopted report. At the same time, the Appellate Body noted that it had treated differently cases in which claims against aspects of a measure were not decided on the merits in the original proceedings. In particular, the Appellate Body has entertained in compliance proceedings claims that had been raised in original proceedings but on which no ruling on the merits had been rendered.

Turning then to the specific claims at issue in these proceedings, the Appellate Body found that the Panel had not erred in admitting the European Union's claims at issue. The Appellate Body agreed with the Panel that the question of whether the European Union could properly reassert these claims in the compliance proceedings depended on whether there had been a decision on the merits of those claims in the original proceedings.

The Appellate Body rejected the United States' contention that the European Union must be barred from pursuing claims relating to the USDOD procurement contracts in these compliance proceedings because the failure to achieve a definitive resolution in the original proceedings must be "laid at the feet" of the European Union. The Appellate Body explained that it had not relied on "fault" or the lack of it as a criterion to determine whether claims fall within the scope of Article 21.5 proceedings. Instead, the Appellate Body had focused on whether certain claims were or were not decided on the merits in the original proceedings and were thus covered by the recommendations and rulings of the DSB. Thus, whether the European Union bore responsibility for the lack of resolution of the claims at issue in the original proceedings either by failing

to request that the Appellate Body complete the legal analysis or by requesting that the Appellate Body not complete the legal analysis was *not* determinative for whether claims relating to the USDOD procurement contracts fell within the Panel's terms of reference.

Accordingly, the Appellate Body upheld the Panel's finding that the European Union's claims relating to the USDOD procurement contracts were within its terms of reference.

3.1.2 European Union's claims relating to the Panel's findings concerning the USDOD procurement contracts

The European Union argued that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in characterizing the payments and access to USDOD facilities, equipment, and employees provided to Boeing through the USDOD procurement contracts as "purchases of services" for purposes of Article 1.1(a)(1) of the SCM Agreement. In the European Union's view, had the Panel properly assessed the evidence before it, it would have found that the USDOD procurement contracts establish a joint-venture-type relationship in which USDOD provides financial contributions to Boeing akin to equity infusions, and in which USDOD provides Boeing with goods and services.

The Appellate Body noted that, in assessing whether the USDOD procurement contracts constitute financial contributions, the Panel in these proceedings examined "the relevant characteristics of the USDOD procurement contracts with a view to determining whether, like the NASA procurement contracts and DOD assistance instruments before the Appellate Body [in the original proceedings], the relationship between DOD and Boeing in the particular context is one of partnership, involving collaboration in pursuit of a common goal for the mutual benefit of DOD and Boeing". In this regard, the Appellate Body observed that, while it was not inappropriate for the Panel to begin its analysis by considering the relevant characteristics of the USDOD procurement contracts from the perspective of whether they resemble collaborative arrangements, in a second step the Panel should have addressed expressly the legal question of whether measures with characteristics such as the USDOD procurement contracts fall within the scope of one of the categories of Article 1.1(a)(1) of the SCM Agreement. Furthermore, having found that the USDOD procurement contracts are most appropriately characterized as purchases of services, the Panel found it unnecessary to address the interpretative issue of whether such transactions fall within the scope of Article 1.1(a)(1), given its ultimate conclusion that the European Union had failed to establish that the USDOD procurement contracts confer a benefit. The Appellate Body observed that whether a "benefit" has been conferred is determined by reference to the trade-distorting potential of the "financial contribution". Thus, a finding with respect to the specific type of financial contribution under Article 1.1(a)(1) may be necessary in order to conduct a proper analysis of benefit as it relates to that category of financial contribution.

First, the European Union took issue with the Panel's finding that the privately funded and nonreimbursed independent research and development (IR&D) expenditures incurred by Boeing in developing its background intellectual property (IP) cannot be considered a contribution of "financial resources" to a "joint undertaking" with USDOD. The Appellate Body considered that, rather than failing to engage with relevant evidence, the Panel apparently disagreed with the European Union's argument, and viewed Boeing's use of its own background IP and know-how in the context of the USDOD procurement contracts as an element not characteristic of a collaborative arrangement. It is in this light that the Appellate Body understood the Panel's statements that the IR&D expenditures are not specified in the procurement contracts as contributions to be made by Boeing, and that Boeing cannot be said to be "contributing" financial resources or IP to a joint venture with USDOD. The Appellate Body further noted that Boeing's use of privately funded IR&D is qualitatively different from Boeing's participation under the USDOD assistance instruments, where the contracts themselves required Boeing to contribute financial resources, and where *both parties* committed nonmonetary resources (facilities, equipment, and employees) to the research project. The Panel also explained its rationale when stating that "[t]hese expenditures are internal costs that contractors like

Boeing incur in order to maintain the technological competence and expertise that enable them to provide the R&D services for which they are contracted." The Appellate Body therefore did not consider that the Panel failed to engage with evidence, or provide a reasoned and adequate explanation in reaching its conclusions on Boeing's non-reimbursed IR&D expenditures.

Second, the European Union argued that, in arriving at the conclusion that USDOD and Boeing cannot be said to share the fruits of the research under the USDOD procurement contracts as they do under the NASA procurement contracts and the USDOD assistance instruments, the Panel failed to engage with the European Union's arguments and evidence. The European Union's first line of argument concerned the question of whether export controls, including the International Traffic in Arms Regulations (ITAR), have prevented Boeing from using technologies developed under the USDOD procurement contracts for commercial purposes. The Appellate Body found that the original panel's finding did not directly contradict the Panel's finding on this issue. However, in the context of its financial contribution analysis, the Panel provided no basis for its conclusion that "Boeing's practical ability to exploit [the military technologies developed under the USDOD procurement contracts] for civil applications is limited by legal restrictions." Nor did the Panel refer to the evidence presented by the European Union in order to demonstrate that Boeing had made use of some ITARcontrolled data and had patented technology developed pursuant to the USDOD procurement contracts.

In support of its conclusion that Boeing's legal right to exploit military technologies developed under the USDOD procurement contracts for commercial purposes "is in practice restricted", the Panel also referred to its analysis of benefit, explaining what it considered to be the difference between the USDOD assistance instruments and the USDOD procurement contracts. However, the Appellate Body considered that the Panel's reasoning was based on the label given to the relevant legal instruments under municipal law rather than on a proper analysis of the characteristics of the instrument. The Appellate Body also noted that the fact that the USDOD procurement contracts do not fund research with explicit dual-use objectives does not determine the extent of limitations on Boeing's ability to exploit USDOD-funded research for civil applications. Furthermore, the Panel's reasoning appeared somewhat circular and did not provide sufficient explanation of the difference between Boeing's practical ability to exploit R&D and patents granted in the context of the USDOD procurement contracts and the USDOD assistance instruments. In this regard, the Appellate Body observed that both categories of legal instruments concern research primarily of a military nature that has been, or at least has the potential of being, exploited for civil purposes in certain cases. Therefore, the outcomes of the research under both could be expected to be covered under the ITAR, thus leading to restrictions on Boeing's ability to use this research for civil purposes. In light of its analysis, the Appellate Body considered that the Panel failed to assess properly the European Union's evidence relating to the actual use of ITARcontrolled data and technology developed pursuant to the USDOD procurement contracts. Furthermore, the Panel did not provide a reasoned and adequate explanation for its conclusion that Boeing's practical ability to exploit military technologies developed under the USDOD procurement contracts for civil purposes is more limited than under the USDOD assistance instruments.

The European Union's second line of argument concerned the Panel's conclusion with regard to Boeing's sales of military aircraft to foreign governments. The Appellate Body considered that the Panel's statement that the US government is the sole purchaser of modern air weaponry in the United States is compatible with the argument that Boeing also sells some military equipment to governments other than that of the United States. Moreover, the European Union's evidence did not demonstrate how the fact that Boeing may have foreign military customers contradicts the Panel's observation that Boeing would be limited in exploiting technology developed under the USDOD procurement contracts for military purposes outside the United States, especially in light of the existing US legal restrictions on the dissemination of military technology and data. In addition, the Appellate Body noted that the European Union's financial contribution argument before the Panel was focused more on the potential *civil* applications of the R&D performed under the USDOD procurement contracts than on the *military* applications of this R&D to Boeing's other customers for military technologies. In any event, the figures put forward by the European Union on the defence

budgets of foreign governments and the percentage of Boeing's military sales outside the United States did not appear to establish a clear link between Boeing and sales to any of those governments. Thus, the Appellate Body considered that the European Union did not demonstrate that the Panel's failure to address explicitly and rely upon its evidence and arguments relating to Boeing's military customers outside the United States has a bearing on the objectivity of its factual assessment.

Third, according to the European Union, the Panel failed to conduct an objective assessment in distinguishing "the nature and purpose of the DOD procurement contracts from that of the NASA procurement contracts and DOD assistance instruments", and concluded that the nature and *purpose* of the interaction between USDOD and Boeing "is not the same as when two partners work together to set research topics based on their aligned interests in the outcomes". With regard to the nature of the USDOD procurement contracts, the European Union submitted that "a primarily military technological purpose is not determinative of whether these programmes have the *effect* of developing technologies and knowledge that could be applicable to Boeing LCA." The Appellate Body noted that that the Panel did not refer to any of the three categories of evidence presented by the European Union in the context of its analysis of financial contribution. The Panel's reference to the Rumpf expert opinion in the context of its terms of reference analysis was not relevant for determining whether the Panel properly considered this evidence in the context of its financial contribution analysis, insofar as the relevant question before the Panel in that context was different from the legal question in the context of its financial contribution analysis. Furthermore, the Panel's reference to this expert opinion in referring to the European Union's definition of the term "dual-use" was descriptive and did not demonstrate that the Panel assessed the pertinence of the European Union's evidence in determining the existence of a relationship of collaboration between USDOD and Boeing in the context of certain USDOD procurement contracts. Moreover, the Panel did not refer to the other two categories of evidence presented by the European Union, namely the examples of civil applications of R&D developed by Boeing pursuant to the USDOD procurement contracts and the list of the USDOD-funded patents owned by Boeing with potential LCA-related applications. The Appellate Body considered that the absence of any substantive assessment of the examples of Boeing's actual use of research conducted pursuant to the USDOD procurement contracts meant that the Panel did not sufficiently explore the evidence before it for purposes of its ultimate conclusion. The European Union further argued that the Panel failed to address its arguments that the "actual and anticipated technological outcomes, rather than the stated objectives, of the R&D are most indicative of the collaborative character of the DOD procurement contracts." The Appellate Body noted that the Panel assessed the "particular commercial context" in which payments by USDOD are provided in exchange for the performance of R&D by Boeing and found that "*the nature and purpose* of this interaction is not the same as when two partners work together to set research topics based on their aligned interests in the outcomes." At the same time, the Panel's analysis focused on the objectives of the USDOD procurement contracts and the military nature of the research, rather than on the actual effects of those contracts. Given that the research under both the USDOD procurement contracts and the USDOD assistance instruments was undertaken for military purposes, the Panel should have properly explained the reasons for distinguishing between the two categories of contracts. In the absence of such an explanation, the Panel was not in a position to provide reasoned and adequate explanations in reaching its conclusion as to the characterization of the USDOD procurement contracts.

With regard to the purpose of the USDOD procurement contracts, the European Union contended that the Panel did not consider evidence demonstrating that the United States intends for, and encourages, USDOD contractors to extract commercial benefit from their work under the RDT&E programmes, as reflected in "the DOD's decision to end its previous policy of recouping 'a fair share of its investment in nonrecurring costs related to products, and/or a fair price for its contribution to the development of related technologies, when the products are sold, and/or when technology is transferred'". The Appellate Body pointed out that the European Union had not relied on this argument specifically in its financial contribution argumentation and that the Panel examined the European Union's evidence in its benefit analysis. In the Appellate Body's view, the Panel was not persuaded that the abstract possibility for USDOD to recoup any potential investments

in commercialised technologies, had that policy stayed in place, established a sufficient link with the nature and functioning of the specific USDOD procurement contracts challenged by the European Union in these proceedings.

In view of the above, the Appellate Body found that the Panel failed to make an objective assessment of the matter before it within the meaning of Article 11 of the DSU in its financial contribution analysis under Article 1.1(a)(1) of the SCM Agreement by not engaging sufficiently with the European Union's evidence and arguments, and by failing to provide reasoned and adequate explanations for its findings.

The European Union further argued that in assessing whether the USDOD procurement contracts confer a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement, "the Panel built upon the same errors" as in its analysis relating to financial contribution under Article 1.1(a)(1) of the SCM Agreement. The Appellate Body recalled the Panel's conclusion that, even if the assessment of benefit under the USDOD procurement contracts focused solely on the allocation of the IP rights arising from the performance of the R&D, in isolation from the other terms of the transaction, it would not regard as appropriate benchmarks the evidence put forward by the European Union in the form of private collaborative R&D agreements. In reaching this conclusion, the Panel had rejected the European Union's evidence of the allocation of IP rights under the private actor collaborative R&D arrangements based on the same deficiencies with respect to which the Appellate Body found that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.

The Appellate Body therefore found, for the same reasons, that the Panel erred in finding that the distribution of IP rights under the USDOD procurement contracts does not confer a benefit pursuant to Article 1.1(b) of the SCM Agreement.

With regard to the European Union's request to complete the legal analysis, the Appellate Body recalled that it found several deficiencies in the Panel's analysis of the evidence before it. Furthermore, multiple aspects of the relevant evidence supporting the participants' arguments, essential for the completion of the analysis, remained contested. The Appellate Body noted that the determination of whether the funding and access provided to Boeing under the USDOD procurement contracts constitute collaborative arrangements with characteristics analogous to equity infusions involves a multifaceted analysis, which needs to take into account not only the objectives and nature of the USDOD procurement contracts, but also their actual and potential effects. In the absence of sufficient factual findings by the Panel and undisputed facts on the record, the Appellate Body was unable to complete the legal analysis and determine whether the USDOD procurement contracts involve a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.

3.1.3 European Union's claims relating to the Panel's findings concerning FSC/ETI tax concessions under Article 1.1(a)(1)(ii) of the SCM Agreement

The European Union requested the Appellate Body to reverse the Panel's finding that the European Union had failed to establish that, after the expiry of the implementation period, the United States continues to grant or maintain subsidies to Boeing in the form of tax concessions pursuant to the foreign sales corporation/ extraterritorial income measures. The European Union argued that this finding is based on the Panel's erroneous interpretation of Article 1.1(a)(1)(ii) of the SCM Agreement as requiring the European Union to demonstrate that Boeing used FSC/ETI tax concessions in order to establish a financial contribution in the form of revenue foregone.

The Appellate Body stated that, for revenue to be considered "foregone" under Article 1.1(a)(1)(ii) of the SCM Agreement, a government must relinquish an entitlement to raise revenue. This determination must focus on the conduct of a government, rather than on the use of tax concessions by the eligible taxpayers.

The Appellate Body clarified, however, that this does not mean that evidence relating to the use of available tax concessions by the eligible taxpayers cannot be relevant in the determination of whether a government has "foregone" or "not collected" revenue.

The Appellate Body noted that, rather than making a determination of whether the US Government has relinquished an entitlement to raise revenue, the Panel focused on whether Boeing used FSC/ETI tax concessions. The Appellate Body considered that the Panel thus failed to focus on the conduct of a government in determining whether revenue is "foregone" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, and, in doing so, erred in the interpretation of this provision. On account of this error, the Appellate Body reversed the Panel's finding that the European Union had not established that, after the expiry of the implementation period, the United States continues to grant or maintain subsidies to Boeing in the form of FSC/ETI tax concessions, because the European Union had failed to demonstrate that those tax concessions involved a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

Having reversed the Panel's finding, the Appellate Body turned to consider the European Union's request to complete the legal analysis and find that that the United States continues to grant or maintain prohibited FSC/ETI subsidies after the expiry of the implementation period and thus failed to "withdraw the subsidy" within the meaning of Article 7.8 of the SCM Agreement. The Appellate Body observed the United States' assertion that it enacted legislation (the Tax Increase Prevention and Reconciliation Act (TIPRA)) that had withdrawn FSC/ETI subsidies with respect to Boeing. Accordingly, the Appellate Body focused its analysis on whether, by enacting the TIPRA, the United States has ceased to provide the financial contribution underpinning FSC/ETI subsidies to Boeing, and has subsequently withdrawn these subsidies with respect to Boeing.

In the course of its analysis, the Appellate Body determined, on the basis of the information on the Panel record, that Section 513 of the TIPRA has not removed FSC/ETI tax concessions for certain qualifying transactions entered into during taxable years before 17 May 2006. The Appellate Body observed, however, that, while the European Union submitted before the Panel evidence allegedly showing that Boeing entered into such qualifying transactions and therefore remains eligible for FSC/ETI tax concessions, the Panel did not reach a conclusion regarding the extent of Boeing's eligibility for those concessions on the basis of Section 513 of the TIPRA. The Appellate Body found, therefore, that, to the extent that Boeing remains entitled to FSC/ETI tax concessions under Section 513 of the TIPRA in the post-implementation period, the United States has not ceased to provide a financial contribution and thus has not withdrawn FSC/ETI subsidies with respect to Boeing within the meaning of Article 7.8 of the SCM Agreement.

3.1.4 European Union's claims relating to the Panel's findings concerning specificity under Article 2.1(c) of the SCM Agreement

3.1.4.1 The Panel's findings concerning industrial revenue bonds

The European Union claimed that the Panel erred in its interpretation and application of the term "disproportionately large amounts of subsidy" in Article 2.1(c) of the SCM Agreement when it failed to follow the provision that "account shall be taken … of the length of time during which the subsidy programme has been in operation" (i.e. 1979 onwards) and instead limited its assessment of specificity of the City of Wichita's IRB subsidy programme to the period of time "after the end of the implementation period" (i.e. 2013 onwards). The Appellate Body noted that the text of Article 2.1(c) does not contain an express indication as to how to determine the time period relevant for assessing the existence of disproportionality, but that a proper understanding of specificity must allow for the concurrent application of the principles in subparagraphs (a)-(c) of Article 2.1 to the various legal and factual aspects of a subsidy. At the same time, since the analysis under Article 2.1(c) will normally focus on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority, indications relating to the appropriate

timeperiod for the assessment of disproportionality may be drawn also from the structure and operation of the subsidy at issue, the circumstances of the case, and the evidence presented by the parties. In the Appellate Body's view, the third sentence of Article 2.1(c) does not prescribe a particular manner in which panels must consider the relevance of the factors therein for their overall analysis. While "the length of time during which the subsidy programme has been in operation" must be taken into account by panels in their assessment of specificity, the temporal baseline for the assessment of disproportionality may not necessarily be the entire duration of the subsidy programme at issue. This may be the case where modifications to a subsidy programme have been made, in particular in the context of compliance proceedings, depending on the characteristics and functioning of the subsidy programme at issue and the existence and the nature of a measure taken to comply.

In light of the above, the Appellate Body found that the Panel did not err in its interpretation of Article 2.1(c) of the SCM Agreement when concluding that the relevant period over which to consider disproportionality is "after the end of the implementation period".

Turning to the Panel's application, the Appellate Body noted that the Panel relied on the nature of these compliance proceedings for its finding that the subsidy is no longer de facto specific, but provided little explanation for this approach. The Panel did not explain how, in the context of these compliance proceedings, it was warranted to base its assessment on a period of time different from that of the original proceedings in light of the particular circumstances of the case, or the nature and functioning of the subsidy at issue. At the same time, the Appellate Body recalled that the subsidy measure in the present case consists of issuance of IRBs to Boeing every year between 1979 and 2007, and thus has been disbursed on a regular and periodic basis. Furthermore, IRBs are used to purchase property on which tax abatements are received for the following 10 consecutive years. The Panel recognized this structure and took into consideration in its analysis the ten-year lifetime of the IRB subsidies. Moreover, in its compliance communication, the United States advised that the City of Wichita "has not provided any IRBs to Boeing since 2007". In this regard, the Panel concluded that "[b]y reducing considerably the proportion of the subsidy programme received by Boeing after the end of the implementation period, the United States has brought the measure into conformity with the SCM Agreement". The amounts of tax abatements also continuously diminished and in 2017 "Boeing [was] due to receive a single tax abatement on Project Property purchased with IRB issuance in 2007." In sum, the Appellate Body found that while the Panel could have better explained the choice of the time-period for assessing whether disproportionately large amounts of IRBs were used by Boeing in determining the existence of *de facto* specificity, the time-period effectively used by the Panel does not appear inappropriate in the particular circumstances of these compliance proceedings and specifically in light of the nature and operation of the IRB subsidies, as well as the nature of the alleged measure taken to comply.

The Appellate Body, however, drew attention to the Panel's analysis and findings concerning the comparison between the expected and actual distribution of the subsidy. The Panel noted that, from 2002 onwards, Boeing and Spirit received 32% of the total amount of IRBs issued, and that this was considerably less than the 69% in the original proceedings. Taking into account that the availability of the IRB programme is somewhat restricted to entities with the capacity and inclination to make investments in certain commercial or industrial property, the Panel did not consider that Boeing and Spirit's receipt of 32% of the total amount of IRBs issued indicates a distribution of the subsidy that is at odds with what one would expect, were the IRB programme to be administered in accordance with the SCM Agreement. The Appellate Body began by highlighting that, in assessing disproportionality, the inquiry is directed at whether the allocation of the subsidy is *in accordance with its conditions of eligibility*, rather than *with the SCM Agreement*. The Appellate Body then referred to its statement in the original proceedings that, despite the fact that not all enterprises in the City of Wichita would, at any given time, wish to enjoy the benefits of IRBs with respect to property development, it "would nonetheless expect that the allocation of such benefits over the 25year period between 1979 and 2005 would have produced a wider distribution of those benefits across different sectors of the Wichita economy". The Appellate Body noted that, in itself, the fact that Boeing and Spirit

received 32% of the total amount of IRBs between 2002 and 2012 does not answer the question of whether or not any disparity existed between the expected distribution of the subsidy, as determined by the conditions of eligibility, and its actual distribution. The existence of a disparity would depend, *inter alia*, on the extent of diversification of economic activities within the City of Wichita's economy, in line with the first factor of Article 2.1(c), third sentence. The Panel, however, did not engage in any such assessment and provided no explanation as to why 32% of the total amount of IRBs received by Boeing and Spirit in a much shorter period of time than in the original proceedings does not reveal the existence of a disparity.

In light of the above, the Appellate Body found that the Panel erred in its application of Article 2.1(c) of the SCM Agreement by providing insufficient reasoning for its conclusion that the distribution of the subsidy was not "at odds with what one would expect were the IRB programme to be administered in accordance with the SCM Agreement". The Appellate Body therefore reversed the Panel's finding that the European Union has failed to establish that the tax abatements provided through IRBs issued by the City of Wichita involve specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

Turning to the European Union's request to complete the legal analysis, the Appellate Body noted that, while the IRB programme is available to enterprises with the capacity to make the required investments, and while the percentage of IRBs issued to Boeing and Spirit since 2002 is reduced from the original proceedings, it had no specific information on record that would permit it to evaluate whether this actual distribution of the subsidy is at odds with its expected distribution in light of the conditions of eligibility. Furthermore, with respect to whether there are any reasons that explain the existence of the disparity between the actual and expected distribution of the subsidy, there was no data on record regarding the percentage of companies that could potentially benefit from the IRB subsidy, or the diversification of Wichita's economy. In the absence of sufficient factual findings by the Panel or undisputed facts on the Panel record, the Appellate Body was unable to complete the legal analysis.

3.1.4.2 The Panel's findings concerning economic development bonds

First, the European Union alleged that the Panel erred in its interpretation of the phrase "limited number of certain enterprises" in Article 2.1(c), second sentence. According to the European Union, the Panel's finding that air hub bonds were used by a "limited number of certain enterprises" because they were granted to only one enterprise, Boeing, while economic development bonds (EDBs), which were granted to only three enterprises, were not so "limited", reflected an interpretation of "limited number" to mean "one" or, at least, "fewer than three". The Panel found that the European Union provided "no reasoning as to why, in light of the level of diversification in the South Carolina economy and the duration of the economic development bond scheme, the grant of economic development bond proceeds to BMW, the Project Emerald companies and Boeing amounts to use by a limited number of enterprises", but that the European Union established that subsidy provided by South Carolina through air hub bond proceeds to compensate Boeing for a portion of the costs in constructing the Gemini facilities and infrastructure is specific within the meaning of Article 2.1(c).

The Appellate Body recalled that the meaning of a quantitatively limited group should be determined, *inter alia*, in light of the factors in Article 2.1(c), third sentence, that require panels to take account of "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation". To the extent that these two factors form part of the legal test under that provision, it would be for the European Union to provide evidence in making a *prima facie* case. Moreover, where a panel's assessment proceeds from Article 2.1(a) and (b) to Article 2.1(c), the panel's analysis under subparagraph (c) would normally build upon the relevant legislative framework examined under Article 2.1(a) and (b). Based on the *de jure* conditions of eligibility for the subsidy, EDBs could be issued only to companies complying with the somewhat demanding minimum investment and employment requirements. The question before the Panel under Article 2.1(c) was

whether, notwithstanding the appearance of non-specificity resulting from the application of the principles in Article 2.1(a), there were reasons to believe that the subsidy may in fact be specific by virtue of the subsidy programme being used by a limited number of certain enterprises.

The Appellate Body noted that the Panel did not elaborate on the reasons for rejecting the European Union's claim that the EDB subsidy had been used by a limited number of certain enterprises. However, the European Union also gave no specific reasons in support of its argument, while the United States submitted that BMW, the Project Emerald companies, and Boeing are among the largest employers in the State of South Carolina. The Appellate Body considered that the Panel's conclusion reflects an understanding that the granting of the subsidy to only three companies does not necessarily demonstrate that the subsidy was used by a "limited number" of certain enterprises within the meaning of the first factor in Article 2.1(c), second sentence. The Appellate Body pointed to the fact that the recipients of the subsidy were not all from the same sector of the economy. Furthermore, there were no indications that, in light of the eligibility requirements under the subsidy scheme and the diversification of economic activities within the State of South Carolina or the length of time during which the subsidy has been in operation, the actual allocation of the subsidy differed from its expected allocation. It could well be that only a small number of companies were ready to make the necessary investments and create the required number of jobs, and therefore be able to satisfy the legal conditions to access the EDB subsidy. Therefore, the Appellate Body understood the Panel to have considered that the European Union has not met its burden of proof in demonstrating that, in the circumstances of the present case, the EDB subsidy has been used by a limited number of certain enterprises. Furthermore, the Panel's reasoning with regard to the air hub bonds was based on the undisputed fact that "air hub bonds have only been issued to Boeing during the almost threedecade long existence of the scheme", which was "unsurprising since the evidence before the Panel suggests that only Boeing meets the requirements to benefit from air hub bond proceeds, namely to be the operator of an 'air carrier hub terminal facility' as defined in the South Carolina Code". In the Appellate Body's view, the Panel's finding with regard to the air hub bonds was therefore made in light of the specific language in the South Carolina Code that appeared to *de facto* restrict the eligibility for those bonds to an enterprise with Boeing's specific profile.

In view of the above, the Appellate Body found that the Panel did not err in its interpretation of the phrase "limited number of certain enterprises" in Article 2.1(c) of the SCM Agreement by implicitly interpreting the term "limited number" as referring to "one" or "fewer than three" entities.

Second, the European Union argued that the Panel erred in interpreting the term "certain enterprises" in Article 2.1(c) of the SCM Agreement as encompassing public entities, such as cities and public colleges, whereas it only encompasses private entities, i.e. business firms or companies involved in commercial transactions and engagements. The European Union also submitted that the Panel erred in its application of Article 2.1(c) by including in its specificity analysis EDBs provided to public entities. In the Appellate Body's view, the definitions of the term "enterprise" indicate that it can be interpreted as an entity that engages in certain activities of business or commercial nature. The reference to "an enterprise or industry or group of enterprises or industries" also suggests that the terms of the provision relate primarily to the type of activity carried out by the entity and do not necessarily limit the scope of entities based on whether they are publicly or privately owned. The understanding that ownership is not dispositive of the definition of "enterprise" finds support also in the third sentence of Article 2.1(c), which requires that account be taken of "the extent of diversification of *economic activitie*s within the jurisdiction of the granting authority". Turning to the relevant context, the Appellate Body noted that Article 1, which sets out the definition of subsidy for purposes of the SCM Agreement, describes the types of financial contributions by reference to the specific governmental action of *granting* the subsidy, and not the nature or activities of the entity *receiving* the contributions. The Appellate Body therefore considered that the determination of whether a number of enterprises or industries constitute "certain enterprises" within the meaning of Article 2.1(c) should be made in light of all relevant characteristics of the entities concerned, including the nature and

purpose of their activities in the markets in question and the context in which these activities are exercised. The ownership of the entity may be a relevant factor but is not determinative of whether an entity qualifies as an "enterprise" for purposes of Article 2 of the SCM Agreement.

Turning to the Panel's analysis of the term "certain enterprises", the Appellate Body recalled that, since the adoption of South Carolina's legislation authorizing the issuance of EDBs in 2002, such bonds have been issued to BMW, the Project Emerald companies, and Boeing, as well as to certain public entities, namely the City of Greenville, the City of Myrtle Beach, and Trident Technical College. The Panel considered that "precisely the fact that economic development bonds can be and have been issued to public entities, namely two cities and a public college, in addition to private entities, suggests that the scheme is not limited to 'certain enterprises' within the meaning of Article 2.1(c)." According to the Appellate Body, the fact that a subsidy has been granted to both public and private entities may be potentially relevant to an assessment of *de facto* specificity, to the extent that all of these entities are "certain enterprises". However, in making this statement, the Panel refrained from making an assessment and reaching a conclusion as to whether the three public entities at issue should be considered as "enterprises", but nevertheless considered these entities relevant to its analysis of *de facto* specificity. In this regard, the Appellate Body highlighted that the notion of specificity within the meaning of the SCM Agreement encompasses the universe of entities that constitute "certain enterprises", as determined in light of the principles in subparagraphs (a) through (c) of Article 2.1. The Appellate Body therefore did not see the pertinence of subsidy recipients that fall outside the definition of an "enterprise" for a panel's determination of whether a subsidy is specific to "certain enterprises". It followed that, if a subsidy is found to be specific "to an enterprise or industry or group of enterprises or industries", the fact that this subsidy has also been granted to certain other entities that do not fall within the definition of an "enterprise" has no bearing on the finding of specificity. At the same time, the Appellate Body pointed out that the Panel had already reached its conclusions with respect to the factors "use of a subsidy programme by a limited number of certain enterprises", and "predominant use by certain enterprises" before making its statement as to the relevance of "public entities" in the assessment of *de facto* specificity. Therefore, the Appellate Body did not consider that the Panel's rejection of the European Union's claims that the EDB subsidy is specific within the meaning of Article 2.1(c) hinged upon its statement relating to the relevance of the three public entities. Thus, the Panel's error did not invalidate the Panel's ultimate finding that the European Union failed to establish that the subsidy provided by South Carolina through EDBs is specific within the meaning of Article 2.1(c) of the SCM Agreement.

Third, The European Union argued that the Panel erred in interpreting the term "predominant" in the factor "predominant use by certain enterprises" in Article 2.1(c), second sentence, as involving a concept entirely different from the term "disproportionate" in the factor "disproportionately large amounts of subsidy to certain enterprises" in the same subparagraph. In the European Union's view, based on this erroneous distinction, the Panel rejected the European Union's evidence as inadequate or irrelevant for determining the existence of "predominant use". The Appellate Body recalled that, given the focus of the other factors under subparagraph (c), the term "predominant" is to be interpreted as relating primarily to the *incidence or frequency* with which the subsidy is used by certain enterprises. At the same time, the different focus of the various factors listed in Article 2.1(c), second sentence, does not imply that the analyses under those factors have to rely on completely distinct sets of evidence. This is because whether a subsidy programme is mainly, or for the most part, used by "certain enterprises" is necessarily a question that should be answered on a case-by-case basis, taking into account the particular characteristics of the subsidy programme at issue and the prevailing circumstances of the case, and in light of the factors in the third sentence of Article 2.1(c) of the SCM Agreement. Furthermore, determining which factors in Article 2.1(c) will be relevant to the analysis of specificity is "a function of what reasons there are to believe that the subsidy may in fact be specific", and panels should "remain open to the applicability of each of the elements set out in Article 2.1(c), and to the possibility that a conclusion in respect of specificity in fact may, depending on the circumstances of the case, rely on an assessment of *one, several, or all of those elements*".

The Appellate Body observed that the Panel did not develop its own understanding of the meaning of the term "predominant use" and what evidence might be relevant to establishing that the EDB scheme was mainly, or most frequently, used by certain enterprises in the present circumstances. The Appellate Body agreed with the European Union that there may be overlap in the evidence demonstrating the existence of "predominant use [of a subsidy programme] by certain enterprises" and the "disproportionately large amounts of subsidy to certain enterprises", depending on the nature, functioning, and actual distribution of the particular subsidy programme; other relevant factual circumstances; and the assessment of the factors in the third sentence of Article 2.1(c) of the SCM Agreement. Evidence about the number of enterprises receiving a subsidy, the amounts received by certain enterprises, and the frequency with which the subsidy has been received by those enterprises may therefore be complementary and, depending on the circumstances of the case, point to the existence of *de facto* specificity based on one or another factor under Article 2.1(c). The Appellate Body observed that the subsidy was granted to relatively few entities, relatively infrequently, and in relatively large amounts. In these circumstances, the question as to whether the subsidy programme has been used predominantly by certain enterprises would have to take into account not just the incidence or frequency with which Boeing and other enterprises have been granted the subsidy, but also the value of the EDBs granted. Only then would it be possible to answer the question of whether the subsidy has been mainly, or for the most part, used by certain enterprises.

In light of the above, the Appellate Body found that the Panel erred in its interpretation of the factors "predominant use by certain enterprises" and "granting of disproportionately large amounts of subsidy to certain enterprises" in Article 2.1(c) of the SCM Agreement. The Appellate Body therefore reversed the Panel's finding that the European Union has failed to establish that the subsidy provided by South Carolina through EDB proceeds is specific within the meaning of Article 2.1 of the SCM Agreement.

With respect to the European Union's request to complete the legal analysis, the Appellate Body observed that there are no findings by the Panel or undisputed facts on the Panel record sufficient to assess whether the EDB subsidy has been predominantly used by certain enterprises. In view of the above, the Appellate Body was unable to complete the legal analysis of the European Union's claim that the EDB subsidy programme is *de facto* specific because of its predominant use by certain enterprises within the meaning of Article 2.1(c) of the SCM Agreement.

3.1.5 European Union's claims relating to the Panel's findings concerning South Carolina's additional corporate income tax credits

The European Union requested the Appellate Body to reverse the Panel's finding that the European Union had failed to establish that the subsidy provided through the additional corporate income tax credits is specific within the meaning of Article 2.2 of the SCM Agreement, and its conclusion that the European Union had not established that the United States failed to withdraw this subsidy within the meaning of Article 7.8 of the SCM Agreement. The European Union claimed that, in finding that the MCIP subsidy is not "limited to certain enterprises located within a designated geographical region", the Panel erred in the application of Article 2.2 of the SCM Agreement and reached, on this basis, an erroneous conclusion that the European Union had failed to establish that the United States had not withdrawn this subsidy within the meaning of Article 7.8 of the SCM Agreement. In addition, the European Union argued that the Panel acted inconsistently with Article 11 of the DSU because the Panel's conclusion that the MCIP subsidy is not specific under Article 2.2 of the SCM Agreement is not based on the objective assessment of the facts.

The Appellate Body considered that a subsidy is specific under Article 2.2 of the SCM Agreement when it is limited to "certain enterprises" located within a "designated geographical region within the jurisdiction of the granting authority". This is the case when access to a subsidy is either explicitly or implicitly limited to entities, engaged in economic activities in the market, that have their headquarters, branch offices, or manufacturing facilities in a "designated geographical region" within the jurisdiction of the granting authority, or that are otherwise established within such a region. A "designated geographical region"

refers to an identified geographical area, space, or place of more or less definite extent or character. The identification of a geographical region for the purposes of Article 2.2 may be explicit or implicit, provided that the relevant region is clearly discernible from the text, design, structure, and operation of the subsidy measure at issue.

The Appellate Body noted the Panel's finding that this subsidy was available only to taxpayers located in an MCIP, due to Section 12-6-3360 of the South Carolina Income Tax Act, which provides that only taxpayers located in an MCIP are eligible for the additional corporate income tax credits. In light of this explicit limitation on access to the subsidy, the Appellate Body disagreed with the Panel that, because enterprises not currently located in an MCIP may become part of an MCIP in the future and then qualify for the subsidy, or that the territory of existing MCIPs may be reduced or expanded and new MCIPs may be established, the MCIP subsidy is not specific within the meaning of Article 2.2 of the SCM Agreement. The Appellate Body thus found that the Panel erred in the application of Article 2.2 in stating that the availability of the MCIP subsidy only to enterprises located within an MCIP "cannot be meaningfully considered to amount to a limitation under Article 2.2". Consequently, the Appellate Body reversed the Panel's finding that the European Union had failed to establish that the subsidy provided through the additional corporate income tax credits is specific within the meaning of Article 2.2 of the SCM Agreement. Having reversed the Panel's finding on account of the Panel's error in the application of Article 2.2, the Appellate Body did not find it necessary to examine further the objectivity of the Panel's assessment under Article 11 of the DSU.

Turning to consider the European Union's request for the completion of the legal analysis, the Appellate Body recalled its conclusion that Section 12-6-3360 of the South Carolina Income Tax Act imposes a limitation on access to the MCIP subsidy. In considering the question of whether this limitation concerns "certain enterprises located within a designated geographical region" within the meaning of Article 2.2, the Appellate Body noted that Section 12-6-3360 of the South Carolina Income Tax Act does not itself predetermine the geographical areas of the MCIPs established in South Carolina. The Appellate Body found, however, that the geographical area of a particular MCIP, such as the Charleston-Colleton MCIP, may be discerned from the instrument establishing an MCIP. The Appellate Body thus considered that the subsidy measure at issue designates the "geographical region" within which enterprises must be located in order to receive the subsidy. The Appellate Body therefore completed the legal analysis and found that the subsidy provided to Boeing through the additional corporate income tax credits, pursuant to Section 12-6-3360 of the South Carolina Income Tax Act, is specific within the meaning of Article 2.2 of the SCM Agreement.

3.1.6 Continuing adverse effects from the original reference period

The European Union requested the Appellate Body to reverse the Panel's finding that adverse effects consisting of significant price suppression and significant lost sales cannot continue to be caused by subsidies in instances where LCA orders occurred prior to the end of the implementation period, but for which deliveries remained outstanding in the post-implementation period. The European Union argued that the Panel erred in the interpretation of Article 7.8 of the SCM Agreement by excluding adverse effects found in relation to specific transactions during the original reference period from the obligation to take appropriate steps to remove adverse effects. The European Union also claimed that the Panel erred in the application of Article 7.8 of the SCM Agreement, and acted inconsistently with Article 11 of the DSU, by erroneously finding that lost sales and price suppression begin and end at the time at which an LCA is ordered, and do not exist throughout the life of the contract until the final aircraft is delivered.

The Appellate Body stated that, depending on the circumstances of a particular transaction or set of transactions that form the basis for a finding of significant price suppression or significant lost sales under Article 6.3(c) of the SCM Agreement, it did not see that these particular phenomena must be limited to the moment at which the transaction or set of transactions first occur. With regard to price suppression, for example, there may be circumstances in which certain payment terms in the future will continue to be a reflection of suppressed prices. With respect to lost sales, the Appellate Body acknowledged that there may

be a stronger case for understanding the phenomena as limited to the moment at which the suppliers of the complaining Member "failed to obtain" a sale, but noted that there may be elements affecting finalization of the transaction, or concerning follow-on transactions in the form of options or purchase rights that may be indicative of an ongoing phenomenon of lost sales. The Appellate Body emphasized, however, that the extent to which elements of the transactions underlying the original finding of adverse effects in the form of price suppression or lost sales endure in a manner so as to indicate the ongoing existence of adverse effects will very much depend on the nature, timing, and scope of those underlying transactions.

The Appellate Body noted that, in the context of the LCA industry in particular, the original panel remarked that, given the particularities of LCA production and sale, the phenomena of price suppression and lost sales "do not begin and end at the time at which an LCA is ordered", but "should be understood to begin at the time at which an LCA order is obtained (or an order is lost), and to continue up to and including the time at which that aircraft is delivered (or not delivered)". The Appellate Body considered that, although the extent to which prices are suppressed or sales are lost is certainly first manifest at the time LCA are ordered, the consequences of these phenomena may continue to be affected by factors occurring from the time of order through delivery. At the same time, it would be improper to suggest that in all instances involving the phenomena of price suppression and lost sales in the LCA market, the phenomena manifest themselves to the same degree throughout the time period from order to delivery. The Appellate Body therefore did not see that there can be any generalized guidance about the circumstances in which original findings of price suppression or lost sales may be said to persist beyond the moment of order.

On the basis of this understanding, the Appellate Body found that the Panel adopted an overly rigid approach with respect to the question of whether outstanding deliveries concerning LCA orders that were relied upon to find significant price suppression or significant lost sales may still provide a basis for a finding of such effects in the post-implementation period. The Appellate Body considered that the mere existence of outstanding deliveries after September 2012 relating to original orders found to have resulted in significant price suppression or significant lost sales between 2004 and 2006 would not necessarily, by itself, be dispositive as to the existence of significant price suppression or significant lost sales in the post-implementation period. At the same time, however, the Appellate Body disagreed with the Panel's suggestion that such evidence can never form the basis of a finding as to the ongoing existence of such effects.

The Appellate Body also found the Panel's reasoning with respect to Article 7.8 of the SCM Agreement unpersuasive. The Panel's concern that the European Union's claim would result in a retrospective remedy appeared premised on the notion that the only means by which the United States could bring itself into compliance under the European Union's theory is to undo the original orders. However, Article 7.8 does not specify what "steps" are "appropriate" for purposes of removing the adverse effects, which suggests that it covers a range of possible actions. While the European Union did not explain what kind of action the United States could have taken with respect to that undelivered aircraft that would have removed the present adverse effects, this does not mean that such removal is not possible, and does not support the Panel's apparent assumption that the only way to remove such effects would therefore have to be a retrospective undoing of the original orders.

More importantly, the Appellate Body considered that the Panel's approach led it to draw a faulty distinction between "present adverse effects", on the one hand, and "consequence[s] or manifestation[s] of an event that occurred in the past" or "continuing manifestations or effects of past adverse effects", on the other. To the extent that adverse effects arising in the post-implementation period are shown to have been caused by subsidies that have not expired, they are themselves adverse effects, not something consequential to the original adverse effects. In this respect, the Appellate Body saw no basis to categorically exclude consideration of delivery data concerning the post-implementation period to the extent that such evidence, in conjunction with other evidence, shows ongoing price suppression or lost sales in the post-implementation period.

While evidence pertaining to outstanding deliveries is unlikely, by itself, to be dispositive as to adverse effects occurring well after the LCA sales that gave rise to the original findings were made, there is no tenable basis to exclude the potential relevance of such evidence in establishing such a case.

The Appellate Body therefore found that the Panel erred in its interpretation of Article 7.8 of the SCM Agreement by excluding *ab initio* from an inquiry into whether the United States had failed to take appropriate steps to remove the adverse effects of the subsidies, evidence relating to transactions for which the orders arose in the original reference period but for which deliveries remain outstanding in the post-implementation period. Accordingly, the Appellate Body reversed the Panel's interpretation of Article 7.8 and its statement in paragraph 9.332 of its Report, that reliance on the role of deliveries of aircraft in the post-implementation period as evidence of a continuation of serious prejudice "is inconsistent with a prospective interpretation of Article 7.8".

The European Union also requested the Appellate Body to reverse the Panel's finding that the European Union's claim of continuing adverse effects was unsupported by the evidence and/or was in contradiction with the findings made in the original proceedings. The European Union argued that the Panel acted inconsistently with Article 11 of the DSU by deviating from the adopted findings in the original proceedings concerning the 200-300 seat LCA market by now focusing on separate aircraft models. The European Union further alleged that the Panel erred under Articles 5 and 6.3 of the SCM Agreement by failing to conduct a proper counterfactual analysis when assessing whether there was continuing price suppression of the A330 in the post-implementation period.

The Appellate Body noted that, although the original panel made ultimate findings for each serious prejudice phenomenon with respect to the 200-300 seat LCA market as a whole, the evidentiary basis for doing so regarding the original reference period related solely to the A330 and the Original A350, but not the A350XWB. This is a relevant consideration in evaluating the extent to which the original adverse effects may be said to continue into the post-implementation period, and, at a minimum, does not seem to support the European Union's assertion that the Panel in these compliance proceedings somehow departed from the approach taken by the original panel in focusing on evidence relating to specific LCA models. The Appellate Body further noted that the European Union sought to rely principally on the fact that orders of Original A350 were converted to orders of A350XWB, and that certain deliveries of the latter remained outstanding at the end of the implementation period. The Appellate Body stated that the Panel had grounds to consider that developments concerning the relevant LCA market since the original reference period precluded mere transposition of the original panel's findings into the post-implementation period. The Appellate Body therefore found that the Panel did not act inconsistently with Article 11 of the DSU "by deviating from the adopted findings in the original proceedings" concerning the 200-300 seat LCA market.

The European Union further alleged that the Panel erred under Articles 5 and 6.3 of the SCM Agreement by failing to conduct a proper counterfactual analysis when assessing whether there was continuing price suppression of the A330 in the post-implementation period. The Appellate Body considered that the Panel properly explained that, in examining claims of significant price suppression, "price trend data alone is not sufficient", and that "it is also necessary to present counterfactual argumentation demonstrating that, in the absence of the subsidies, prices would have been higher". The Appellate Body also explained its view that the Panel would have considered that the "actual" and the "counterfactual" situations were the same in the sense that, as of the end of the implementation period, the 787 would have been launched in the LCA market regardless of subsidization and would have been competing with the A350XWB. In this light, the Appellate Body considered that the Panel's view that the A330 would not have been able to command the sort of price it once did, in view of the technological superiority of the 787 and the A350XWB, did not reflect a failure to conduct a proper counterfactual analysis. The Appellate Body also noted that the Panel had identified other reasons for its rejection of the European Union's claim. The Appellate Body therefore

found that the Panel did not err under Articles 5 and 6.3 of the SCM Agreement by failing to conduct a proper counterfactual analysis when assessing whether there was continuing price suppression of the A330 in the post-implementation period.

Having found no Panel error under either Article 11 of the DSU, or under Articles 5 and 6.3 of the SCM Agreement, the Appellate Body upheld the Panel's separate finding that "the European Union's arguments are unsupported by the evidence and/or in contradiction with the findings made in the original proceeding."

3.1.7 Technology effects

The European Union requested the Appellate Body to reverse the Panel's finding that the European Union failed to establish that the pre-2007 aeronautics R&D subsidies are a genuine and substantial cause of adverse effects in the post-implementation period through a technology causal mechanism. The European Union contended that the Panel, in reaching this finding, committed several legal errors in the application of Articles 5, 6.3, and 7.8 of the SCM Agreement, and failed to make an objective assessment of the matter under Article 11 of the DSU.

The Appellate Body began by assessing the European Union's fundamental concern that the Panel erred in assessing the existence of adverse effects of the pre-2007 aeronautics R&D subsidies by limiting its analysis to the counterfactual *launch* date of the 787 and excluding consideration of the impact of these subsidies on the timing of *delivery* of the 787. The European Union challenged this aspect of the Panel's analysis on the basis of a claim of error in the application of Articles 5, 6.3, and 7.8 of the SCM Agreement, and allegations that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

Although the participants did not take issue with the manner in which the Panel articulated the counterfactual question before it, they disagreed on the scope and import of the findings in the original proceedings regarding the type of counterfactual analysis that should be conducted in these compliance proceedings. Having examined certain key passages from the original panel and Appellate Body reports, the Appellate Body noted that the technology effects of the pre-2007 aeronautics R&D subsidies were *acceleration* effects with respect to the development of technologies for the 787. The Appellate Body also observed that the concept of "launch" was particularly relevant in the original proceedings. For purposes of the original reference period from 2004 to 2006, launch was the principal accelerated event that enabled the original panel to reach conclusions of adverse effects arising from a subsidized 787. Any acceleration of the 787's first delivery occurred after the 2004-2006 reference period and was a consequence of its accelerated launch. Indeed, the original panel and the Appellate Body acknowledged that there were also acceleration effects with respect to the promised first deliveries of the 787 by affirming that, through the pre2007 aeronautics R&D subsidies, Boeing was able to offer "promised deliveries commencing in 2008".

The Appellate Body observed the apparent view of the Panel and the participants that the findings in the original proceedings *already settle* the question of whether, in these compliance proceedings, the analysis of the technology effects claims should focus on the timing of the 787's launch or whether such an analysis should also take into account the impact of the acceleration effects of the pre-2007 aeronautics R&D subsidies on the timing of first delivery of the 787. The Appellate Body considered that the relevant counterfactual question in the original proceedings was *different* from the one at issue in these compliance proceedings. The original panel was not required to examine whether the acceleration effects caused by the pre-2007 aeronautics R&D subsidies *continued* to exist at a particular point in time. Rather, the original panel's task concerned the issue of whether the pre-2007 aeronautics R&D subsidies at issue *caused* a technology effect by accelerating the development of the 787 technologies and, if so, whether such acceleration effects caused serious prejudice to the interests of the European Communities during the 2004-2006 reference period. For this reason, in the Appellate Body's view, it was sufficient for the original panel to find that "the NASA aeronautics R&D subsidies accelerated the technology development process by *some amount* of time,

and, therefore gave Boeing an advantage in bringing its technologies to market." Therefore, the analysis revolved around the issue of *whether, not by how long*, the pre-2007 aeronautics R&D subsidies accelerated the 787's technology development process.

By contrast, in these compliance proceedings, the Panel's inquiry focused on the issue of whether the acceleration effects of the pre-2007 aeronautics R&D subsidies that were found to exist by the original panel *still exist* in the post-implementation period and, if so, whether such acceleration effects cause serious prejudice to the interests of the European Union *in the post-implementation period*. In these circumstances, the Appellate Body did not see why the Panel, in addressing the European Union's technology effects claims in these compliance proceedings, would have been bound by the approach adopted by the original panel, which addressed a different counterfactual question.

In the Appellate Body's view, it was clear that the Panel based its conclusion *solely* on the counterfactual time estimates with respect to the 787's *launch*. Thus, the Panel's counterfactual analysis ultimately did not include consideration of the time estimates with respect to the counterfactual first delivery of the 787. The European Union maintained that the notion of *presence in the market* of the 787 – a factor mentioned by the Panel in framing the counterfactual question – concerns not only the launch of a product that Boeing offers, but also the time at which the product is offered for delivery to customers and the timing of actual delivery. For the Appellate Body, a central element in the Panel's counterfactual question indeed related to the moment by which the 787 is deemed to be "present in the market". Thus, the Appellate Body considered that the key issue before it was whether the Panel properly addressed the counterfactual question by limiting its analysis of the acceleration effects of the pre-2007 aeronautics R&D subsidies to the timing of the 787's launch *or* whether a proper application of that counterfactual question *also* required consideration of the acceleration effects on the timing of first delivery of the 787.

The Appellate Body pointed to certain features of the LCA industry that shed light on this question. In particular, the Appellate Body observed that LCA are sold to customers through longterm contracts, often involving staggered deliveries of aircraft over several years. The terms and conditions of each purchase contract are set at the time the order is made, and include many different elements, such as aircraft specification, net price, discounts, non-price concessions, and financing arrangements. Moreover, LCA purchase contracts provide both the basic airframe price, as well as for the escalation of that price to account for the time that elapses between the negotiation of the price at the time of order and the delivery of the aircraft.

The Appellate Body further indicated that the Panel's counterfactual analysis was part of a broader inquiry seeking to determine whether the pre-2007 aeronautics R&D subsidies continue to cause serious prejudice within the meaning of Articles 5 and 6.3 in the post-implementation period. In the LCA market, the market phenomena of price suppression and lost sales are not limited to what occurs at the time of an LCA order and, therefore, such phenomena may continue up to the point of LCA delivery. Consequently, in the context of the LCA market, determining whether the forms of serious prejudice under Article 6.3 at issue in this dispute still existed in the post-implementation period requires assessing whether any acceleration effects from the pre-2007 aeronautics R&D subsidies *also* had an impact on the timing of the first delivery of the 787 in the post-implementation period. In this respect, the Appellate Body noted that, unless otherwise specified, its references to "first delivery of the 787" covered both promised first delivery and actual first delivery.

Moreover, the Appellate Body considered that, if the pre-2007 aeronautics R&D subsidies had an impact on stages of the 787's development – either before or after its launch – that affected the timing of the first delivery of the 787 in relation to the end of the implementation period, then assessing the timing of this aircraft's first delivery would have been particularly appropriate for determining whether the acceleration effects still exist in the post-implementation period and could be attributed to the pre-2007 aeronautics

R&D subsidies. For the Appellate Body, if there were no such acceleration effects that affected the timing of the first delivery of the 787, then the Panel should have reasoned why that is the case, rather than excluding consideration of this issue *ab initio*.

In addition to the above considerations, the Appellate Body was of the view that there were several indications before the Panel that should have led it to evaluate whether the forms of serious prejudice alleged by the European Union are still present in the post-implementation period by examining whether, absent the pre-2007 aeronautics R&D subsidies, first delivery of the 787 would have occurred after the end of the implementation period. As a starting point, the original panel and the Appellate Body considered that the technology effects of the pre-2007 aeronautics R&D subsidies accelerated both the 787's launch and its promised first delivery. Furthermore, the Appellate Body considered that it should have been telling for the Panel that both parties presented argumentation related to activities pertaining to, and time estimates for, the 787's launch *and* its first delivery.

For the foregoing reasons, the Appellate Body was not persuaded that it was sufficient for the Panel to base its conclusion regarding the European Union's technology effects claims solely on its understanding of the original panel's findings. By failing to assess in its counterfactual analysis whether the acceleration effects of the pre-2007 aeronautics R&D subsidies had an impact, not just on the launch of the 787, but also on the timing of the first delivery of the 787, the Appellate Body concluded that the Panel did not properly assess the counterfactual question as to whether there remain acceleration effects of the pre-2007 aeronautics R&D subsidies in the post-implementation period. Accordingly, the Appellate Body found that the Panel erred in the application of Articles 5 and 6.3 and, as a consequence, Article 7.8 of the SCM Agreement. The Appellate Body therefore reversed the Panel's findings that the European Union failed to demonstrate that the *acceleration* effects of the pre-2007 aeronautics R&D subsidies in relation to Boeing's technology development for the 787 have continued into the post-implementation period; and that the European Union therefore failed to demonstrate the existence of original subsidy technology effects of the pre-2007 aeronautics R&D subsidies in the post-implementation period.

The European Union also requested the Appellate Body to reverse the Panel's analysis with respect to the spillover technology effects of the pre-2007 aeronautics R&D subsidies on the 7879/10, the 777X, and the 737 MAX. The Appellate Body considered that the Panel's conclusions regarding the European Union's claims with respect to the spill-over technology effects were largely dependent on its earlier findings regarding the original subsidy technology effects of the pre-2007 aeronautics R&D subsidies on the 787. Since it had reversed the Panel's analysis regarding the original subsidy technology effects, the Appellate Body consequently reversed the Panel's findings that the European Union failed to demonstrate the existence of spill-over technology effects of the pre-2007 aeronautics R&D subsidies with respect to the 787-9/10, 777X, and 737 MAX in the post-implementation period. As a consequence, and to that extent, the Appellate Body also reversed the Panel's findings with respect to the European Union's failure to establish that the pre-2007 aeronautics R&D subsidies are a genuine and substantial cause of any of the forms of serious prejudice alleged with respect to the A350XWB and the A320neo in the post-implementation period, through a technology causal mechanism.

The Appellate Body recalled that, in addition to the above claim of error in the application of Articles 5, 6.3, and 7.8 of the SCM Agreement, the European Union brought multiple claims challenging the Panel's findings that the European Union failed to establish that the technology effects of the pre-2007 aeronautics R&D subsidies continue into the post-implementation period. Because it had already reversed the Panel's ultimate findings regarding the acceleration effects of the pre-2007 aeronautics R&D subsidies, the Appellate Body indicated that it need not consider the additional claims and arguments by the European Union.

Having reversed the Panel's findings, the Appellate Body turned to assess the European Union's request that the Appellate Body complete the legal analysis and find that the pre-2007 aeronautics R&D subsidies

cause: (i) original subsidy technology effects with respect to the 787 in the post-implementation period; and (ii) spill-over technology effects with respect to the 787-9/10, 777X, and 737 MAX in the post-implementation period.

The European Union maintained that, in determining the minimum counterfactual R&D timeframe for the 787-8, a counterfactual time-frame of "up to 10 years" should be used. The European Union submitted that this leads to a potential launch at a date leading "up to" 2012 (up to eight years later than the 787's actual launch) and possible promised first delivery up to 2016 (up to eight years later than the 787's promised first delivery). Moreover, taking into account the delay for actual delivery of the 787 results in a counterfactual first delivery of the 787-8 as late as 2019. The European Union argued on appeal that the Appellate Body "would merely need to confirm … that the first delivery of the 787, absent the non-withdrawn subsidies, would have been delayed until after 2012, i.e. after the end of the implementation period". However, the Appellate Body did not consider that the completion exercise would be as straightforward as the European Union described it. Indeed, the participants contested the relevant time estimates for conducting the 787's counterfactual analysis. As a result, there were no uncontested facts with respect to the time that Boeing would have required for the 787's launch, its promised first delivery, or its actual first delivery, absent the pre-2007 aeronautics R&D subsidies. Moreover, there were no findings by the Panel specifying a precise date by which, absent the pre-2007 aeronautics R&D subsidies, Boeing would have launched the 787. From the findings by the Panel, it was therefore unclear whether the counterfactual launch date of the 787 would have been around 2006, 2010, or some time in between those dates. In addition, because the Panel did not examine the impact of acceleration effects on the timing of the first delivery of the 787, it naturally did not specify when the 787's first delivery would have occurred in the absence of these subsidies. Nor were there any findings by the Panel regarding the substantive assessment of whether there are any acceleration effects on post-launch R&D that might have had an impact on the timing of the counterfactual first delivery of the 787.

Thus, the Appellate Body considered that it had no basis to assess whether the promised first delivery of the 787 would have occurred *before* or *after* the end of the implementation period. In a situation where the counterfactual launch would have taken place in 2006 or 2007, *promised* first delivery would have been in 2010 or 2011, that is, before the end of the implementation period. Conversely, if the 787's counterfactual launch would have been in 2010, promised first delivery of this aircraft would have been scheduled for 2014. Similarly, because of the indeterminate nature of the counterfactual timing of the 787's launch, there were various uncertainties regarding the timing of the *actual* first delivery of the 787. Indeed, in a situation where the counterfactual launch would have occurred in 2006, and on the basis of the assumption that there is a seven-year time lag between the 787's launch and its actual first delivery, the 787's *actual* first delivery could possibly have been in 2013, which would be shortly after the end of the implementation period in September 2012. Alternatively, in a situation where the counterfactual launch would have taken place at a moment closer to 2010, the 787's actual first delivery could have occurred, under these assumptions, at a date leading up to 2017. Given these very different outcomes based on different counterfactual launch dates, the Appellate Body saw considerable uncertainty regarding which transactions would have become the subject of the serious prejudice analysis.

Consequently, given the lack of sufficient factual findings by the Panel and uncontested facts on the Panel record, the Appellate Body found that it was unable to complete the legal analysis with regard to whether there remain acceleration effects of the pre-2007 aeronautics R&D subsidies in the post-implementation period.

3.1.8 Price effects

The European Union and the United States appealed different aspects of the Panel's analysis as to whether certain subsidies cause adverse effects through a price causal mechanism. The Appellate Body examined: (i) the European Union's claim relating to the causation standard adopted by the Panel in connection with its

analysis of the effects of the *tied* tax subsidies; (ii) the United States' claim relating to the Panel's assessment of the relative significance of the amount of the tied tax subsidies; and (iii) the European Union's claim relating to the Panel's analysis of the effects of the *untied* subsidies.

3.1.8.1 European Union's claims relating to the Panel's causation standard

The European Union appealed the Panel's alleged finding that, in order for the tied tax subsidies to be found to cause significant lost sales through a price causal mechanism, there must be no non-price factors that potentially contributed to Boeing's success in obtaining such sales. The European Union considered that, in stating that there must be "no non-price factors that explain Boeing's success in obtaining the sale", the Panel improperly elevated the Appellate Body's approach to the completion of the legal analysis in the original proceedings into the applicable legal standard for assessing causation. According to the European Union, such an understanding is contrary to Articles 5 and 6.3 of the SCM Agreement because the assessment as to whether there is a genuine and substantial relationship of cause and effect does not require a determination that the subsidy is the sole cause of that effect.

The question presented by the European Union was whether, notwithstanding the Panel's correct articulation of the legal standard, the Panel nevertheless went on to apply an incorrect legal standard by demanding that, to establish causation, the European Union must demonstrate that there were no other potential causes of the adverse effects. In support of its argument, the European Union pointed to the repeated statement by the Panel that, in order for the sales campaigns at issue to be found to be particularly price-sensitive, there must be "no non-price factors that explain Boeing's success in obtaining the sale". The Appellate Body noted that this statement originated from the Appellate Body's analysis in the original proceedings. There, the Appellate Body stated that a sales campaign would be considered particularly pricesensitive when "Boeing was under particular pressure to reduce its prices in order to secure LCA sales in particular sales campaigns, and there are no other non-price factors that explain Boeing's success in obtaining the sale or suppressing Airbus' pricing".

The European Union maintained that the Panel was wrong to have relied on the Appellate Body's statement because, in attempting to complete the legal analysis in the original proceedings, the Appellate Body was unable to do so with respect to sales campaigns where the panel record showed that there had been nonprice factors capable of explaining the outcome. The Appellate Body noted, however, that when it had explained that causation could be established only when "there are no other non-price factors that explain Boeing's success" in a particularly pricesensitive sales campaign, it was referring to the role of those non-price factors as weighed and balanced against factors relating to price. Only subsequently in its analysis did the Appellate Body then recognize that, if any non-price factors had been advanced, this would have necessitated a non-attribution analysis of those factors as well as a weighing of price and non-price factors in its causation analysis, which would have entailed new factual findings. Therefore, although the European Union is correct that the Appellate Body ultimately was able to complete the analysis only in instances where the United States had not advanced any non-price factors, this was due to the fact that the role and relevance of those non-price factors was contested, and thus no uncontested facts or alternative panel findings were available. The Appellate Body therefore rejected the European Union's contention that the Panel erred in elevating the Appellate Body's approach to completing the legal analysis into the applicable legal standard. Rather, the Panel was relying on reasoning by the Appellate Body that was reflective of the proper legal standard.

In addition, having reviewed the Panel's reasoning in both the non-confidential summary of the sales campaign evidence contained in the body of the Panel Report, as well as the more detailed explanations set out in the HSBI Appendix to the Panel Report, the Appellate Body did not find support for the proposition that the Panel adopted an approach to causation whereby it declined to consider whether subsidies cause adverse effects in instances where any non-price factor or factors were advanced. Rather, the Panel's reasoning reflected a weighing and balancing of both price and non-price factors in determining, with

respect to each sales campaign, the extent to which the sales campaigns were or were not particularly price-sensitive. This suggested to the Appellate Body that, rather than declining to evaluate any sales campaign once a non-price factor was identified, the Panel in fact assessed whether non-price factors were such that they attenuated the role of price factors in explaining Boeing's success in obtaining the sale. The Appellate Body further noted that, for three of the sales campaigns – Delta Airlines 2011, Icelandair 2013, and Air Canada 2013 – the United States advanced particular factors other than price that were alleged to attenuate the effect of the subsidy in explaining why Boeing obtained the sale. The Panel nevertheless found for these sales campaigns that Boeing appeared to be under particular pressure to reduce its prices in order to secure the sale, and there were no non-price factors that explain Boeing's success in obtaining the sale. In particular, the non-price factor that was identified by the Panel with respect to the Icelandair 2013 sales campaign – which was found not to attenuate price as a causal factor – was the same non-price factor that was identified with respect to other sales campaigns for which the Panel found that non-price factors mitigated the role of price. This demonstrated to the Appellate Body that the Panel did not embrace a legal standard requiring that there must be no other non-attribution factors and that the subsidy must represent the *only* cause of the adverse effects.

The Appellate Body therefore considered that the Panel's understanding of the legal standard properly reflected a weighing and balancing of price and nonprice factors to reach a conclusion as to whether a sales campaign was particularly price-sensitive, such that the tied tax subsidies could be found to be a genuine and substantial cause of serious prejudice. Accordingly, the Appellate Body found that the Panel did not err in the interpretation of Articles 5 and 6.3, and, as a consequence, Article 7.8 of the SCM Agreement, when identifying the applicable causation standard.

3.1.8.2 United States' claims relating to the Panel's assessment of the relative significance of the amount of the tied tax subsidies

The United States requested the Appellate Body to reverse the Panel's finding that the effects of the tied tax subsidy at issue with respect to the single-aisle LCA market – namely, the Washington State B&O tax rate reduction – are significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement and threat of impedance within the meaning of Article 6.3(a)(b) of that Agreement. The United States challenged two aspects of the Panel's assessment of the relative significance of the amount of the tied tax subsidy for purposes of determining whether the subsidy contributed in a genuine and substantial way to Airbus' loss of five specific sales campaigns between 2007 and 2015 that the Panel had identified to be particularly price-sensitive. First, the United States claimed that the Panel had erred under Articles 5 and 6.3 of the SCM Agreement, or, in the alternative, had acted inconsistently with Article 11 of the DSU, in estimating the per-aircraft impact of the subsidy to be approximately US$1.99 million per the 737 MAX or 737NG. The United States observed that the Panel's estimate was based on an inappropriate assumption that Boeing was able to pool the benefits of the subsidy received in connection with all of its LCA sales and deploy such benefits to target only the particularly price-sensitive sales campaigns. Second, the United States argued that, even assuming *arguendo* that the Panel's estimate were correct, the Panel had still erred under Articles 5 and 6.3 of the SCM Agreement, and/or had acted inconsistently with Article 11 of the DSU, in concluding that the subsidy is a genuine and substantial cause of Airbus' loss of the five particularly price-sensitive sales campaigns, because the Panel had not established that the per-aircraft subsidy amount was large enough to explain the entirety of the differentials in Airbus' and Boeing's net prices in those sales campaigns.

With respect to the Panel's estimated per-aircraft subsidy amount, the Appellate Body agreed with the United States that the Panel's calculation had assumed that Boeing was able to deploy the benefits of the tied tax subsidies arising from all of its LCA sales to lower its LCA prices only in particularly price-sensitive sales campaigns. However, the Appellate Body disagreed with the United States that such an assumption necessarily contradicts the nature of the tied tax subsidy discussed by the Appellate Body in the original proceedings or the Panel in these compliance proceedings. The Appellate Body explained that,

while the fact that the subsidies are granted with respect to individual sales speaks to the recipient's ability to reduce the price of each individual sale while nevertheless achieving the same profit margin for that sale, it does not mean that the recipient will always do so in the specific circumstances of each case. Rather, with respect to the present case, the Appellate Body considered that the Panel's findings regarding the duration of the subsidy in question, the duopolistic conditions of competition in the LCA market, and the varying significance of price and non-price factors in different sales campaigns, as well as the circumstances of individual sales campaigns, had provided a support for the Panel's proposition that Boeing would be highly incentivized to deploy the benefits of the tied tax subsidies arising from multiple LCA sales to target particularly price-sensitive sales campaigns.

In addition, the Appellate Body highlighted that Articles 5(c) and 6.3 of the SCM Agreement do not require a panel to quantify the precise per-unit impact of the subsidy for purposes of finding a genuine and substantial causal link between the subsidy and alleged adverse effects. Accordingly, the Appellate Body disagreed that the Panel's estimate of the per-aircraft subsidy amount constitutes a violation of Articles 5 and 6.3 of the SCM Agreement. Rather, in the Appellate Body's view, the Panel's assessment of the per-aircraft subsidy amount provided a useful estimate of the maximum extent to which Boeing would have been able to lower its prices with the use of the tied tax subsidy for purposes of establishing the requisite causal link. The Appellate Body declined to address the United States' alternative claim under Article 11 of the DSU, stating that the Panel's assessment of the per-aircraft subsidy amount relates more properly to the application of the legal standard under Articles 5 and 6.3 of the SCM Agreement than to the objectivity of the Panel's assessment of the facts within the meaning of Article 11 of the DSU.

With respect whether the Panel was required to establish that the per-aircraft subsidy amount explains the entirety of the differential in Airbus' and Boeing's net prices for purposes of reaching lost sales findings, the Appellate Body recalled that one approach to assessing the existence of the requisite causal link between the subsidy and alleged serious prejudice is by recourse to a counterfactual analysis. The Appellate Body explained that, where a complainant seeks to demonstrate lost sales through a subsidy's effects on the prices of the subsidized firm, a proper counterfactual test may entail a comparison between, on the one hand, the degree of price reduction made available with the use of the subsidy in the particular sale in question and, on the other hand, the degree of price difference that could have changed the outcome of that sale. However, the Appellate Body disagreed with the proposition that, when making such a comparison, a panel is necessarily required to establish that the former amount exceeds the latter. This is because, for example, in a situation where price is effectively the only consideration for the customers' decision to purchase the product of the subsidized firm instead of the product of the competing firm, requiring the subsidy to explain the entirety of the pricing advantage of the subsidized firm may equate to an overly stringent requirement that the subsidy be the sole cause of the subsidized firm winning the sale.

In addition, with particular respect to the LCA markets where competing aircraft are differentiated from each other in various respects, such as seating capacity and flight range, the Appellate Body stated that the differential in net prices cannot be the exclusive indicator as to whether the subsidy contributed in a genuine and substantial way to the outcome of particular sales campaigns. In this context, the Appellate Body noted that the Panel had based its lost sales findings not only on evidence pertaining to the net price differentials but also on evidence pertaining to the difference in the net present value (NPV) of Airbus' or Boeing's offer that can change the outcome of highly competitive sales campaigns. Under these circumstances, the Appellate Body disagreed with the United States that the Panel had erred merely because its conclusion was not based on a finding that the per-aircraft subsidy amount exceeds the differentials in the net prices offered by Airbus and Boeing in the five sales campaigns. The Appellate Body also addressed the United States' more specific arguments regarding the Panel's analysis of each of the five individual sales campaigns, and rejected each of these arguments.

Accordingly, the Appellate Body found that the United States had failed to demonstrate that the Panel had erred under Articles 5 and 6.3 of the SCM Agreement, or had acted inconsistently with Article 11

of the DSU, in reaching its findings that the subsidy is a genuine and substantial cause of Airbus' loss of sales in the five sales campaigns, and consequently to significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, and threat of impedance within the meaning of Article 6.3(a)-(b) of that Agreement, in the post-implementation period. The Appellate Body thus upheld the Panel's findings that the European Union had established that the tied tax subsidies cause significant lost sales, within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement, in the single-aisle LCA market, with respect to the Fly Dubai 2014, Icelandair 2013, and Air Canada 2013 sales campaigns, in the post-implementation period, as well as threat of impedance of imports of Airbus single-aisle LCA to the United States and exports of Airbus single-aisle LCA to the United Arab Emirates, within the meaning of Articles 5(c) and 6.3(a) and (b) of the SCM Agreement, in the post-implementation period.

3.1.8.3 European Union's claims relating to the Panel's analysis of the untied subsidies

The European Union requested the Appellate Body to reverse the Panel's findings that the European Union had failed to establish that the "untied subsidies" – consisting of various state and local cash flow subsidies and the post-2006 aeronautics R&D subsidies – are a genuine and substantial cause of adverse effects in the post-implementation period through a price causal mechanism. According to the European Union, the Panel erred in the interpretation and application of Articles 5 and 6.3 of the SCM Agreement by requiring that, in order to demonstrate that the untied subsidies cause adverse effects, the European Union must trace the dollars from the untied subsidies to actual price reductions of LCA sales. The European Union further alleged that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by deviating from the Appellate Body's findings in the original proceedings.

The Appellate Body noted that, unlike the tied tax subsidies, the untied subsidies are not contingent on the production or sale of LCA on a per-unit basis, but instead increase Boeing's nonoperating cash flow. The question, therefore, was under what circumstances subsidies to Boeing in the form of additional cash can be found to cause adverse effects through a price causal mechanism. The Appellate Body noted that, in the original proceedings, it had considered that the legal standard for causation could be established on the basis of its assessment of several factors consisting of the conditions of competition, the magnitude of the subsidy, and whether there was a genuine link with relevant LCA production. The Panel, however, did not accept that such an approach was sufficient to establish that the subsidy was a genuine cause of adverse effects. Instead, under the standard it adopted, the Panel also required an explanation of, or evidence concerning, the manner in which subsidies providing additional cash to Boeing would have altered its pricing strategy for a particular LCA programme. The Panel therefore appeared to have adopted a legal standard requiring that, in order for a causation finding to be sustained, it would be necessary to demonstrate that the subsidies at issue in fact altered Boeing's pricing behaviour with respect to a particular LCA programme.

The Appellate Body did not consider that the legal standard adopted by the Appellate Body in the original proceedings supported the Panel's view that, in order to establish that untied subsidies caused adverse effects through a price causal mechanism, it was required to find that the subsides actually altered Boeing's LCA pricing behaviour for particular LCA programmes. For the Appellate Body, this amounted to a requirement that the untied subsidies be the sole cause, or only substantial cause, of the lowering of LCA prices, a causation standard that has previously been found to be too demanding. Instead, the Appellate Body noted that, in the original proceedings, certain untied subsidies were found to have caused significant lost sales because they "enhanced the pricing flexibility" that Boeing enjoyed by reason of the tied tax subsidies.

The Appellate Body noted, moreover, that, because the Panel rejected the European Union's reliance on the Appellate Body's approach to demonstrating a genuine link between an untied subsidy and Boeing's pricing behaviour, it did not examine whether the purported links advanced by the European Union between the untied subsidies and certain relevant LCA programmes existed. Accordingly, while the Panel acknowledged that "subsidies that reduce the fixed costs of a producer may be shown to impact prices", the Panel never examined the European Union's arguments and evidence in order to assess whether these purported links

met the standard set out by the Appellate Body when it examined the City of Wichita IRB tax abatements. Therefore, even if, as the Panel stated, one should not interpret "what the Appellate Body said in that particular context as setting forth an economic theory or legal ruling regarding the basis on which untied subsidies, through their impact on the recipient's pricing behaviour, should be considered to be a *genuine* cause of serious prejudice", the Panel did not consider how the situation in these compliance proceedings mandated a result different from that found in the original proceedings.

Therefore, the Appellate Body found that the Panel erred under Articles 5 and 6.3 of the SCM Agreement by requiring that the European Union demonstrate that the untied subsidies actually led to price reductions of Boeing LCA sales in order to establish that the subsidies caused adverse effects through the lowering of Boeing LCA prices. The Appellate Body therefore reversed the Panel's findings that the European Union had failed to establish that the untied subsidies cause serious prejudice, within the meaning of Articles 5(c) and 6.3 of the SCM Agreement, in the post-implementation period through a price causal mechanism. Having reversed this finding, the Appellate Body did not address whether, in addition, the Panel acted inconsistently with Article 11 of the DSU.

With respect to the European Union's request for completion of the legal analysis regarding the untied subsidies, the Appellate Body recalled that, in the original proceedings, it had adopted a "cumulation" approach in completing the legal analysis with respect to the effects of the untied subsidies. The Appellate Body also noted that, in these compliance proceedings, the European Union requested the Appellate Body to find that the untied subsidies contribute to adverse effects through a price causal pathway in the same way that the untied subsidies had been found to contribute to adverse effects in the original proceedings. On that basis, the Appellate Body turned to consider whether there were sufficient factual findings by the Panel and undisputed facts on the record to find that the effects of the untied subsidies "complement and supplement" the effects of the tied tax subsidies, which had been found to be a genuine and substantial cause of adverse effects in the singleaisle LCA market, and thereby cause adverse effects within the meaning of Articles 5 and 6.3 of the SCM Agreement in the singleaisle LCA market.

The Appellate Body stated that, in the circumstances of this case, the legal standard for causation concerning the untied subsidies entailed an assessment of the conditions of competition, the magnitude of the subsidy, and whether there was a sufficient link between the subsidy and relevant LCA production. With particular respect to the existence of a link between the subsidy and LCA production, the Appellate Body recalled that, in the original proceedings, it had found the requisite link between the City of Wichita IRB tax abatements and Boeing's production of the 737NG because those IRBs were specifically aimed at, and were used for the purpose of, enhancing Boeing's manufacturing facilities in Wichita that were involved in part in production and assembly operations for the 737NG. This, together with other relevant considerations, supported the Appellate Body's conclusion that the Wichita IRBs enhanced the pricing flexibility that Boeing enjoyed by reason of the tied tax subsidies, thereby causing adverse effects within the meaning of Articles 5 and 6.3 of the SCM Agreement. The Appellate Body also recalled that, with respect to the other untied subsidies at issue in the original proceedings, it could not complete the legal analysis either because the original panel record had indicated that these subsidies were related to Boeing's general costs rather than directed at particular products or benefitted aircraft *other than* the 737NG, or because there had been no panel findings or undisputed facts indicating that these subsidies had been received or expected to be received in connection with expenditures related to the 737NG.

For purposes of determining whether it could complete the legal analysis in these compliance proceedings, the Appellate Body examined whether there were sufficient Panel findings or undisputed facts on the record establishing the requisite link between each of the four untied subsidies that the European Union alleged had affected the prices of Boeing's singleaisle LCA. Having examined the Panel record regarding these subsidies' design, operation and application, the Appellate Body concluded that there were no

specific Panel findings or undisputed facts indicating that any of those subsidies had been generated in connection with production of the relevant LCA, or they had otherwise enhanced Boeing's pricing flexibility for these LCA. Thus, the Appellate Body found that it was unable to complete the legal analysis.

3.1.9 Additional claims on appeal

The Appellate Body also noted that there were certain additional claims by the European Union and conditional claims by the United States that it did not address because it did not consider their disposition necessary for the resolution of the dispute.

First, the European Union claimed that the Panel erred in the interpretation of Articles 5, 6.3, and 7.8 of the SCM Agreement in finding that "a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market", as it related to the serious prejudice phenomena of significant price suppression, price depression, and lost sales. The European Union maintained that the Appellate Body should instead interpret Article 6.3(c) to permit a finding of adverse effects in the form of significant price suppression, price depression, or lost sales where the subsidized product and the like product do not compete in the same market. The European Union stated that, in requesting reversal of this Panel finding, it sought to enable the Appellate Body, in completing the legal analysis, to find significant lost sales in instances where the 787-8/9 and the A350XWB-900 competed for the sale, even though the Panel placed these competing products into two separate product markets. The Appellate Body noted the Panel's finding that there is no bright-line distinction between these markets and that, depending on the circumstances, certain larger medium-sized aircraft could be found to exercise meaningful competitive constraints on smaller larger-sized aircraft. In any event, in light of the disposition of other claims on appeal, and the fact that the Appellate Body was not called upon to consider the European Union's request for completion of the legal analysis regarding the twin-aisle LCA markets, the Appellate Body did not consider any potential competitive relationship between the 787-8/9 and the A350XWB-900 LCA and, therefore, did not address the European Union's claim of error.

The European Union also claimed that the Panel erred in the interpretation of Articles 5, 6.3, and 7.8 of the SCM Agreement in purportedly finding that aggregation and cumulation of subsidies are the only two approaches to the collective assessment of the adverse effects of multiple subsidies. The European Union added that it sought reversal of the Panel's interpretation since it would be, in the European Union's view, critical for the purposes of the Appellate Body's completion of the legal analysis. The Appellate Body recalled that it had previously found that "at least two approaches to a collective assessment of the effects of multiple subsidy measures may be used, namely, aggregation and cumulation." The Appellate Body stated that, as this language suggests, the Appellate Body had not excluded the existence of other methods for the collective assessment of the effects of multiple subsidies.

However, the Appellate Body noted that it was unable to conclude that the untied subsidies were a genuine cause of adverse effects and that such a showing would have been required under the European Union's proposed approaches to the collective assessment of multiple subsidies. Therefore, in light of its disposition of other claims on appeal, the Appellate Body was not called upon to consider any such additional methods for the collective assessment of subsidies and, therefore, did not address the European Union's claim of error.

Finally, the Appellate Body noted that the United States had presented conditional claims regarding the Panel's benefit and specificity analyses concerning certain US government contracts, its benefit analysis concerning certain South Carolina measures, and its finding regarding significant price suppression with respect to the A330. The Appellate Body explained that, in light of its disposition of other claims on appeal, the conditions for each of these claims had not been triggered.

3.2 Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R

This dispute concerned Korea's imposition of the following four measures in response to the Fukushima Dai-ichi Nuclear Power Plant (FDNPP) accident in March 2011: (i) the additional testing requirements adopted in 2011 for non-fishery products from Japan (except livestock); (ii) the product-specific import bans adopted in 2012 on Alaska pollock from one Japanese prefecture and on Pacific cod from five Japanese prefectures; (iii) the additional testing requirements adopted in 2013 for fishery and livestock products from Japan; and (iv) the "blanket import ban" adopted in 2013 on all fishery products from eight Japanese prefectures in relation to 28 fishery products.

Before the Panel, Japan claimed that all of Korea's challenged measures were inconsistent with Articles 2.3, 5.6, 7, and Annexes B(1) and B(3) to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Japan also claimed that the 2011 and 2013 additional testing requirements were inconsistent with Article 8 and Annexes C(1)(a), (c), (e), and (g) to the SPS Agreement. Korea requested the Panel to reject all of Japan's claims.

Noting that Korea had referred to the provisional nature of its measures under Article 5.7 of the SPS Agreement, the Panel began its analysis with this provision. The Panel found that the measures at issue did not fulfil all the requirements under Article 5.7 and therefore did not fall within the scope of Article 5.7.

In relation to whether Korea's measures were more trade-restrictive than required under Article 5.6 of the SPS Agreement, the Panel examined the alternative measure suggested by Japan, i.e. testing for caesium only and rejecting any food products with caesium levels over 100 becquerel per kilogram (Bq/kg). The Panel considered this alternative measure as technically available, economically feasible, significantly less trade-restrictive than Korea's measures, and capable of achieving Korea's appropriate level of protection (ALOP). The Panel then found that the 2011 additional testing requirements and the product-specific import bans were not more trade-restrictive than required when *adopted*, but at the time of the establishment of the Panel they were *maintained* inconsistently with Article 5.6 because they were more trade-restrictive than required. The Panel also found that the 2013 additional testing requirements and the blanket import ban were adopted (except for the ban on Pacific cod from Fukushima and Ibaraki) and *maintained* inconsistently with Article 5.6 because they were more trade-restrictive than required to achieve Korea's ALOP.

In relation to whether Korea's measures arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail under the first sentence of Article 2.3 of the SPS Agreement, the Panel first assessed whether similar conditions prevail in Japan and other Members. The Panel considered that the relevant conditions to be compared under Article 2.3 to be "whether products from Japan and the rest of the world have a similar potential to be contaminated … and whether the levels of contamination would be below Korea's tolerance levels" for certain radionuclides. Based on the views of the experts the Panel had appointed and data on contamination levels of food products from Japan and other origins, the Panel found that similar conditions prevailed in Japan and other Members with regard to the adoption of certain measures in 2013 and with regard to the maintenance of all of the challenged measures. The Panel further found that the discriminatory treatment under Korea's measures was not rationally connected to Korea's regulatory objective of protecting Korea's population against the risk arising from consumption of contaminated food products. The Panel thus found arbitrary or unjustifiable discrimination where similar conditions prevail in relation to the adoption of certain measures in 2013 and in relation to the maintenance of all of the challenged measures. Finally, in relation to whether Korea's measures were applied in a manner which would constitute a disguised restriction on international trade under the second sentence of Article 2.3, the Panel found that Korea's measures "constitute equally a disguised restriction on international trade" based on the Panel's finding of arbitrary or unjustifiable discrimination.

In relation to the obligations concerning control, inspection and approval procedures under Article 8 and Annex C to the SPS Agreement, the Panel found that Japan failed to establish that Korea acted inconsistently with Annexes C(1)(a), (c), (e), and (g) and Article 8 with respect to the adoption and maintenance of the 2011 and the 2013 additional testing requirements. In particular, with respect to Annex C(1)(a), the Panel found that Japan had failed to demonstrate that Japanese imported products and Korean domestic products could be presumed to be "like" under this provision.

In relation to the transparency obligations under Article 7 and Annex B to the SPS Agreement, the Panel first found that Annex B(1) requires that the publication of an SPS regulation contain sufficient content that the interested Member will know "the conditions (including specific principles and methods) that apply to its goods". The Panel then found that Korea acted inconsistently with Annex B(1) because it had failed to publish the measures in such a manner as to enable Japan to become acquainted with them. Turning to Annex B(3), the Panel found that Korea acted inconsistently with this provision because Korea's SPS enquiry point provided an incomplete response to Japan's first request and failed to respond to Japan's second request.

3.2.1 Article 5.6 of the SPS Agreement: "more trade-restrictive than required to achieve" Korea's Appropriate Level of Protection

Korea appealed the Panel's finding that Korea had acted inconsistently with Article 5.6 of the SPS Agreement with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures. Korea contested the Panel's findings relating to the achievement of Korea's ALOP by an alternative measure proposed by Japan, arguing that the Panel effectively applied an incorrect ALOP. In particular, Korea contended that, after initially accepting Korea's ALOP, the Panel then proceeded to apply a quantitative standard of 1 millisievert per year (mSv/year) as Korea's ALOP while disregarding other elements of its ALOP, including maintenance of levels of radioactive contamination in food as low as reasonably achievable (ALARA), below the 1 mSv/year radiation dose limit, at a level that exists in the ordinary environment. Japan responded that the Panel correctly determined and applied Korea's ALOP.

Under Article 5.6, a complainant must establish that an alternative measure: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's ALOP; and (iii) is significantly less restrictive to trade than the contested SPS measure. Annex A(5) to the SPS Agreement defines the "appropriate level of sanitary or phytosanitary protection" as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".

The main issue raised by Korea in this appeal was whether the Panel applied an incorrect ALOP in its assessment of the alternative measure proposed by Japan. The Appellate Body observed that, in setting out the relevant ALOP for its analysis, the Panel stated that it must determine whether Japan's alternative measure achieves the following level of protection:

> [T]o maintain radioactivity levels in food consumed by Korean consumers at levels that exist in the ordinary environment – in the absence of radiation from a major nuclear accident – and thus maintain levels of radioactive contamination in food that are "as low as reasonably achievable" (ALARA), below the 1 mSv/year radiation dose limit.

The Appellate Body noted that this formulation of the relevant ALOP, as articulated by Korea and accepted by the Panel, consists of both qualitative and quantitative aspects concerning radioactivity levels in food consumed by Korean consumers, namely: (i) the levels that exist in the ordinary environment; (ii) ALARA; and (iii) the quantitative dose exposure of 1 mSv/year. The Appellate Body reviewed the Panel's analysis

and observed that, despite recognizing that Korea's ALOP comprises several elements, various statements throughout the Panel's analysis reflected a predominant focus on exposure below 1 mSv/year as a decisive indicator of whether Japan's proposed alternative measure would meet Korea's ALOP.

While neither Article 5.6 nor Annex A(5) to the SPS Agreement precludes a Member's ALOP from containing multiple elements, the Appellate Body considered that the Panel did not clearly resolve whether each of the elements at issue represented a distinct component of Korea's ALOP, and how these elements interact as parts of Korea's overall ALOP. Further, the Panel did not resolve whether the qualitative aspects of Korea's ALOP were fully comprised by the 1 mSv/year dose limit, such that an alternative measure achieving exposure below that quantitative threshold would necessarily achieve the qualitative level of protection represented by the ALARA element and maintenance of radioactivity levels in food at levels that exist "in the ordinary environment". The Appellate Body also considered that the Panel's findings as to the achievement of exposure "below" or "significantly lower" than 1 mSv/year did not clearly correspond to the other elements of the relevant ALOP. Moreover, the Appellate Body did not consider the achievement of the multifaceted ALOP accepted by the Panel to follow automatically from the Panel's observations as to the "conservative" nature of the proposed alternative measure.

The Appellate Body recalled that a panel must ascertain the respondent's ALOP on the basis of the totality of the arguments and evidence on the record, which may include evidence of the level of protection reflected in the SPS measure actually applied. Where a panel considers that a respondent's ALOP differs from that articulated by the respondent, the panel must clearly explain what it has determined the respondent's ALOP to be, along with the reasons and evidentiary basis for the panel's determination. Despite certain statements by the Panel that could have called into question whether the ALARA principle or radioactivity levels that exist in the ordinary environment can serve as part of a meaningful ALOP, the Panel did not resolve the issue and did not make any finding to this effect. Ultimately, the Panel accepted Korea's own formulation of the relevant ALOP as the level of protection that would need to be achieved by Japan's alternative measure.

The Appellate Body concluded that, while the Panel accepted Korea's articulation of a multifaceted ALOP, its analysis focused on the quantitative element of 1 mSv/year. The Panel reached conclusions with respect to Japan's alternative measure that left unclear whether it considered the alternative measure to satisfy all of the elements of Korea's ALOP it had identified. The Panel's findings effectively subordinated the elements of ALARA and radioactivity levels "in the ordinary environment" to the quantitative element of exposure below 1 mSv/year, in a manner that was at odds with the articulation of the ALOP explicitly accepted by the Panel at the outset of its analysis.

The Appellate Body thus found that the Panel erred in its application of Article 5.6 of the SPS Agreement in finding that Japan's proposed alternative measure achieves Korea's ALOP. Consequently, the Appellate Body reversed the Panel findings at issue.

3.2.2 Article 2.3 of the SPS Agreement – arbitrary or unjustifiable discrimination "between Members where identical or similar conditions prevail"

Korea appealed the Panel's findings that Korea had acted inconsistently with Article 2.3 of the SPS Agreement with respect to: (i) the adoption of the blanket import ban (except for the ban on Pacific cod from Fukushima and Ibaraki) and the 2013 additional testing requirements; and (ii) the maintenance of all of Korea's measures. Korea challenged the Panel's interpretation and application of Article 2.3, first sentence, concerning whether "similar conditions prevail" between the territories of Japan and other Members, and whether Korea's measures result in arbitrary or unjustifiable discrimination. In particular, Korea challenged the Panel's interpretation with respect to the scope of the conditions that must be compared under Article 2.3, and argued that the Panel applied an incorrect standard that focused exclusively on the risk present in products as *the relevant* condition. Korea emphasized the relevance of environmental and ecological conditions in Japan and the status of the FDNPP, as well as factors related to radionuclide dispersion and contamination,

in arguing that the Panel improperly focused on the contamination levels of products to the exclusion of other relevant conditions. Japan submitted that the Panel correctly found that similar conditions prevail between Japanese food products and products from other sources, arguing that the Panel considered all relevant factors and properly accounted for them.

Under the first sentence of Article 2.3, a complainant bears the burden of establishing that a measure arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Article 2.3 therefore requires demonstrating as a threshold matter that "identical or similar conditions prevail" between Members. The Appellate Body has said that identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence. In this regard, "conditions" relating to the particular objective pursued and risks addressed by the SPS measure in question are relevant for the analysis under Article 2.3 of whether identical or similar conditions prevail between Members.

With regard to the Panel's interpretation of the relevant "conditions" under Article 2.3, the Appellate Body considered that the Panel correctly recognized that the regulatory objective of a measure should inform the determination of the relevant conditions under Article 2.3. The Appellate Body agreed with the Panel's conclusion that the conditions referred to in Article 2.3 may be construed to "include those found in products and not just the territory of an exporting or importing Member". The Appellate Body disagreed, however, with the Panel's conclusion that Article 2.3 permits consideration of the "risk present in products in international trade as the relevant condition" because this would not give appropriate weight to all other relevant conditions under Article 2.3. While the analysis under Article 2.3 may include consideration of conditions that can be characterized as being present in the products from different Members, a proper interpretation of Article 2.3 includes consideration of other relevant conditions, such as territorial conditions (including ecological and environmental conditions), to the extent they have the potential to affect the products at issue. The analysis under Article 2.3 thus entails consideration of all relevant conditions in different Members, including territorial conditions that may not yet have manifested in products but are relevant in light of the regulatory objective and specific SPS risks at issue.

The Appellate Body thus found that the Panel erred in its interpretation of Article 2.3 when it concluded that this provision permits consideration of the "risk present in products in international trade as the relevant condition" because the Appellate Body understood the Panel to have concluded that the scope of relevant "conditions" under Article 2.3 may be exclusively limited to "the risk present in products".

Turning to the Panel's application of Article 2.3, the Appellate Body noted that the "relevant conditions" identified by the Panel for the purposes of Article 2.3 concern "whether products from Japan and the rest of the world have a similar potential to be contaminated" with certain radionuclides, and "whether the levels of contamination would be below Korea's tolerance levels".

The Appellate Body reviewed the Panel's assessment of "the source of radioactive contamination", including "major releases of man-made radionuclides" and contamination of the global environment prior to the FDNPP accident. The Appellate Body noted that the Panel's findings concerning past releases of radionuclides referred generally to the potential for contamination, without accounting for any degree of contamination or differentiating the relative potential for contamination in different territories. The Appellate Body considered that the Panel's conclusion as to "the potential to be contaminated with radionuclides", without regard to any specific source or relative degree, appeared to conflict with some of the Panel's intermediate observations concerning the sources of worldwide contamination. The Appellate Body cited various statements by the Panel indicating that particular release events may be capable of increasing the potential for contamination of food within a specified geographical location or territory.

To the Appellate Body, although aspects of the Panel's reasoning appeared to suggest that radionuclide dispersion is not globally uniform across different territories, the Panel's conclusion concerning environmental contamination made no distinction between territories as it relates to the relative degree of potential for food contamination. The Appellate Body also considered that the Panel's conclusion regarding environmental contamination, as well as its general assessment of territorial conditions surrounding the FDNPP in relation to other territories, did not reflect a number of factors that the Panel had identified as affecting radionuclide contamination of different areas.

The Appellate Body then reviewed the Panel's assessment of "the levels of radionuclides in food" based on data provided by Japan, and the Panel's comparison of the potential for contamination in Japanese products with those of other origins. The Appellate Body observed that the Panel's assessment of Japanese food focused on actual – not potential – levels of contamination for different products during different time periods, with emphasis on Korea's "tolerance level" for the relevant radionuclide.

With regard to the Panel's comparison of the potential for contamination in food of Japanese and other origins, the Appellate Body considered the Panel's analysis to reflect the contradiction between, on the one hand, the Panel's generalized description of global radionuclide contamination and, on the other hand, its observation of conditions related to specific events and locations. In the Appellate Body's view, this apparent gap in the Panel's reasoning was unresolved in the Panel's concluding comparisons on the existence of "similar conditions" for Japanese and non-Japanese products, which reflected the Panel's focus on the presence of contamination in food without accounting for differences in territorial conditions affecting the potential for contamination.

The Appellate Body recalled that the Panel identified the relevant "conditions" to be compared as being the "potential to be contaminated" with the relevant radionuclides, and "whether the levels of contamination would be below Korea's tolerance levels". The Panel did not explicitly indicate that similarity based on contamination levels below a certain tolerance level would necessarily amount to similar "potential" to be contaminated generally. Rather, the Panel presented these as combined elements of the relevant "conditions" that would need to be demonstrated to be "similar" for the purposes of Article 2.3. While the "potential to be contaminated" appeared to concern a question of degree, taking into account Korea's regulatory objective, the Appellate Body considered the Panel's comparison of "conditions" under Article 2.3 to be effectively based on actual radionuclide concentration levels in samples of food products as measured against quantitative tolerance levels corresponding to each radionuclide.

The Appellate Body therefore agreed with Korea's claim on appeal that the Panel erred in the application of Article 2.3 by focusing on product test data without properly accounting for whether the territorial conditions in Japan and the rest of the world were similar within the meaning of Article 2.3.

The Appellate Body thus found that the Panel erred in its interpretation and application of Article 2.3 in finding that similar conditions prevail between Japan and other Members. Consequently, the Appellate Body reversed the Panel findings at issue. In light of the reversal of the Panel's findings regarding the existence of "similar conditions" within the meaning of Article 2.3, the Appellate Body considered that it was not necessary to address Korea's additional claims of error regarding arbitrary or unjustifiable discrimination, and whether Korea's measures constituted disguised restrictions on international trade.

3.2.3 Article 5.7 of the SPS Agreement: provisional measures

On appeal, Korea challenged the Panel's finding that its measures did not fulfil the requirements of Article 5.7 of the SPS Agreement. First, Korea claimed that the Panel was not authorized to make findings under Article 5.7 and thus erred under Articles 6.2, 7, and 11 of the DSU. Second, Korea claimed that the Panel made several errors in its interpretation and application of Article 5.7 in finding that Korea's measures do not meet the requirements of this provision. In particular, Korea claimed that the Panel erred

in allocating the burden of proof under Article 5.7 to Korea. Korea also claimed that the Panel erred in finding that: (i) relevant scientific evidence was "not insufficient" with respect to the product-specific import bans, the blanket import ban, and the 2013 additional testing requirements; (ii) the blanket import ban and the 2013 additional testing requirements were not adopted on the basis of available pertinent information; and (iii) Korea did not review its measures within a reasonable period of time.

The Appellate Body recalled that Articles 7 and 11 of the DSU concern the terms of reference and the function of panels, respectively. The Appellate Body further recalled that the measures and the claims identified in the panel request constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU. Under that provision, unless the parties agree otherwise, panels shall have the following terms of reference: "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." The Appellate Body also referred to Article 7.2 of the DSU, which specifies that panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Turning to Article 11 of the DSU, the Appellate Body observed that this provision also refers to the "matter" that is before panels.

The Appellate Body considered that a panel's mandate, as reflected in Articles 7.1 and 11 of the DSU, is to examine the "matter" before it in light of relevant provisions of the covered agreements cited by the parties and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. The Appellate Body stated that parties may refer to a WTO provision merely to serve as relevant *context* to the interpretation of other WTO provisions identified in the "matter" before a panel. According to the Appellate Body, in such cases, while Article 7.2 of the DSU requires panels to "address the relevant provisions in any covered agreement … cited by the parties", a panel's mandate does not extend to making findings as to the consistency of the measure at issue with a provision cited as mere interpretative context.

In this dispute, Japan did not make a claim of inconsistency under Article 5.7 of the SPS Agreement in its panel request. Instead, it was Korea's rebuttal arguments before the Panel that prompted the Panel to examine Korea's measures under Article 5.7. Thus, the Appellate Body considered that the issue before it was whether, in light of Korea's references to Article 5.7, the Panel was correct to make findings as to the consistency of Korea's measures with each of the requirements of Article 5.7.

The Panel record showed that Korea had not alleged before the Panel that its measures would be justified or exempted from the obligations contained in Articles 2.3, 5.6, 7, and 8 and Annexes B and C to the SPS Agreement, by virtue of their alleged provisional nature under Article 5.7 of the SPS Agreement. Korea also had not argued that there are two sets of obligations for provisional measures and definitive measures under Articles 2.3 and 5.6. Rather, the Appellate Body considered that Korea's main argument before the Panel had been that a particular situation – namely, the alleged insufficiency of scientific evidence to conduct an assessment of the risk associated with the consumption of certain food products from Japan – was relevant to the assessment of Japan's claims under Articles 2.3 and 5.6. Given the nature of Korea's reliance on Article 5.7 as mere context, the Appellate Body considered that the Panel was called upon to explore the relevance of the alleged insufficiency of relevant scientific evidence in examining the consistency of Korea's measures with Articles 2.3 and 5.6. In addition, the Appellate Body considered that the Panel was called upon to explore whether Article 5.7 provides relevant context to the interpretation of certain provisions of the SPS Agreement at issue in this dispute. To the Appellate Body, Korea's reliance on Article 5.7, as context for other claims, did not entitle the Panel to make findings as to the consistency of Korea's measures with Article 5.7.

In light of the manner in which Korea had referred to Article 5.7 before the Panel, the Appellate Body concluded that, by making findings as to the consistency of Korea's measures with Article 5.7, the Panel

had exceeded its mandate, thereby acting inconsistently with Articles 7.1 and 11 of the DSU. For this reason, the Appellate Body declared the Panel's findings under Article 5.7 of the SPS Agreement moot and of no legal effect. Having mooted the Panel's findings under Article 5.7 of the SPS Agreement, the Appellate Body did not consider it necessary to examine further Korea's other claims of error in relation to those same Panel's findings.

3.2.4 Panel's treatment of evidence

Both Korea and Japan claimed on appeal that the Panel erred in its treatment of evidence when assessing the consistency of Korea's measures with Articles 2.3 and 5.6 of the SPS Agreement. Korea claimed that the Panel erred under Article 11 of the DSU by considering evidence that either was not available to the Korean authorities at the time of the adoption of the measures or did not exist at the time of the Panel's establishment. In its Other Appeal, Japan claimed that the Panel erred in the interpretation and application of Articles 3.3-3.4, 3.7, and 11 of the DSU, as well as the application of Articles 2.3 and 5.6 of the SPS Agreement, by disregarding evidence relating to the situation after the Panel's establishment in its assessment of Japan's claims that the challenged measures were maintained inconsistently with the requirements of Articles 2.3 and 5.6.

The Appellate Body noted that Korea's and Japan's claims of error on appeal related to the Panel's application of Articles 2.3 and 5.6 of the SPS Agreement to the facts of this dispute. The Appellate Body recalled that it had reversed the Panel's findings of inconsistency under Articles 2.3 and 5.6. Given that the participants' claims of error concern Panel findings that the Appellate Body had already reversed, the Appellate Body did not consider it necessary to examine further these claims of error.

3.2.5 Panel's expert selection

Korea appealed the Panel's decision to consult with two of the experts appointed by the Panel. Korea claimed that the Panel erred under Article 11 of the DSU by appointing these two experts in disregard of Korea's due process rights. Korea contended that the Panel should have found that there was an objective basis to conclude that these experts' independence or impartiality was likely to be affected, or that there were justifiable doubts about their independence or impartiality.

The Appellate Body noted that Korea's claim of error concerned the Panel's application of Articles 2.3, 5.6, and 5.7 of the SPS Agreement. The two experts at issue had provided responses to the majority of the questions posed by the Panel, and the Panel had relied on these responses in its assessment of the consistency of Korea's measures with Articles 2.3, 5.6, and 5.7. The Appellate Body recalled that it had reversed the Panel's findings under Articles 2.3 and 5.6, and had declared the Panel's findings under Article 5.7 moot and of no legal effect. Consequently, the Appellate Body did not consider it necessary to examine further Korea's claim of error on appeal regarding these experts.

3.2.6 Annex B(1) to the SPS Agreement: publication

Korea appealed the Panel's finding that Annex B(1) to the SPS Agreement requires that the publication of an SPS regulation contain sufficient content that the interested Member will know "the conditions (including specific principles and methods) that apply to its goods". Korea claimed that the Panel erred in its interpretation of Annex B(1) by imposing additional obligations not included in this provision. Korea also appealed several aspects of the Panel's application of Annex B(1) to the measures at issue in this dispute. In particular, Korea claimed that the Panel erred in finding that: (i) the press release announcing the blanket import ban did not include the full product coverage of the measure; (ii) the press releases announcing the 2011 and 2013 additional testing requirements did not include sufficient content to enable Japan to know the conditions that would be applied to its goods; and (iii) Korea did not show that interested Members would have known to look to certain websites for information on each of the challenged measures. In

addition, Korea claimed that the Panel erred under Article 11 of the DSU by finding that the Panel could not know whether the web addresses provided by Korea were available on the day Korea announced the measures at issue and what content was available on that day. Japan contended that Korea's claims of error on appeal should be rejected.

Annex B(1) to the SPS Agreement requires Members to ensure that all adopted SPS regulations are published promptly in such a manner as to enable interested Members to become acquainted with them. The Appellate Body considered that, to enable interested Members to become acquainted with an adopted SPS regulation, an Annex B(1) publication must be accessible to interested Members and contain sufficient information, including the product scope and the requirements of the adopted SPS regulation, to give the means to interested Members to become familiar with it. The precise content and amount of information that must be included in an Annex B(1) publication to enable interested Members to become acquainted with an adopted SPS regulation will depend on the particular SPS regulation at issue.

The Appellate Body agreed with the Panel to the extent the Panel's reference to "conditions" meant the requirements of the adopted SPS regulation. The Appellate Body, however, modified the Panel's finding to the extent that the Panel considered that Annex B(1) requires, in all cases, that the Annex B(1) publication include the "specific principles and methods" applicable to the products. The Appellate Body found instead that whether an Annex B(1) publication needs to include the "specific principles and methods" may only be determined with reference to the specific circumstances of each case, such as the nature of the SPS regulation at issue, the products covered, and the nature of the SPS risks involved.

With respect to the publication of the blanket import ban, the Appellate Body agreed with the Panel that the press release announcing this measure did not contain the full product scope of the ban. The Appellate Body recalled that the press release at issue referred generally to "all fishery products". The Appellate Body noted that Korea's notification to the WTO of the blanket import ban included algae, and that Korea confirmed, on appeal, that its notification accurately described the product scope of the blanket import ban. The Appellate Body agreed with the Panel that the blanket import ban covered products that would normally be included in a category other than "fishery products". Thus, similarly to the Panel, the Appellate Body considered that the press release at issue did not publish the blanket import ban in such a manner as to enable Japan to become acquainted with this ban. Therefore, the Appellate Body found that the Panel did not err in its application of Annex B(1) in finding that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing the full product scope of the blanket import ban.

With respect to the publication of the 2011 and 2013 additional testing requirements, the Appellate Body agreed with the Panel that the press releases announcing these measures do not enable interested Members to become acquainted with the SPS regulations at issue because they do not include information on the levels of caesium (and iodine in the 2011 press release) that would trigger the additional testing; the specific radionuclides to be tested; the maximum levels for those radionuclides that would result in products being rejected; and, in relation to the 2013 press release, the procedure and location of the testing required for the additional radionuclides. Therefore, the Appellate Body found that the Panel did not err in its application of Annex B(1) in finding that Korea acted inconsistently with Annex B(1) and Article 7 of the SPS Agreement by not publishing sufficient information to enable Japan to become acquainted with the requirements of the 2011 and 2013 additional testing requirements.

With respect to the accessibility of all SPS measures at issue, the Appellate Body recalled that the publication of an adopted SPS regulation must be accessible to interested Members. Where an adopted SPS regulation is published in a manner that prevents interested Members from locating and accessing it, such publication could not be said to enable interested Members to become acquainted with the SPS regulation. The Appellate Body noted Japan's argument before the Panel that the press releases announcing the measures at issue were not generally known and Japan's ability to become acquainted with the measures was inhibited

by the location of the websites of various government authorities where the press releases were posted. The Appellate Body considered that, in light of the case presented by Japan, it was for Korea to provide some evidence or explanation that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue. That could have included a showing that these websites were the customary locations in Korea to publish SPS regulations on certain products. Korea, however, had not provided the Panel with a clear explanation concerning whether interested Members would have been able to locate and access these press releases. The Appellate Body thus found that the Panel did not err in finding that Korea did not show that interested Members would have known to look to the websites indicated by Korea for information on the SPS measures at issue.

Korea also claimed that the Panel erred under Article 11 of the DSU in faulting Korea for not having provided archived versions of the webpages containing the press releases announcing the measures at issue. The Appellate Body noted that the Panel record contained evidence that could be indicative of the publication dates of the press releases on the government websites provided by Korea. This evidence was not addressed by the Panel and is absent from its analysis. To the Appellate Body, by disregarding such evidence, the Panel could not have complied with its duty under Article 11 of the DSU to conduct an objective assessment of the matter. Furthermore, the Appellate Body noted that, while the Panel implicitly placed the burden of further confirming the publication dates of the press releases on Korea, it never sought the relevant information from the parties to the dispute. The Appellate Body observed that it is not enough for a panel to leave it to the parties to guess what proof the panel will require. Thus, in the present case, the Panel should not have left it to Korea to anticipate, in the absence of a contestation of the publication dates by Japan, that it would be required to submit the archived versions of the webpages to prove the publication dates of the press releases on government websites. Rather, to the extent the Panel considered it was necessary for it to have such evidence, it should have sought it from both parties to the dispute and should only then have drawn appropriate inferences. For these reasons, the Appellate Body found that the Panel acted inconsistently with Article 11 of the DSU in finding that it was unable to know whether the web addresses provided by Korea were available on the day Korea announced each of the SPS measures at issue and what content was available on that day.

The Appellate Body explained that its finding that the Panel acted inconsistently with Article 11 of the DSU concerned only one of the bases for the Panel's ultimate finding that Korea failed to publish its SPS measures at issue in accordance with Annex B(1) to the SPS Agreement. The Appellate Body thus noted that the Panel's ultimate finding of inconsistency with Annex B(1) was not affected.

3.2.7 Annex B(3) to the SPS Agreement: enquiry point

Korea claimed on appeal that the Panel erred in its interpretation and application of Annex B(3) of the SPS Agreement in finding that Korea acted inconsistently with this provision because Korea's SPS enquiry point provided an incomplete response to Japan's first request and failed to respond to Japan's second request for information. Japan argued that Korea's claims should be rejected.

The Appellate Body observed that the introductory clause of Annex B(3) provides that each Member "shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents". The Appellate Body considered that a single failure of an enquiry point to respond would not in and of itself automatically result in an inconsistency with the obligation provided for in Annex B(3). Whether and the extent to which an enquiry point actually provides answers and documents are not irrelevant for the assessment under Annex B(3). Rather, it informs an assessment of whether "one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents" within the meaning of Annex B(3). This assessment requires an examination of all the relevant factors, including the total number of questions received by the enquiry point and the proportion of and the extent to which questions were answered, the nature and scope of the information sought

and received, and whether the enquiry point repeatedly failed to respond. The Appellate Body thus found that the Panel erred in its interpretation of Annex B(3) in finding that a single failure of an enquiry point to respond to a request would result in an inconsistency with Annex B(3). Consequently, the Appellate Body reversed the relevant Panel findings.

With respect to the Panel's application of Annex B(3), the Appellate Body noted that the Panel limited its analysis to the responsiveness of Korea's enquiry point only vis-à-vis the two requests submitted by Japan. To the Appellate Body, this did not constitute a sufficient examination of all relevant factors necessary to determine whether Korea acted inconsistently with Annex B(3). In particular, the Panel did not assess: (i) the scope and nature of the information sought through Japan's second request; (ii) how many requests had been received by Korea's enquiry point in total over a period of time and the proportion of questions that had been answered; and (iii) whether the enquiry point repeatedly failed to respond. Therefore, the Appellate Body found that that the Panel erred in its application of Annex B(3) in its assessment of whether Korea acted inconsistently with that provision. Consequently, the Appellate Body reversed the Panel findings at issue.

3.2.8 Article 8 and Annex C(1)(a) to the SPS Agreement: presumption of likeness

Japan appealed the Panel's finding that Japan had failed to establish that imported and domestic products can be presumed to be "like" for the purposes of its claim under Annex C(1)(a) of the SPS Agreement. To Japan, the Panel erred in its interpretation and application of Annex C(1)(a) in articulating the conditions in which likeness may be presumed under that provision and in finding that Japanese imported products subject to the 2011 and 2013 additional testing requirements and Korean domestic products could not be presumed to be "like".

At the outset, the Appellate Body recalled that Annex C(1)(a) requires Members to ensure, with respect to any procedure to check and ensure the fulfilment of SPS measures, that "such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products." The Appellate Body then highlighted that Japan's appeal focused on the likeness requirement in the second clause of Annex C(1)(a) and, more particularly, on the Panel's decision not to presume the likeness of Japanese imported products and Korean domestic products for the purposes of Japan's claim of inconsistency under that clause.

The Appellate Body recalled that several panels had found, under the GATT 1994 and the General Agreement on Trade in Services (GATS), that, when a measure makes a distinction between products (or between services and service suppliers) based exclusively on the origin of the products (or the services and the service suppliers), a complainant is not necessarily required to establish likeness based on the criteria traditionally employed as analytical tools for assessing likeness. Instead, these panels had found that, in such cases, likeness can be presumed. The Appellate Body also referred to its report in *Argentina – Financial Services*, where it had endorsed this approach of presuming likeness in the context of Articles II:1 and XVII:1 of the GATS.

The Appellate Body recognized that this dispute was the first in which a panel had addressed the presumption of likeness in the context of the SPS Agreement. The Appellate Body further observed that, in its analysis, the Panel had accepted that, in principle, likeness may be presumed for the purpose of Annex C(1)(a) if a procedure distinguishes between products based exclusively on their origin. The Appellate Body, however, was not convinced that the Panel could have done so under the SPS Agreement without further analysis. As the Appellate Body emphasized, SPS measures are defined in Annex A(1) of the SPS Agreement as measures applied to protect human, animal, or plant life or health from a certain risk or to prevent or limit certain damage from pests. In the Appellate Body's view, in light of Annex A(1), the question arose whether

a procedure to check and ensure the fulfilment of SPS measures is at all capable of making a distinction between products based *exclusively* on their origin and thus whether likeness may be presumed in the context of Annex C(1)(a). The Appellate Body noted that the Panel had not explored that question.

The Appellate Body considered it, however, unnecessary to reach a conclusion regarding the Panel's view that likeness may be presumed under Annex C(1)(a). The Appellate Body agreed with the Panel that the 2011 and 2013 additional testing requirements do not draw a distinction between Japanese and Korean products based solely on origin. Thus, the Appellate Body took the view that it was inconsequential whether likeness may be presumed under Annex C(1)(a), because, in the particular circumstances of this case, the Panel, in any event, would not have been in a position to presume that Japanese and Korean products are "like" in relation to the procedures at issue.

The Appellate Body then turned to examine whether its preliminary assessment should be maintained in light of Japan's arguments on appeal that challenged the Panel's finding that the measures at issue do not draw a distinction between Japanese and Korean products based solely on origin. Ultimately, the Appellate Body was not persuaded by Japan's arguments on appeal. In relation to this dispute, the Appellate Body therefore saw no error in the Panel's decision to decline to presume likeness, which confirmed its view that it was not necessary for the purposes of Japan's claim of error on appeal to consider whether the presumption of likeness may at all be used in the context of Annex C(1)(a).

The Appellate Body thus found that the Panel did not err in declining to presume that Japanese imported products and Korean domestic products are "like" for purposes of Annex C(1)(a). Consequently, the Appellate Body upheld the Panel findings at issue.

3.3 Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*, WT/DS437/AB/RW

This dispute concerns the imposition by the United States of countervailing duties on a range of products from China, as well as the underlying investigations and determinations by the United States Department of Commerce (USDOC) leading to the imposition of those duties.

Before the original panel, China challenged several aspects of the USDOC's investigations and determinations. The original panel found, among other things, that: (i) the USDOC's public body determinations were inconsistent with Article 1.1(a)(1) of the SCM Agreement; (ii) the USDOC's rebuttable presumption that majority government-owned entities are public bodies was, as such, inconsistent with Article 1.1(a)(1) of the SCM Agreement; (iii) the USDOC's specificity determinations were inconsistent with Article 2.1(c) of the SCM Agreement; and (iv) the USDOC's initiation of two investigations with respect to export restraints was inconsistent with Article 11.3 of the SCM Agreement. At the same time, the original panel found that the USDOC did not act inconsistently with: (i) Articles 14(d) or 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in its benefit determinations; (ii) Article 2.1(c) of the SCM Agreement by failing to identify the underlying subsidy programmes; and (iii) Article 12.7 of the SCM Agreement by not relying on facts available on the record. In the original proceedings, the Appellate Body reversed the original panel's findings that the USDOC had not acted inconsistently with: (i) Articles 14(d) or 1.1(b) of the SCM Agreement, and found that the USDOC had impermissibly rejected in-country private prices in China; (ii) Article 2.1(c) of the SCM Agreement, but found itself unable to complete the legal analysis in this regard; and (iii) Article 12.7 of the SCM Agreement, but found itself unable to complete the legal analysis in this regard.

To comply with the DSB recommendations and rulings, the USDOC revised 12 of the countervailing duty determinations at issue and maintained the related duties in place. In the compliance dispute, which is the object of this appeal, China challenged the United States' compliance measures: (i) the USDOC's preliminary and final determinations under Section 129 of the Uruguay Round Agreements Act (Section 129); (ii) the

Public Bodies Memorandum, both as a measure of general and prospective application and a measure relating to the Section 129 proceedings at issue; (iii) the original USDOC final countervailing duty determination in the Solar Panels investigation; (iv) certain subsequent periodic and sunset reviews of the countervailing duty orders; and (v) all "instructions and notices" by which the United States imposes, assesses, and/or collects cash deposits and countervailing duties in the proceedings at issue, and its ongoing conduct in doing so.

The Panel made several findings that were not appealed. With respect to China's claim under Article 32.1 of the SCM Agreement, the Panel found that China had not demonstrated that the United States acted inconsistently with Article 32.1 of the SCM Agreement in the Oil Country Tubular Goods (OCTG), Line Pipe, Pressure Pipe, and Solar Panels Section 129 proceedings. In addition, the Panel found that China had not demonstrated that the United States acted inconsistently with Article 2.2 of the SCM Agreement in the Thermal Paper Section 129 proceeding; and that China had not demonstrated that the United States acted inconsistently with Articles 11.3 and 12.7 of the SCM Agreement in the two Magnesia Bricks administrative reviews. The Panel further found that China had not demonstrated that the United States acted inconsistently with Article 21.3 of the SCM Agreement in the Thermal Paper, Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics and Aluminum Extrusions sunset reviews. Finally, with respect to the "ongoing conduct" of imposing, assessing, and collecting countervailing duty and cash deposits under the countervailing duty orders at issue, the Panel found that China had not demonstrated the existence of "ongoing conduct" inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement and with Articles 19.1, 19.3, and 19.4 of the SCM Agreement.

The Panel also made several other findings that were appealed. In particular, the United States appealed the compliance Panel's findings that: (i) several administrative reviews and sunset reviews issued under the countervailing duty orders at issue fell within the scope of the Panel's terms of reference; (ii) the USDOC's Public Bodies Memorandum can be challenged "as such" as a rule of norm of general and prospective application falling within the purview of Article 21.5 of the DSU; (iii) the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 Proceedings because the USDOC "failed to explain … how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market determined price" and by failing "to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations"; and (iv) the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings because it failed to adequately explain its conclusions regarding the existence of the relevant subsidy programmes.

For its part, China appealed the Panel's findings that: (i) a public body determination under Article 1.1(a)(1) of the SCM Agreement does not require a particular degree or nature of connection between an identified government function and the particular financial contribution at issue; (ii) the USDOC's public body determinations are not based on mere ownership or control over an entity by a government, without more; (iii) the Public Bodies Memorandum does not materially restrict the USDOC's discretion to act consistently with Article 1.1(a)(1); and (iv) that an investigating authority may reject available in-country prices if there is evidence of price distortion, and not only if there is evidence that a government "effectively determines" the price at which the good is sold within the country of provision.

3.3.1 The Panel's terms of reference – Article 21.5 of the DSU

The United States requested the Appellate Body to reverse the Panel's finding that certain measures, including several subsequent reviews fell within the Panel's terms of reference. The United States submitted that the Panel had erred in finding that these measures fulfilled the criteria employed in a series of prior disputes of having a sufficiently close nexus, in terms of nature, timing, and effects, to the declared measures taken to comply.

The Appellate Body recalled that in addressing the terms of reference in compliance proceedings under both the Anti-Dumping Agreement and the SCM Agreement, panels and the Appellate Body had focused on the nexus, in terms of nature, timing, and effects, between subsequent reviews and the declared measure taken to comply. The Appellate Body noted that the Panel had assessed the nexus between the relevant measures in this dispute and the recommendations and rulings of the DSB in terms of "nature", "timing", and "effects". Based on considerations relating to all three factors, the Panel found that the interrelated effects of the USDOC's original determinations, Section 129 determinations, and administrative and sunset review determinations reflected a particularly close relationship for the purposes of Article 21.5 of the DSU and thus concluded that the subsequent reviews at issue fell within the Panel's terms of reference.

The Appellate Body saw no merit in the United States' contention that the Panel based its findings on a "superficial examination" of the relationship between the subsequent reviews at issue and the declared measures taken to comply, on the one hand, and the recommendations and rulings of the DSB, on the other hand. Having reviewed the Panel's analysis in light of the specific allegations of error raised by the United States, the Appellate Body concluded that the Panel had assessed correctly the scope of the measures falling within its terms of reference in these Article 21.5 proceedings based on the criteria of their relationship in terms of nature, timing, and effects. Accordingly, the Appellate Body upheld Panel's findings that the subsequent reviews at issue and the Final Determination in the original Solar Panels investigation fell within the Panel's terms of reference under Article 21.5 of the DSU.

3.3.2 Public bodies – Article 1.1(a)(1) of the SCM Agreement

On appeal, China challenged the compliance Panel's finding that the USDOC's public body determinations in the relevant Section 129 investigations were not based on an improper legal standard under Article 1.1(a)(1) of the SCM Agreement. In particular, China took issue with the Panel's reading of Article 1.1(a)(1) as not requiring "a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue". In China's view, the Panel's interpretation was incompatible with the Appellate Body's reports in prior disputes, particularly *US – Anti-Dumping and Countervailing Duties (China)* (DS379) and *US – Carbon Steel (India)* (DS436). The thrust of China's position was that it is not sufficient for an investigating authority to establish that a certain entity has a sufficiently close relationship with government to constitute a public body. That investigating authority must also establish that the entity concerned is exercising a governmental function when engaging in the specific investigated conduct under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) of Article 1.1(a)(1). In response, the United States submitted that the Panel had properly interpreted Article 1.1(a)(1). For the United States, the relevant question for a public body inquiry is not whether the investigated conduct is governmental but rather whether the entity engaging in the *conduct* is governmental. Thus, it suffices for an investigating authority to determine that, overall, the *entity* concerned has a sufficiently close relationship with government to find that entity to constitute a public body. In addition, at the oral hearing, the United States made a request that the Appellate Body adopt the United States' position it had rejected in prior disputes that the definition of a public body is "any entity that a government meaningfully controls, such that when the entity is conveying economic resources, it is transferring the public's resources".

The Appellate Body referred to its interpretation of Article 1.1(a)(i) in prior disputes, finding that a public body within the meaning of that provision is an entity that possesses, exercises or is vested with governmental authority, that a public body determination hinges on whether one or more of these characteristics exist in a particular case, and that the question of what constitutes a public body is informed by which functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member, as well as the classification and functions of entities within WTO Members generally. Further, the Appellate Body recalled that a public body inquiry must be conducted on a case-by-case basis, having due regard to the core characteristics and functions of the relevant entity, its relationship with the government, the legal and economic environment prevailing in the country in which it operates. Depending on the specific circumstances of each case, evidence relevant to a public body inquiry may include: (i) evidence that

an entity is, in fact, exercising governmental functions, especially where such evidence points to a sustained and systematic practice; (ii) evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates; and (iii) evidence that a government exercises meaningful control over an entity and its conduct. The Appellate Body cautioned that, when conducting a public body inquiry, an investigating authority must evaluate and give due consideration to all relevant characteristics of the entity and examine all types of evidence that may be pertinent to that evaluation. Referring to the Appellate Body report in *US – Carbon Steel (India)*, the Appellate Body disagreed with the United States' contention that a public body is "any entity that a government meaningfully controls, such that when the entity is conveying economic resources, it is transferring the public's resources". According to the Appellate Body, this would conflate the relevant *evidentiary* elements for a public body determination and the *definition* of a public body.

Based on this interpretation of Article 1.1(a)(1), the Appellate Body rejected China's contention that the focus of a public body inquiry is on the conduct alleged to constitute a financial contribution, and instead found that the inquiry hinges on the *entity* engaging in the conduct, its core characteristics, and its relationship with government. This, noted the Appellate Body, comports with the fact that a "government" in the narrow sense and a "public body" are both "governmental" in nature. Just as any act or omission by a government in the narrow sense can be deemed to constitute a measure attributable to a Member, so any act or omission by a public body is directly attributable to a Member irrespective of the nature of the act or omission itself. Once it has been established that an entity is a public body, then all conduct of that entity shall be attributable to the Member concerned for purposes of Article 1.1(a)(1). The Appellate Body recognized that an *entity*'s conduct or practice may constitute evidence relevant to a public body inquiry. However, cautioned the Appellate Body, the assessment of such evidence is aimed at answering the central question of whether the entity itself possesses the core characteristics and functions that would qualify it as a public body. The Appellate Body added that while the conduct of an entity may constitute relevant evidence to assess its core characteristics, an investigating authority need not necessarily focus on every instance of conduct in which that relevant entity may engage, or on whether each such instance of conduct is connected to a specific "government function".

Similarly, the Appellate Body rejected China's position that, in order to "meaningfully control" an entity, a government must exercise control over the specific conduct that is alleged to constitute a financial contribution. As the Appellate Body observed, the type of inquiry that China described is more akin to the inquiry an investigating authority would undertake to assess, pursuant to the second clause of Article 1.1(a)(1)(iv), whether a government or public body has "entrusted or directed" a private body to carry out one of the types of conduct listed in subparagraphs (i)-(iii). The Appellate Body considered that to accept China's position would unduly blur the distinction between a public body inquiry and an "entrustment or direction" inquiry. The Appellate Body also took the view that its prior application of Article 1.1(a)(1) to Chinese state-owned commercial banks did not support China's position.

Hence, the Appellate Body upheld the compliance Panel's interpretation of Article 1.1(a)(1) as not prescribing a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue. The Appellate Body also upheld the Panel's conclusion that China had failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) because they are based on an improper legal standard. The Appellate Body noted that China had raised a number of additional claims in respect of the USDOC's public body determinations in the relevant Section 129 investigations. As these additional claims were conditioned upon the Appellate Body's reversal of the Panel's interpretation of Article 1.1(a)(1), the Appellate Body did not address them.

On appeal, China also challenged the compliance Panel's conclusion that the Public Bodies Memorandum was not, "as such", inconsistent with Article 1.1(a)(1) of the SCM Agreement because of being based on an improper legal standard. The thrust of China's position was that the analytical framework set out in

the Public Bodies Memorandum allows the USDOC to find certain Chinese companies to be public bodies without inquiring into whether those entities are performing a government function when they engage in the alleged financial contributions. The Appellate Body noted that China's position was based largely on the same grounds as its appeal of the compliance Panel's interpretation of Article 1.1(a)(1). Having upheld the Panel's interpretation that Article 1.1(a)(1) does not prescribe a connection of a particular degree or nature between an identified government function and the particular financial contribution at issue, the Appellate Body did not find it necessary to further engage with China's challenge of the Panel's conclusion in respect of the Public Bodies Memorandum. The Appellate Body also did not find it necessary to engage further with the participants' claims and arguments about whether the Public Bodies Memorandum (i) could be challenged "as such" as a rule or norm of general or prospective application"; and (ii) restricts in a material way the USDOC's discretion in making public body determinations.

3.3.3 Benefit – Articles 1.1(b) and 14(d) of the SCM Agreement

On appeal, the United States and China took issue with different Panel findings under Articles 1.1(b) and 14(d) of the SCM Agreement. The United States contended that the Panel erred in finding that the United States "failed to explain … how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" and "failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations". In turn, China sought to review of the Panel's finding that "an investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government 'effectively determines' the price of the goods at issue."

With respect to the interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement, the Appellate Body recalled its findings in *US – Softwood Lumber IV* that a determination of whether the remuneration paid for a government-provided good is "less than adequate" under Article 14(d) requires the selection of a benchmark against which the price for the government-provided good must be compared, and that the market from which a benchmark is selected for the purpose of a benefit analysis need not be completely undistorted or free of any government intervention. In this respect the Appellate Body noted that "the text [of Article 14(d)] does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'" and that the provision therefore "does not qualify in any way the 'market' conditions which are to be used as the benchmark". At the same time, the guideline in Article 14(d) "does not require the use of private prices in the market of the country of provision in every situation" but rather requires that "the method selected for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale". The Appellate Body observed that in *US – Softwood Lumber IV* the situation of government predominance in the market, as a provider of certain goods, was the only one raised on appeal, and it had not excluded that there may be other situations in which recourse to out-of-country prices may be warranted.

Subsequently, *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clarified that the concept of "price distortion" is central to the analysis of whether recourse to out-of-country prices is warranted under Article 14(d) by highlighting that what would allow an investigating authority to reject in-country private prices is *price distortion*, not the fact that the government is the predominant supplier *per se*. Importantly, "the decision to reject in-country prices as the benchmark due to the role of the government in the market for the good in question can only be made on a case-by-case basis, in accordance with the relevant evidence in the particular investigation, rather than in the abstract."

In sum, the Appellate Body stated that the central inquiry under Article 14(d) in choosing an appropriate benefit benchmark is whether government intervention results in *price distortion* such that recourse to out-of-country prices is warranted, or whether instead in-country prices of private enterprises and/or government-related entities are *market-determined* and can therefore serve as a basis for determining

the existence of benefit. Thus, what would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention in the market itself. What an investigating authority must do in conducting the necessary analysis therefore will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record. The Appellate Body emphasized that, in all cases, the investigating authority must provide a reasoned and adequate explanation of the basis for its conclusions in its determination, and only once it has properly established and explained why in-country prices are distorted, is it warranted to have recourse to an alternative benchmark for the benefit analysis under Article 14(d).

3.3.3.1 Whether the Panel erred in its interpretation of Article 14(d) of the SCM Agreement in finding that recourse to out-of-country prices is not limited to circumstances in which the government "effectively determines" the price of the goods in question

China requested the Appellate Body to modify the basis for the Panel's conclusion that the United States acted inconsistently with Articles 1.1 and 14(d) of the SCM Agreement, and affirm the Panel's finding of inconsistency on the ground that the USDOC did not determine that domestic Chinese prices for the relevant inputs were effectively determined by the government. China argued that, while the Panel correctly found that "an investigating authority must demonstrate *causation* [between government intervention and price distortion] in order to reject available in-country benchmarks under Article 14(d)", the Panel "was required to address the logically prior issue of what constitutes a 'market' price". In China's view, "[u]nder a proper interpretation of Article 14(d), an investigating authority may reject available in-country prices only in the 'very limited' circumstance in which government policies or actions effectively determine the price at which the good is sold within the country of provision, either *de jure* or *de facto*."

The Appellate Body noted the Panel's finding that "an investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government 'effectively determines' the price of the goods at issue." The Panel took the view that "the existence of price distortion may … preclude a proper comparison of the terms of the financial contribution with market terms. This may be the case when the government is the sole or predominant provider of a good, but it may also be the case in other circumstances that render the comparison equally impossible or irrelevant." Therefore, the Panel considered that "the outcome of the inquiry necessary to identify an appropriate benchmark, including the decision whether the circumstances in a particular investigation justify use of an out-of-country benchmark, will depend on the facts of each case." The Appellate Body agreed with the Panel recalling that central to the inquiry under Article 14(d) in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention in the market. The Appellate Body considered that different types of government interventions may result in price distortion, such that recourse to out-of-country prices is warranted, beyond the scenario in which the government's role is so predominant that it effectively determines the price of the goods in question.

The Appellate Body further agreed with the Panel that the existence of price distortion "may well … preclude a proper comparison of the terms of the financial contribution with market terms" not only when the government is the sole or predominant provider of a good, but also "in other circumstances that render the comparison equally impossible or irrelevant". The Appellate Body did not exclude that types of government intervention that do not directly or effectively determine in-country prices may have similar distortive impact on those prices, such that they no longer represent a proper benchmark for adequate remuneration. In the Appellate Body's view, recourse to out-of-country prices in such situations may be warranted, insofar as the investigating authority has established the existence of price distortion resulting from government intervention. The Appellate Body therefore disagreed with China that the "three circumstances that panels

and the Appellate Body have identified as potentially justifying the use of out-of-country benchmarks" are limited to those "in which the government effectively determines the price at which the good is sold, either *de jure* or *de facto*", namely where the government (i) sets prices administratively; (ii) is the sole supplier of the good; and (iii) possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price.

At the same time, the Appellate Body observed that while central to the inquiry under Article 14(d) is the question of whether inc-ountry prices of private enterprises and governmentrelated entities are distorted, the concept of "price distortion" is not equivalent to any impact on prices as a result of *any* government intervention. The Appellate Body therefore disagreed with China's suggestion that the Panel's interpretative approach in the present dispute is based on the premise "that any government policy or action is a potential 'distortion' under Article 14(d) and that the only fact that an investigating authority must establish" is that the policy or action had what the Panel called a "direct impact" upon in-country prices for the good in question. Instead, the determination of whether in-country prices are distorted must be made on a case-by-case basis, taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record. Only once the investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision and has made a finding of price distortion may it, consistently with Article 14(d), have recourse to out-of-country prices.

The Appellate Body therefore found that the Panel did not err in rejecting China's claim that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting in-country prices without having first found that prices for the inputs in question were effectively determined by the government of China.

3.3.3.2 Whether the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement

With respect to the interpretation of Article 14(d), the United States argued that the Panel "examined the USDOC's determinations by looking only for a single kind of price analysis, specifically, one that would demonstrate the 'deviat[ion]' between 'in-country prices' and 'a market-determined price'". The United States argued that the Panel erroneously considered that "distortion of internal prices, justifying resort to out-of-country benchmarks, is only evident in the difference between the price of the good being assessed and a market-determined price in the same country." The United States considered that in this way, the Panel misconstrued the legal standard under Article 14(d) as requiring a price comparison analysis or quantification of the price distortion, such that an explanation of why in-country prices are distorted requires, in each case, a showing of the extent of deviation, or the quantification of the difference, between two different price points.

The Appellate Body noted that the specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark under Article 14(d), as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending upon a number of factors, including the circumstances of the case and the characteristics of the market. However, in all cases, the existence of price distortion resulting from government intervention has to be established and adequately explained by the investigating authority in its report. There may be different ways to demonstrate that prices are actually distorted, such as a quantitative assessment, price comparison methodology, or a counterfactual analysis. Depending on the circumstances, a qualitative analysis may also appropriately establish how government intervention actually results in price distortion, provided that it is adequately explained. The Appellate Body recognized, in this regard, that governmental involvement in the market can take many forms, which may have distortive price effects, irrespective of whether the government directly regulates prices or indirectly affects them such that they are found to be distorted as a result. For the Appellate Body, evidence of direct impact of the government intervention on prices, such as administrative

price-fixing or predominance of the government as a supplier in the market, may be probative and make the finding of price distortion very likely such that other evidence may be of lesser importance. While evidence of indirect impact of the government intervention on prices may also be relevant in determining the existence of price distortion, establishing the nexus between such government intervention and price distortion may require more detailed analysis and explanation of how prices have been distorted as a result of such indirect impact of the government intervention.

Furthermore, the Appellate Body pointed out that, while the investigating authority's analysis of whether and how price distortion resulted from government intervention will vary depending upon the circumstances of the case, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information in the record, so that its determination of how prices in the specific markets at issue are actually distorted as a result of government intervention would be based on positive evidence. Thus, independently of the method chosen by the investigating authority, it has to engage with and analyse the methods, data, explanations, and supporting evidence put forward by interested parties, or collected by the investigating authority, in order to ensure that its finding of price distortion is supported by, and not diminished or contradicted by evidence and explanations on record. In turn, it is the role of panels to assess whether the investigating authority's explanation for its determination is reasoned and adequate by critically reviewing that explanation, in depth, and in light of the facts and explanations presented by the interested parties. Specifically, panels have to review whether the competent authority's explanation of how government intervention actually results in price distortion in the markets in question fully addresses the nature and complexities of the data in the record, and whether it appears adequate in light of alternative methods, data, and explanations of that data presented by the parties. In any event, the investigating authority must provide a reasoned and adequate explanation of how the government intervention actually results in distortion of in-country prices.

In the first sentence of paragraph 4.155 of *US – Carbon Steel (India)*, the Appellate Body had observed that, "[a]lthough the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined." The United States disagreed with the Panel's reading of the Appellate Body's statement in the following sentence of the same paragraph, namely, that "[p]roposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market." The Appellate Body considered that these statements together form part of the Appellate Body's interpretation of Article 14(d) and reflect the understanding that different methods may be chosen by the investigating authority in demonstrating the direct or indirect impact of government intervention on in-country prices. However, the investigating authority needs to provide a reasoned and adequate explanation whether prices are market-determined or how they are distorted as a result of government intervention. Therefore, the Appellate Body did not consider that the statement "[p]roposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market" constitutes merely an example of a situation when prices might not be market-determined, as the United States seems to suggest. Nor did the Appellate Body understand the Panel to have read this statement as requiring the use of a single type of analysis in determining the existence of price distortion, in each case.

The Appellate Body noted the Panel's observation that "in view of the fact that government intervention may, in principle, affect supply or demand for a certain good in any market and in view of the fact that 'the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited', it is important that a decision to reject in-country prices as a benchmark be supported by a reasoned and adequate explanation *as to how government intervention distorts the price of the inputs at issue*." According to the Panel, "[e]vidence of widespread government intervention in the economy, without evidence of *a direct impact on the price of the good in question or an adequate explanation* of how the price of the good in question is distorted as a result, will not suffice to justify a determination that there are no 'market-determined' prices for the good in question which can

be used for purposes of determining the adequacy of remuneration for government-provided goods." By requiring in the alternative either "evidence of a direct impact on the price of the good in question" or "an adequate explanation of how the price of the good in question is distorted as a result", the Panel's statement was in line with the Appellate Body's conclusion that while there may be different ways to demonstrate the existence of price distortion, the investigating authority must choose a method capable of establishing how in-country prices are actually distorted as a result of government intervention. The Appellate Body nevertheless highlighted that investigating authorities should provide a reasoned and adequate explanation of the basis for their price distortion findings in each case, independently of whether their finding is based on evidence of direct or indirect impact of the government intervention on in-country prices.

The Appellate Body further agreed with the Panel's conclusion that "[a]n investigating authority must explain how government intervention in the market *results* in in-country prices for the inputs at issue deviating from a market-determined price", insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting for government intervention. The Panel's reasoning was consonant with the Appellate Body's interpretation that the existence of price distortion by reason of government intervention can be established by recourse to different methods in different cases, as long as investigating authorities have undertaken the necessary analysis in order to establish in its report that price distortion actually results from government intervention in the market. The Panel's statement referring to "direct impact" as well as other forms of more indirect impact on prices – provided that the investigating authority explains how the prices of the goods in question are distorted as a result – acknowledged that various forms of government intervention could lead to price distortion, while recognizing that, in each case, an explanation would be required whether and how the government intervention has actually resulted in price distortion, before a finding that certain in-country prices cannot be relied upon is reached. The Appellate Body concluded that the Panel did not require one single type of quantitative or price comparison analysis in all cases.

The Appellate Body therefore found that the Panel did not err in rejecting China's claim that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting in-country prices without having first found that prices for the inputs in question were effectively determined by the government of China.

With respect to the Panel's application of Article 14(d), the United States contended that the Panel "fixated on a particular kind of price analysis and excluded from its consideration the explanation and evidence the USDOC provided demonstrating how prices in the relevant sectors are not market-determined", and "[having already adopted the incorrect approach for its analysis … further erred in characterizing the USDOC's explanation as unresponsive to the question of whether prices were or were not market determined". Specifically, in the United States' view, the Panel failed to recognize that examining prices is not the only way to demonstrate price distortion, that the emphasis on market-determined prices highlights that an examination of "prevailing market conditions" assume the existence of a "functioning market", and that, absent such a market, an internal price cannot serve as a benchmark for measuring the adequacy of remuneration. Furthermore, the United States argued that the Panel made a number of erroneous observations in examining whether the USDOC considered in-country and government-related prices, analysed specific input markets on a stand-alone basis, and conducted a diligent investigation and solicited relevant facts.

The Appellate Body noted that, as was evident from the Panel's description of the USDOC's analysis, the USDOC assessed a number of factors relating to the Government of China's (GOC) intervention with state-invested enterprises (SIE) in China, and in China's steel sector generally. From this analysis the USDOC inferred that "the prices in the domestic market of steel inputs produced by China's SIEs cannot be considered to be 'market-determined' for purposes of a benchmark analysis." In turn, the question before the Panel was whether the USDOC had provided, in its written determinations, a reasoned and adequate explanation of how the evidence on the record actually established the existence of price distortion in the markets of the inputs at issue as a result of government intervention and how this explanation supported its decision to

have recourse to out-of-country prices. The Panel emphasized the importance of ensuring "that a decision to reject in-country prices as a benchmark be supported by a reasoned and adequate explanation as to how government intervention distorts the price of the inputs at issue", as opposed to merely relying on "[e]vidence of widespread government intervention in the economy". The Appellate Body thus understood the Panel's preoccupation to have been with the requirement to establish how the existence of price distortion actually resulted from the government interventions in the market. To this end, the Panel reviewed the USDOC's determinations and referred to various statements made in the Benchmark Memorandum and the United States' submissions.

In the Appellate Body's view, the Panel rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific and focused assessment of how government intervention had resulted in price distortion in the four input markets at issue. Critical for the Panel's conclusion was the United States' position that "the USDOC was '*not required to analyse specific prices* for the relevant inputs to determine that SIE and private prices in China's steel and polysilicon sectors are not market-determined'." The Panel also emphasized that "the information collected and summarized in the Benchmark Memorandum focuses on *government intervention* in the Chinese economy as a whole and the steel sector generally, *rather than* on the specific input markets at issue." This understanding was in line with the Panel's conclusion that "[t]he USDOC did not even attempt to provide a reasoned and adequate explanation for its determinations that *in-country* prices for steel rounds and billets (OCTG), *stainless steel coil (Pressure Pipe), hot-rolled steel (Line Pipe), and polysilicon (Solar Panels) were distorted* as a result of pervasive government intervention in the Chinese domestic markets for these inputs, and therefore were not market-determined."

According to the Appellate Body, the USDOC considered that its rationale of "pervasive government intervention" in China's economy in general and its steel industry as a whole equally applied to the specific input markets at issue because the steel sector "necessarily includes all types of steel inputs", without further analysis or explanation of how various forms of government intervention actually resulted in distortion of the prices of the specific input markets under investigation. Beyond its reference to the fact that "the records in these three cases demonstrate the existence of export restraints for these three products during the relevant periods of investigation", the USDOC did not engage in any specific assessment of the four input markets in question. Thus, from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention, the USDOC appeared to have drawn a general inference that prices in the specific markets at issue were equally distorted.

Furthermore, the Panel rejected the notion that "a presumption that *government intervention in the market necessarily results in price distortions* for the goods in question [would] suffice to support the conclusion that in-country prices for the input at issue may be rejected as a benchmark." The Panel then concluded that "[t]he record of the four Section 129 proceedings at issue and the arguments of the United States clearly show that the USDOC did not find it necessary to demonstrate how the actions of the GOC influenced the in-country price of the inputs at issue." The Appellate Body thus understood the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue, and resulted in price distortion with respect to the determinations at hand. Absent from this analysis was a sufficient assessment of how the various forms of government interventions, taken individually or together, impacted upon the prices in China's steel market, and specifically the input markets at issue, and how they actually resulted in the distortion of all the SIE and private *prices* of those inputs in those markets, as opposed to more generally distorting the *market*.

The Appellate Body therefore disagreed with the proposition that the Panel was "fixated on a particular kind of price analysis and excluded from its consideration the explanation and evidence the USDOC provided demonstrating how prices in the relevant sectors are not market determined", and "erred in characterizing

the USDOC's explanation as unresponsive to the question of whether prices were or were not market determined". Instead, the Appellate Body understood the Panel to have found that the USDOC did not sufficiently analyse or explain how the widespread government interventions described in the Benchmark Memorandum actually resulted in the distortion of in-country prices in the specific input markets and regarding the specific products subject to each of the challenged USDOC determinations at issue. Thus, the Panel understood the USDOC's analysis as one of widespread government intervention and "market distortion" more generally, and not of "price distortion" in the input markets at issue resulting specifically from those government interventions.

The Appellate Body observed that the Panel's analysis of whether the USDOC disregarded evidence regarding prices for the inputs at issue supported its conclusion that "the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price." In this regard, the United States argued that the "Panel concluded, without justification, that the USDOC automatically rejected government prices", whereas "[t]he USDOC provided an extensive explanation as to why it rejected 'government-related' prices" and "did not reject these prices because of their source, but rather because of their *nature*." The Appellate Body recalled that, in line with the applicable standard of review, whereas the investigating authority has discretion in choosing the method for establishing price distortion, it also needs to analyse alternative methods, arguments, and evidence presented by the parties, in order to assess whether its approach properly determines the existence of price distortion resulting directly or indirectly from government intervention. Ultimately, the investigating authority's conclusion has to be sufficiently reasoned and adequately explained, also in light of these alternative arguments, explanations and evidence. In turn, "an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that *alternative explanation*." Thus, for the Appellate Body, the Panel's task in the present case was to review whether, in light of the evidence and arguments submitted by the parties, and the rationale underlying plausible alternative explanations, the approach ultimately adopted by the USDOC in its determinations, and the conclusions drawn from the evidence it relied upon, remain adequate and sufficiently substantiated also in light of those alternative explanations.

With respect to the Panel's finding that "the Mysteel Report was largely ignored by the investigating authority", the United States submits that "[t]he Mysteel prices are precisely the subject of the USDOC's analysis in the benchmark memoranda – that is, they are among the Chinese prices the USDOC described as being distorted by the numerous government interventions identified on the record." The Appellate Body recalled that the USDOC's rationale in the Benchmark Memorandum was focused on establishing price distortion based on pervasiveness of government intervention in China's steel sector, rather than on the exercise of market power by the GOC and therefore on the question of whether the government could effectively determine prices in the input markets in question. The Appellate Body disagreed with the United States, to the extent it suggested that the Panel "ignored the central question of market-determined pricing". Instead, the Appellate Body understood the Panel to have found that the USDOC's rejection of in-country prices (including Mysteel prices) was based on, and merely consequential to, its findings of pervasive government intervention and market distortion in the steel sector generally, which did not provide a reasoned and adequate explanation of how the widespread government intervention and "market distortion" led to "price distortion" in the specific input markets at issue.

The Appellate Body further noted that the USDOC did not question the plausibility of Professor Ordover's analytical framework of price alignment set out in a document concerning price information for the inputs at issue submitted by the GOC to the USDOC in a number of Section 129 proceedings at issue, but that it had rejected its relevance mainly because it had adopted a different approach in these compliance proceedings. The USDOC observed in particular that "the GOC's intervention in the steel sector as a whole in the Benchmark Memorandum establishes that the market signals – throughout the sector as a whole – are distorted by the effects of longstanding and continued pervasive government intervention", and that "[i]n these circumstances, the presence or absence of Professor Ordover's antitrust-based 'indicia' are not

particularly telling indicia of market distortion". The USDOC also noted that Professor Ordover's approach was not "the *only* framework under which to determine whether the government can affect the market". The Appellate Body observed, however, that the fact that the alternative framework was not the *only* one does not respond to the question whether, in light of that alternative framework and price data, the framework adopted by the USDOC in these Section 129 proceedings and its conclusions still hold. Rather, the Appellate Body agreed with the Panel that "when information which appears on its face relevant to that analysis under Article 14(d) is before the investigating authority, it must consider this information and, if it concludes it is not probative or relevant to its analysis, explain that conclusion."

In this regard, the Appellate Body took note of China's argument that pricing data in the Mysteel Report reflected the proposition that market factors – as opposed to government intervention – were responsible for the fluctuations of Chinese steel prices. Furthermore, the Ordover Report highlighted that "the Chinese steel industry as a whole is 'highly fragmented', as are the specific steel markets at issue in the relevant investigations", "which makes the domestic market highly competitive and difficult to control". The same report also documented some of the major instances in which "private investment in the Chinese steel industry grew rapidly during the periods of investigation", in the form of "private investment in major capacity expansions as well as private investments in existing Chinese steel enterprises". Therefore, even though the USDOC's analysis was not based primarily on the SIEs' market share in China's steel market or on a price alignment rationale, it appears that the alternative explanations and pricing data on record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations did not explain why, in light of the price data and alternative explanations, the conclusion it had reached for the entire steel sector necessarily applies to all specific inputs.

The Appellate Body was therefore of the view that the Panel's analysis did not reflect an insistence that a particular method of analysis of prices is the only way to establish price distortion, or that, as the United States puts it, the Panel "overlooked the context within which the USDOC addressed the Mysteel evidence". Indeed, the Panel recognized that "the SCM Agreement does not prescribe a specific mode of analysis for the determination of an appropriate benchmark for purposes of determining whether goods are provided for less than adequate remuneration within the meaning of Article 14(d)." At the same time, the Panel considered the price data on record to have been relevant to the question whether the existence of price distortion had been adequately established and explained under the USDOC's own approach. As the Panel observed, however, "[n]either the Benchmark Memorandum nor the Supporting Benchmark Memorandum to that memorandum, nor the Final Benchmark Determination in the Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels[,] refer[s] to the prices for the inputs at issue set out in the Mysteel Report."

The United States also took issue with the Panel's observation that "the USDOC did not consider that it was necessary to proceed with a detailed analysis of the specific markets for the inputs at issue." The Appellate Body recalled its finding that, in its analysis in the Benchmark Memorandum, the USDOC did not engage in a specific assessment of the four input markets in question, and drew an overall inference that prices in all specific input markets are distorted from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention. However, the Mysteel prices placed by the GOC on the record were specific to the three steel inputs at issue and, in China's view, "[t]here was no evidence on the record that any plans or policies adopted by the GOC directed either privately-owned or government-related suppliers to sell these inputs to particular entities or at a particular price." Thus, the Appellate Body considered that, as observed by the Panel, it would have been relevant for the USDOC to take into account this data in its analysis and examine the extent to which it affected its conclusions that price distortion existed in China's steel sector, and in particular in the three specific input markets.

The United States also pointed to the USDOC's conclusion that, "[a]lthough the Department requested information from the GOC to ascertain the structure of the hot-rolled steel, steel rounds, and stainless steel coils markets, including the identities and state ownership levels of the producers operating therein, the

GOC's response was incomplete and therefore unreliable for purposes of such an analysis." The USDOC thus found that "information necessary to an inputspecific market analysis is not available on the record [and] in addition to, and in the alternative to, [its] determination about the Chinese steel sector as a whole", the USDOC also relied upon "the facts otherwise available … with regard to the particular steel inputs at issue". The Appellate Body recalled that, "[t]o the extent possible, an investigating authority using the 'facts available' in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party." In relying upon facts available, however, the USDOC did not consider the Mysteel prices for the three specific inputs provided by China. The Appellate Body therefore did not consider that the fact that China's responses to the USDOC's request for information were incomplete could justify the absence of an assessment of the price data that was submitted and thus available on record. Therefore, although the USDOC had discretion to choose its approach in establishing whether in-country prices were distorted, it would have been necessary to explain in its determinations why the approach it had adopted and the conclusions it had reached were still valid, in light of the Mysteel pricing data and the alternative narrative of the Ordover Report.

Additionally, with respect to in-country private prices, the United States contended that "after considering import pricing data that China submitted on the record of the original investigations, the USDOC concluded that it could not be used", and that the USDOC actually used Chinese prices where appropriate, such as in the Pressure Pipe investigation. As the Appellate Body saw it, the use or rejection by the USDOC of certain import pricing data provided by China in the original proceedings did not obviate the need for the USDOC to examine the evidence and explanations on the record of the Section 129 proceedings at issue. The United States' arguments therefore were not pertinent to the Panel's conclusion that the USDOC failed to adequately explain its rejection of in-country prices on the record of the Pressure Pipe, Line Pipe, and OCTG investigations in the course of the Section 129 proceedings.

The United States further challenged the basis for the Panel's finding that nothing on the record suggested that the USDOC considered the possibility that "price information which does not distinguish between SIE suppliers and private suppliers may nonetheless be relevant to an analysis of the adequate remuneration for the inputs at issue." The Appellate Body observed that, in the Section on "Evaluation of Additional Issues" in the Final Benchmark Determination, the USDOC noted the possibility of alignment of private and SIE prices, but found that "it is neither necessary nor feasible to conduct such a price analysis in these Section 129 proceedings." The Appellate Body stated that, while the USDOC may not have rejected these data because of their source, it nevertheless rejected them because at the point of addressing the question of whether a price alignment analysis would be possible, the USDOC had already reached its conclusion that longstanding and continued pervasive government intervention distorted market signals throughout the steel sector, such that there were no potential benchmarks from the domestic industry that could be considered "market-based" for any of the inputs at issue. This latter conclusion was reached separately from, and before addressing the Mysteel prices in the USDOC's additional discussion of whether an analysis price alignment is possible. However, the Appellate Body recalled that the USDOC's prior conclusion as to the existence of price distortion in the entire steel sector based on pervasive government intervention in the Benchmark Memorandum could not in itself constitute a sufficient basis for rejecting the relevance of the Mysteel data.

In addition, the USDOC considered that "neither the available record evidence", "nor the evidence on prices likely to be available … is likely to provide additional probative insight on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers". It was in this context that the USDOC referred to the price evidence before it and indicated that it was only limited, in particular because most data, including the Mysteel prices, did not distinguish between SIEs and private suppliers. The USDOC thus considered that it would not be possible to conduct an analysis of whether private prices aligned with SIE prices in the absence of sufficient data distinguishing between these two sets of prices. The Appellate Body noted that, although the rationale of the Ordover

Report and the associated Mysteel price data were different from the approach adopted by the USDOC in the Benefit Memorandum, these indicia related to the steel sector and the relevant input markets. As such, they constituted pertinent information which could potentially call into question the USDOC's finding that all in-country prices, including private prices of the inputs at issue, were distorted. Therefore, the Appellate Body saw no reason to disagree with the Panel that "[g]iven that 'proper benchmark prices may be drawn from a variety of potential sources, including private or government-related entities', price information which does not distinguish between SIE suppliers and private suppliers may nonetheless be relevant to an analysis of the adequate remuneration for the inputs at issue."

The Appellate Body considered that, in addressing the question of whether it would be possible to analyse price alignment, the USDOC dismissed, in the Final Benchmark Determination, the price data on record largely on the basis of its prior conclusion in the Benchmark Memorandum that all in-country steel prices in China were distorted by government intervention. Even though the USDOC might not have "exclude[d] government-related prices automatically" or because of their source, it did not engage in an analysis of whether this pricing data was distorted, or consider whether the data and supporting explanations could have affected its conclusions in the Benchmark Memorandum that *both* government-related and private prices in China's steel sector are distorted, as they applied to the specific inputs at issue. In this regard, as the Panel observed, the United States "dismisse[d] the 'heavy emphasis' placed by China on the Mysteel Report by stating that these 'data ultimately say nothing about whether those prices also reflect the effects of sustained state intervention in the sector'." For the Appellate Body, it appeared that the Panel considered that the USDOC insufficiently explained "why, in its view, the price data on the record did not relate to prevailing market conditions in the country of provision in the sense of Article 14(d)", and rejected the relevance of this information mainly because the rationale underlying the Ordover Report and Mysteel pricing data were different from the rationale that the USDOC had adopted in the determinations at issue. Thus, for the Panel, the USDOC did not sufficiently engage with record pricing data and alternative explanations before reaching the conclusion that no in-country prices can be relied upon as benefit benchmarks and that, therefore, the USDOC would continue using the alternative benchmarks from the original investigations.

Finally, the United States claimed that the Panel's finding of inconsistency with regard to the Solar Panels investigation is incoherent and unsupported by any rationale. The United States took issue with the Panel's conclusion that "there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC on the basis of which it could have considered a proper benchmark for purposes of determining whether goods are provided for less than adequate remuneration within the meaning of Article 14(d)." The Panel therefore found that "China has not demonstrated that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement for failing to consider in-country prices that were available on the record in this Section 129 proceeding." In its overall conclusion under Articles 1.1(b) and 14(d), however, the Panel found that "the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a marketdetermined price." In the Appellate Body's view, the Panel's finding that there was no relevant price information on the record of the Solar Panels investigation did not undermine the Panel's earlier conclusions that the USDOC did not provide "a reasoned and adequate explanation for its determinations that in-country prices for … polysilicon (Solar Panels) were distorted as a result of pervasive government intervention in the Chinese domestic markets for these inputs", and that it "outlined governmental involvement in the relevant markets and, on that basis alone, determined that it could not use in-country prices of the relevant inputs to assess the adequacy of remuneration". Specifically, for the Appellate Body, even though there was no price evidence in the record of the Solar Panels investigation that should have been taken into account by the USDOC, the Panel found that, in its earlier analysis, the USDOC failed to explain how government intervention in the market resulted in price distortion also with respect to this investigation.

The Appellate Body therefore found that the United States has not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding that the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price. In addition, Appellate Body found that the United States has not established that the Panel erred in its in finding that, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record.

3.3.4 Specificity – Article 2.1(c) of the SCM Agreement

Based on its reading of Article 2.1(c) of the SCM Agreement, and its review of the USDOC's reasoning and analysis, the Panel found that the United States did not comply with the requirement in Article 2.1(c) to "take account of the length of time during which the subsidy programme has been in operation" because it failed to adequately explain its conclusions regarding the existence of the relevant subsidy programme. The Panel determined, on this basis, that the United States had acted inconsistently with Article 2.1(c) in 11 of the Section 129 proceedings at issue.

On appeal, the United States argued that neither the panel nor the Appellate Body made findings of inconsistency regarding the "existence of a subsidy programme" when presented with that issue in this dispute, and claimed that this was therefore not an appropriate basis upon which to assess the consistency of the measures with Article 2.1(c), third sentence. The United States further argued that the compliance Panel improperly interpreted Article 2.1(c) to require the USDOC to identify a "systematic subsidy programme" consisting "entirely of acts of subsidization", and that the Panel's erroneous reading of Article 2.1(c) led the Panel to disregard reasoning and analysis provided by the USDOC that was "directly responsive" to the compliance Panel's concerns regarding the existence of the relevant "subsidy programmes".

Based on its analysis, the Appellate Body disagreed with the United States that the Panel was required to limit its review to the USDOC's examination of the "duration" of the relevant subsidy programmes, without considering whether the USDOC had properly identified those programmes in the context of the relevant Section 129 proceedings. The Appellate Body reasoned in this regard that the requirement to establish the existence of a subsidy programme is part and parcel of the obligation, arising under the third sentence of Article 2.1(c), to take into account the time during which the subsidy programme has been in operation. The Appellate Body added that the issue of whether the USDOC had properly identified the relevant subsidy programmes was left unresolved in the original proceedings, and it saw no reason why China would have been precluded from reasserting a claim in this regard in these compliance proceedings, as a basis for its contention that the United States was in breach of its obligations under Article 2.1(c).

With respect to the Panel's interpretation and application of Article 2.1(c), the Appellate Body agreed with the Panel that, while "evidence of 'a systematic series of actions' may be particularly relevant in the context of an unwritten programme, the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c)." The Appellate Body also found that the Panel's subsequent review of the USDOC's analysis properly focused on "whether the information relied upon by the USDOC supports its finding of a systematic series of actions evidencing the existence of a plan or scheme pursuant to which subsidies have been provided". The Appellate Body added that, in its reasoning, the Panel rightly contrasted the USDOC's failure to explain "systematic activity … regarding the existence of an unwritten subsidy programme" with information before the USDOC merely indicating "repeated transactions". On this basis, the Appellate Body disagreed with the United States insofar as it had argued that the Panel erred in its articulation of the standard to be applied under Article 2.1(c). The Appellate Body also disagreed with the United States to the extent it had claimed that the Panel's finding under Article 2.1(c) was based on an isolated reading of the USDOC's specificity analysis. Instead, the Appellate Body understood the Panel's concern to have been that the USDOC's reasoning and references to "subsidy programmes" were

generic in nature and did not sufficiently discuss the steel sector or the provision of inputs in the context of the specific determinations at issue. For these reasons, the Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in 11 of the Section 129 proceedings at issue in this dispute.

3.3.5 Separate opinion of one Division member

3.3.5.1 Public bodies – Article 1.1(a)(1) of the SCM Agreement

In a separate opinion, one member of the Appellate Body Division concurred with the majority in: (i) rejecting China's interpretation of the term "public body" under Article 1.1.(a)(1) of the SCM Agreement; (ii) upholding the Panel's conclusion that China failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1); and (iii) leaving intact the Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1). However, he disagreed with the majority's view that a clarification of the criteria for determining when an entity is a public body was not necessary.

The Division member considered that the continuing lack of clarity as to what is a "public body" represents an instance of undue emphasis on "precedent". He expressed the view that the original mistake was in *US – Anti-Dumping and Countervailing Duties (China)*, to define the term "public body" as an entity that "possesses, exercises or is vested with governmental authority". He considered that this is *one way* to identify a public body, but it is not the *only* way to give meaning to the concept in specific circumstances. In his view, in subsequent appeals the Appellate Body treated the phrase "possesses, exercises or is vested with governmental authority" as a necessary element for determining whether an entity is a public body – while adding criteria that seemed to undermine the role of that element. In his opinion, that has sown confusion. Noting also that the United States had expressly asked the Division to clarify the meaning of the term "public body", the Division member considered that a clarification of the criteria for determining whether an entity is a public body was therefore both necessary and warranted.

In this regard, he observed that the text of Article 1.1(a)(1) does not elaborate on the meaning of the term "public body" and does not call for a single abstract definition or basic criterion for the term "public body". Instead, Article 1.1(a)(1) calls for an examination of whether a transfer of financial value is "by a … public body" and can therefore be attributed to a government. In his view, that examination involves an assessment of the relationship between the relevant entity and the government. When that relationship is sufficiently close, the entity in question may be found to be a public body and all of its conduct may be attributed to the relevant Member for purposes of Article 1.1(a)(1). If a government has the ability to control the entity in question and/or its conduct, then the entity could be found to be a public body within the meaning of Article 1.1(a)(1). The Division member added that he did not consider that the Appellate Body should elaborate on the meaning of the term "public body" in greater detail. Rather, it should leave space for domestic authorities to apply the criteria described above, provided their decisions meet the requirements of objectivity, reasoned and adequate explanation, and sufficient evidence.

While supporting the majority's rejection of China's appeal of the Panel's conclusion that the USDOC's public body determinations in the relevant Section 129 proceedings were not inconsistent with Article 1.1(a)(1) of the SCM Agreement, he expressed disagreement with the majority's criteria for determining whether an entity is a public body and offered a summary of criteria that may be relevant in determining whether an entity is a public body. In his view, whether an entity is a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates. Just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. An entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to

convey financial value. Thus, concluded the Division member, there is no requirement for an investigating authority to determine in each case whether the investigated entity possesses, exercises, or is vested with governmental authority.

3.3.5.2 Benefit – Articles 1.1(b) and 14(d) of the SCM Agreement

One member of the Appellate Body Division disagreed with the majority's decision to uphold the Panel's finding. He noted that the Panel rejected the USDOC's benchmark analysis in each of the four underlying Section 129 proceedings in a single paragraph of the Panel Report, saying that "the USDOC *did not find it necessary* to demonstrate how the actions of the GOC influenced the in-country price of the inputs at issue"; that "[t]he USDOC *did not even attempt* to provide a reasoned and adequate explanation for its determinations that in-country prices … were distorted as a result of pervasive government intervention"; and that "the USDOC outlined governmental involvement in the relevant markets and, *on that basis alone*, determined that it could not use in-country prices of the relevant inputs to assess the adequacy of remuneration." The Division member added that, although the majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, it in fact it rejected the USDOC's extensive qualitative analysis and wrote an opinion that could only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices.

The Division member then proceeded to detail what the USDOC did, which the Panel dismissed in three sentences and without any objection from the majority. He noted, for example, that in its Benchmark Memorandum, the USDOC examined: (i) the involvement of the GOC in the functioning of China's SIEs; (ii) detailed industrial plans directing ministries to reduce the number of firms and to increase the scale of production; (iii) government control exerted over appointments to the board of directors and corporate positions; (iv) evidence regarding controlled mergers and acquisitions; and (v) bankruptcy prevention and other indicia of government intervention with the functioning of the market. In assessing the functioning of SIEs in the steel sector in particular, the USDOC pointed to the sector's place as a "pillar" industry in which the state retains "somewhat strong influence"; evidence of increasing excess capacity; export restraints; "five-year plans" detailing favoured and unfavoured production scales, investments, technologies, products, and production locations; strict control over investments; control over SIEs' appointment processes; hindered bankruptcy of large SIEs; and preferential access to capital, land, and energy. With respect to the prices of private steel producers in China, the USDOC examined several factors, including the SIEs' significant market share, the presence of many SIE steel producers shielded from competitive market forces, export restraints on steel input products, restrictions on foreign investment, and other factors. In addition, in the Supporting Benchmark Memorandum, the USDOC referred to the inadequacy of questionnaire responses leading to an absence of representative price data, and a need to rely, in part, on facts available with respect to the input-specific market analysis of the three steel inputs. In the Final Benchmark Determination, the USDOC additionally explained why it could not carry out a price alignment analysis to further support its explanation that private steel input prices in the underlying proceedings were distorted. Finally, with respect to the Solar Panels investigation and in light of the GOC's failure to respond to the USDOC's request for information, the USDOC relied entirely on facts available. The Division member further noted that the Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC's conclusions, ran to hundreds of pages. Yet, the Panel discarded the USDOC's reasoning and supporting evidence in a single paragraph, characterizing the USDOC's determinations as "not even [an] attempt" to provide an explanation as to why in-country steel prices are not marketdetermined.

The Division member added that, in finding that the USDOC "failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a marketdetermined price" without any assessment of the USDOC's arguments and evidence, the Panel in effect faulted the USDOC for not having further analysed in-country prices, even where it had already found those prices to have been distorted. Why that should have been required in this case is not clear. Yet, provided that the investigating

authority had sufficiently explained why it considers the respective government interventions to have distorted domestic prices, the Division member did not see why the USDOC should have been required to rely on or further analyse such in-country prices in the context of a benchmarking analysis by, for example, comparing in-country prices with a hypothetical market-determined benchmark and finding the existence of a deviation. He noted that such prices may reflect the very same government interventions that gave rise to the subsidy the USDOC sought to countervail.

The Division member proceeded to set out, in some detail, his disagreement with the Panel and the majority of the Appellate Body. In particular, he considered that only a meaningful examination by the Panel of the USDOC's analysis, reasoning, and underlying evidence could allow the Panel to reach a conclusion as to whether the USDOC provided a sufficient explanation for its decision to have recourse to out-of-country prices. Yet the Panel did not carry out any such review. The Division member added that the Appellate Body majority faulted the USDOC for an alleged failure to provide "a sufficient assessment of how the various forms of government interventions, taken individually or together, impacted upon the prices in China's steel *market*, and specifically the input markets at issue, and how they actually resulted in the distortion of all the SIE and private *prices* of those inputs in those markets, as opposed to more generally distorting the market". He queried how the majority could reach this conclusion, considering that the Panel did not engage in any such assessment and failed to provide a substantive analysis of the USDOC's reasoning and underlying evidence. Rather than reviewing the Panel's findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seemed to him that the majority had engaged in its own review of the USDOC's determinations and, based on that review, upheld the Panel's findings that were based on the wrong legal standard, and reflected virtually no engagement with the USDOC's determinations. In this way, the majority appeared to have assumed the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel. In his view, the majority thus appeared to have exceeded the Appellate Body's mandate to review "issues of law covered in the panel report and legal interpretations developed by the panel".

Moreover, the Division member noted that the Panel recognized that "an investigating authority may carry out … a market analysis at different levels of detail with respect to the products in question, depending on the circumstances of the case." Having said that, however, the Panel did not appear to have taken into account the USDOC's qualitative analysis, which led it to conclude that: (i) prices in the entire steel sector could not be considered market-determined and similar rationale applied to the markets of the specific steel inputs at issue; (ii) information needed to conduct an input-specific market analysis was not provided by China in response to the USDOC's questionnaires and, thus, was not on the record; and (iii) the USDOC had data from the record of the original investigations relating to the considerable market shares of SIEs in the three input markets at issue. This conclusion was based "on the totality of circumstances in the Chinese steel sector including, *inter alia*, the GOC's other policy interventions in the sector (e.g. industrial policies affecting both the suppliers and purchasers of the steel inputs, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions), all of which serve to distort firm-level decisions thereby preventing the existence of the market conditions which are necessary for a proper benchmark under Article 14(d) of the SCM Agreement". In addition, the USDOC reviewed the available evidence on the record, including price evidence presented by the GOC, but concluded that "this evidence does not demonstrate that prices in the steel input markets in question in China are appropriate for use as benchmarks to determine the adequacy of remuneration in the relevant investigations."

In addition, the Division member noted that the Panel reached its conclusion that "the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" for all four benchmark determinations at issue, *prior* to analysing whether the USDOC disregarded certain input-specific price evidence on the record. Thus, the Panel's analysis of whether the USDOC provided a reasoned and adequate explanation for its conclusion that in-country prices are not market-determined was divorced from its discussion of the record evidence, suggesting that, in the Panel's view, the USDOC's approach would *never* sufficiently justify recourse to out-

of-country prices, independently of the evidence before it. This was particularly apparent from the Panel's review of the Section 129 proceedings concerning Solar Panels, where the GOC did not submit a response to the USDOC's Benchmark Questionnaire. Even in that context, however, the Panel found that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country polysilicon prices, without any analysis of the adverse facts available on which the USDOC relied.

In his separate opinion, the Division member considered "inexplicable" the majority's decision to uphold this finding by the Panel. Given that the Panel did not examine the substance of the evidence relied upon by the USDOC for purposes of establishing whether polysilicon prices are not market-determined, the Division member considered it unclear on what basis the majority upheld the Panel's conclusion, or what the majority considered the USDOC was required to do in order to establish that government intervention resulted in price distortion.

The Division member also noted that USDOC addressed the Mysteel Report submitted by China as an exhibit to the Ordover Report, which provided "an economic framework for evaluating whether market prices were 'distorted' by the government's predominant role as a supplier". While it did "not take issue with whether Professor Ordover's analytical framework concerning 'market power' is useful in the context of antitrust analysis", the USDOC observed that this was "not the only [analytical framework] permitted by the Appellate Body for a market distortion analysis; nor … the most relevant or explanatory in the context of the [People's Republic of China's (PRC)] steel industry, given the multifaceted nature of government intervention in that industry". Additionally, the USDOC referred to the indicia and supporting information in the Ordover Report but found it unnecessary to address each of them separately. The USDOC explained, in this regard, that it did not consider "the presence or absence of Professor Ordover's antitrust-based 'indicia'" to be "particularly telling indicia of market distortion", and that "[f]or example, the continued participation of private suppliers in the market is not particularly probative when market entry and exit decisions, and 'profitability' itself, are distorted by government intervention." Furthermore, even though the USDOC rejected both SIE and private prices in the entire steel sector in China as suitable benefit benchmarks, it nevertheless sought to analyse relevant price data on the record but found that this data was insufficient to conduct any meaningful analysis of whether private prices align with SIE prices. In its analysis, however, the Panel simply took issue with the absence of reference by the USDOC to the *prices* in the Mysteel Report, thereby disregarding the entirety of the USDOC's analysis in the Benchmark Memorandum as to why these same prices are not market-determined. Therefore, the Division member did not believe the majority had any basis for upholding the Panel's conclusion, based on the Panel's assertion that the USDOC did not sufficiently examine indicia such as fluctuation of steel prices over time, fragmentation of the industry, or the existence of private investment. For these reasons, he disagreed with the majority's view that the USDOC had failed to explain "in its determinations why the approach it had adopted and the conclusions it had reached were still valid, in light of the Mysteel pricing data and the alternative narrative of the Ordover Report". For him, this was precisely what the USDOC had done. In any event, it would have been for the Panel – not the Appellate Body – to review the evidence on the record and examine it against the USDOC's analysis.

In sum, this Division member found that, in endorsing the Panel's standard, the majority appeared to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. The task of the Panel in the present case was to examine whether the USDOC provided a reasoned and adequate explanation for its decision to have recourse to out-of-country prices under Article 14(d). Rather than properly engaging with that question, the Panel simply found that the USDOC "did not even attempt" to provide any explanation for its rejection of in-country prices and disregarded price evidence on the record, without any substantive assessment of the USDOC's analysis and the evidence relied upon by it, including World Bank reports, Organization for Economic Cooperation and Development (OECD) working papers, economic surveys,

articles and expert opinions, and legislative and administrative documents. In light of the shortcomings in the Panel's analysis, the Division member did not agree with the majority's decision to uphold the Panel's conclusions.

3.3.5.3 Specificity – Article 2.1(c) of the SCM Agreement

One member of the Division disagreed with the majority's findings, recalling that a subsidy programme within the meaning of Article 2.1(c) may be evidenced in several ways, including "by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises". The Division member saw no basis in Article 2.1(c) to require an investigating authority to demonstrate, first, "the existence of a subsidy within the meaning of Article 1.1", and, second, "a 'plan or scheme' pursuant to which this subsidy has been provided to certain enterprises". He further noted that a specificity analysis under Article 2.1(c) is not concerned with redetermining the existence of "subsidized prices", or whether the inputs at issue are produced and provided to downstream purchasers pursuant to "government instructions", and that the question of whether a measure is consistent with Article 2.1(c) does not require a "redetermination" of the existence of a subsidy, or its constituent elements.

Regarding the Panel's review of the USDOC's findings, the Division member remarked that, in assessing whether the USDOC had an objective basis to carry out a specificity analysis under Article 2.1(c), the Panel made no reference to the reasoning and analysis provided by the USDOC in the context of the original investigations, other than to note that the "underlying documents from the *original* investigation, for the OCTG and other investigations, [had] *not* been submitted on the record of these compliance proceedings." The Panel appeared thereby to have precluded the possibility that the underlying subsidy programmes may have already been identified in the context of the USDOC's public body, financial contribution, and benefit analyses in each investigation. The Division member added that rather than faulting the USDOC for not providing "a reasoned and adequate explanation for its conclusions regarding the existence of a subsidy programme", the Panel should have carefully examined the analysis provided by the USDOC in the context of its public body, financial contribution, and benefit findings in order to assess whether the USDOC had *identified* the "subsidy programmes" that it was investigating, and thus had an objective basis to carry out a *de facto* specificity analysis under Article 2.1(c). For these reasons, the Division member considered that the Panel erred in finding that China had demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Section 129 proceedings at issue.

3.4 Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/AB/R

This dispute concerned the definitive anti-dumping duties imposed by Korea on imports of certain valves for pneumatic transmissions (pneumatic valves) originating from Japan, following the investigation conducted by the Korea Trade Commission (KTC) and the KTC's Office of Trade Investigation (OTI). The KTC initiated the investigation and published the notice of initiation on 21 February 2014 based on an application filed by two producers of pneumatic valves in Korea, TPC Mechatronics Corporation (TPC) and KCC Co., Ltd. (KCC). On 19 August 2015, on the basis of the KTC's Final Resolution, the Minister of Strategy and Finance (MOSF) imposed anti-dumping duties on the imports of pneumatic valves from Japan through Decree No. 498 for five years at the following rates: 11.66% for SMC Corporation (SMC) and exporters of its products, and 22.77% for CKD Corporation (CKD), Toyooki Kogyo Co., Ltd., and exporters of their products, as well as other suppliers from Japan.

In the Request for the Establishment of a Panel by Japan (Japan's panel request), Japan claimed that the measure at issue is inconsistent with Korea's obligations under Articles 3.1 and 3.2, Articles 3.1 and 3.4, Articles 3.1 and 3.5, Articles 3.1 and 4.1, Article 6.5, Article 6.5.1, Article 6.9, Article 12.2, and Article 12.2.2 of the Anti-Dumping Agreement. As a consequence of these inconsistencies, Japan also claimed that Korea acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

With respect to its terms of reference, the Panel found that the following claims in Japan's panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly as required under Article 6.2 of the DSU and are therefore not within the Panel's terms of reference:

a. Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement concerning the definition of the domestic industry (claim 7);

b. Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the Korean investigating authorities' consideration of the volume of the dumped imports (claim 1);

c. Japan's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the consideration of the effect of the dumped imports on prices (claim 2);

d. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the impact of the dumped imports on the state of the domestic industry, with the exception of the allegations that the Korean investigating authorities failed to evaluate two of the specific factors listed in Article 3.4 (part of claim 3);

e. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to consider some known factors other than the dumped imports that were injuring the domestic industry at the same time with the exception of the allegations concerning whether the Korean investigating authorities considered certain known factors in isolation and dismissed them without an adequate examination (part of claim 5);

f. Japan's claim under Article 6.9 of the Anti-Dumping Agreement concerning the obligation to inform interested parties of essential facts that formed the basis of the decision to impose definitive anti-dumping measures (claim 10);

g. Japan's claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement concerning the Korean investigating authorities' obligation to give proper public notice of their final determination (claims 11 and 12); and

h. Japan's consequential claim under Article VI of the GATT 1994.

The Panel found that the following claims in Japan's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly pursuant to Article 6.2 of the DSU and are therefore properly *within* the Panel's terms of reference:

a. Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning the alleged failure of the Korean investigating authorities to evaluate the ability to raise capital or investments, and the magnitude of the margin of dumping (part of claim 3);

b. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement that the Korean investigating authorities' demonstration of causation lacks foundation in their analyses of the volume of dumped imports, effects of imports on prices, and the impact of those imports on the domestic industry, irrespectively and independently of whether the Korean investigating authorities' analyses are found to be inconsistent with Articles 3.1, 3.2, and 3.4 (claim 6);

c. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure by the Korean investigating authorities to demonstrate any causal relationship between the dumped imports and the injury to the domestic industry (claim 4);

d. Japan's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning the alleged failure of the Korean investigating authorities to examine certain known factors adequately and their examination of such factors in isolation (part of claim 5);

e. Japan's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement concerning the confidential treatment of information and the provision of non-confidential summaries of information for which confidential treatment was sought by the applicants (claims 8 and 9); and

f. Japan's consequential claim under Article 1 of the Anti-Dumping Agreement.

The Panel then made substantive findings regarding each of the claim found within its terms of reference. On claim 3, the Panel found that Japan failed to establish that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement due to their alleged failure to evaluate two economic factors, namely the ability to raise capital or investments and the magnitude of the margin of dumping. With respect to the ability to raise capital or investments, the Panel found that Japan failed to point to any facts on the record that would suggest that the KTC's analysis was not objective and that a reasonable and unbiased investigating authority could not have evaluated the ability of the domestic industry to raise capital as the KTC did. With respect to the magnitude of the margin of dumping, the Panel found that the KTC did more than merely list or indicate the existence of margins of dumping, and that the KTC undertook the evaluation as a substantive matter. In addition, the Panel found that Japan failed to demonstrate that there were specific factual circumstances in this case that required the KTC to evaluate the magnitude of the margin of dumping in any particular manner. On this basis, the Panel found that Japan failed to establish that the KTC acted inconsistently with Articles 3.1 and 3.4 in its evaluation of the magnitude of the margin of dumping.

With respect to the three claims raised under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, i.e. claims 4, 5, and 6, the Panel chose to first address Japan's claim 6. In this regard, the Panel considered that Japan raised an "independent" claim of violation of Article 3.5 with respect to Korea's flawed volume, price effects, and impact analyses, even if the Panel should find that those flaws do not constitute violations of Articles 3.2 and 3.4. The Panel found the Korean investigating authorities to have acted inconsistently with Articles 3.1 and 3.5 by failing to: (i) ensure price comparability when they compared the individual transaction prices of certain models of dumped imports with the average prices of corresponding models of the domestic like product (the relevant price comparisons); and (ii) adequately explain their consideration of the price-suppressing and -depressing effects of dumped imports in their determination of causation, in light of the undisputed fact that the prices of the dumped imports were higher than those of the domestic like product throughout the period of trend analysis on the basis of both the average price of the product as a whole and the average prices of representative models.

However, the Panel found that Japan failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because their causation determination was undermined by alleged flaws in their consideration of the significance of the increase in the volume of the dumped imports. The Panel also found that Japan failed to demonstrate that the Korean investigating authorities' determination of causation is, with respect to the analysis of the impact of dumped imports on the domestic industry and independently of any inconsistencies with Article 3.4, inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

With respect to claim 4, the Panel found that Japan's arguments concerning volume trends and price trends were identical to its volume and price effects-related arguments under its "independent" causation claim (claim 6), which the Panel rejected. On the basis of the same considerations, the Panel dismissed these arguments. Turning to Japan's arguments concerning profit trends, the Panel found that Japan failed to establish that insufficient correlation between dumped imports and trends in domestic industry profits suffices to demonstrate that a reasonable and unbiased investigating authority could not have properly

found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC. Thus, the Panel rejected Japan's claim 4. Finally, with respect to claim 5, the Panel concluded that Japan has failed to demonstrate that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 by failing to adequately examine other known factors causing injury to the domestic industry at the same time as dumped imports and the cumulative effect of such other known factors.

Turning to claim 8, the Panel considered that the main issue before it under Article 6.5 of the Anti-Dumping Agreement was whether the KTC granted confidential treatment to 38 items of information identified by Japan that were provided by the applicants without requiring a showing of good cause and without an objective assessment of that showing to justify the confidential treatment.

The Panel indicated that, under Article 15 of the Enforcement Rule of the Customs Act of Korea lists five categories of information that are entitled to confidential treatment in anti-dumping investigations. Furthermore, in the Anti-Dumping investigation at issue, the applicants filed "Disclosed", or public, versions of at least three of their written submissions, and certain information was redacted from these documents. The Panel noted that there was no explicit mention of "good cause" in any of the three public versions of the written submissions. Nor was there any link therein between the redacted information and the categories laid out in Article 15 of the Enforcement Rule of the Customs Act. Likewise, there was no specific indication in the relevant documents on the record that the KTC or the OTI assessed whether good cause had been shown by the applicants. Consequently, the Panel considered that the Korean investigating authorities granted confidential treatment to certain information provided by the applicants "without any evidence that a showing of good cause that would justify the confidential treatment had been required from the applicants". For the foregoing reasons, the Panel found that, with respect to the 38 items of information identified by Japan, the Korean investigating authorities acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.

In the context of claim 9, the Panel indicated that the issue before it under Article 6.5.1 of the Anti-Dumping Agreement was whether, with respect to certain information, the KTC failed to require that the submitting parties provide a non-confidential summary of information for which confidential treatment was sought.

The Panel noted that the "Disclosed" versions of the three communications submitted by the applicants (the investigation application, the summary of opinion from attorneys, and the rebuttal opinion of applicants) have entire sections from which information was removed, without any narrative to summarize the specific information deleted from the text. The Panel noted that the information redacted from the submissions includes a significant amount of important data, such as information relating to the production and sales of the domestic like product and various economic indicators regarding the state of the domestic industry. Thus, in the Panel's view, "the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'." On this basis, the Panel concluded that, "[b]y failing to require that the submitting parties provide a sufficient non-confidential summary of the information in question, the Korean Investigating Authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement."

3.4.1 Article 6.2 of the DSU – sufficiency of Japan's panel request and the Panel's terms of reference

On appeal, Japan argued that the Appellate Body should reverse the Panel's findings that Japan's claims concerning the definition of domestic industry (claim 7), the volume of the dumped imports (claim 1), the price effects of the dumped imports (claim 2), the disclosure of essential facts (claim 10) and part of Japan's claim concerning the impact of the dumped imports on the domestic industry (claim 3) were outside the

Panel's terms of reference. Korea, on its part, requested the Appellate Body to reverse the Panel's findings that Japan's claims concerning causation (claims 4, 6, and part of claim 5), as well as its claims concerning the confidential treatment of information (claims 8 and 9) were within the Panel's terms of reference.

The Appellate Body found that the requirements under Article 6.2 of the DSU are central to the establishment of the jurisdiction of a panel since a panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction, and fulfils a due process objective by providing the respondent and third parties notice regarding the nature of the complainant's case and enabling them to respond accordingly. To assess whether a panel request is sufficiently precise to meet the requirements of Article 6.2 of the DSU, panels must scrutinize carefully the panel request, read as a whole, and on the basis of the language used. Whether a panel request complies with the requirements of Article 6.2 of the DSU must therefore be determined on the face of the panel request, on a case-by-case basis. Furthermore, subsequent submissions of the parties during panel proceedings may not cure defects in the panel request but may be consulted to confirm the meaning of the words used therein.

The Appellate Body noted that the present dispute concerned the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in the second sentence of Article 6.2 of the DSU. To meet this requirement, a panel request must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed. To this end, the Appellate Body indicated that the identification of the treaty provision claimed to have been violated is always necessary and a minimum prerequisite, but that depending on the particular circumstances of a case, the identification of the treaty provision alleged to have been breached, alone, may not be sufficient to comply with the requirements of Article 6.2. This is the case, for example, where a provision contains not one single, distinct obligation, but rather multiple obligations, such that a panel request might need to specify which of the obligations contained in the provision is being challenged. In addition, the Appellate Body recalled that a panel request need only provide the legal basis of the complaint, that is, the *claims* underlying this complaint, and not the *arguments* in support thereof. Finally, the Appellate Body recalled its statements in certain past disputes that a brief summary of the legal basis of the complaint required by Article 6.2 of the DSU "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". The Appellate Body emphasized that the use of the phrase "*how or why*" in these cases does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU.

The Appellate Body then considered that, generally speaking, the Panel's articulation of the legal standard under Article 6.2 of the DSU complied with these requirements. This being said, the Appellate Body noted that, to the Panel, with regard to the seven claims that invoked Article 3.1 of the Anti-Dumping Agreement together with another subparagraph of Article 3 or Article 4.1 of the Anti-Dumping Agreement, merely paraphrasing the first part of Article 3.1, or use the language of that provision in the narrative of a panel request, would not in itself normally suffice to present the problem clearly. The Appellate Body observed that the Panel relied, *inter alia*, on this reasoning in determining whether these claims were within its terms of reference.

To the Appellate Body, however, none of Japan's claims were limited to paraphrasing the language of Article 3.1 of the Anti-Dumping Agreement alone. Rather, Japan also identified, at a minimum, another paragraph of Article 3 or Article 4 alleged to have been breached. The Appellate Body therefore indicated that whether Japan's paraphrasing of Article 3.1 of the Anti-Dumping Agreement, together with the remainder of the narrative contained in the panel request, including Japan's reference to the other provision(s) concerned, complied with the requirements of Article 6.2 of the DSU should be assessed on a case-by-case basis, depending on the relevant circumstances of each claim. Such circumstances may include the nature of the measure at issue and the manner in which it is described in the panel request, as well as the nature of the provision of the covered agreements alleged to have been breached. Thus,

the fact that the narrative of seven of Japan's claims paraphrased the language of Article 3.1 was not, in and of itself, dispositive of whether the panel request complied with the requirements of Article 6.2 of the DSU.

3.4.1.1 Terms of reference – Japan's claim 7 concerning the definition of domestic industry

The Appellate Body noted that the Panel had found Japan's claim 7 concerning the definition of the domestic industry to consist of a general reference to the language in Article 3.1 of the Anti-Dumping Agreement, which the Panel had found not to be sufficient to present the problem clearly. However, the Appellate Body indicated that, while part of Japan's claim may consist of paraphrasing the language of Article 3.1 of the Anti-Dumping Agreement, this was not, in and of itself, sufficient to establish that Japan's panel request did not comply with the requirements of Article 6.2 of the DSU. Japan's claim, while brief, identified both Articles 3.1 and 4.1 of the Anti-Dumping Agreement as the provisions of the covered agreements alleged to have been breached. Further, the Appellate Body noted that Japan's panel request related specifically to the portion of the measure at issue that concerns the definition of domestic industry and its alleged inconsistency with Korea's obligation under Articles 3.1 and 4.1. Regarding the nature of the provisions concerned, the Appellate Body found that the obligation established by Articles 3.1 and 4.1 is well-delineated, and that these provisions, together, establish a distinct obligation, such that Japan's identification of these provisions in the narrative of the panel request plainly connects the measure at issue with the provisions of the covered agreement alleged to have been breached, as required by Article 6.2 of the DSU. The Appellate Body therefore reversed the Panel's finding that Japan's claim 7 was not within its terms of reference.

3.4.1.2 Terms of reference – Japan's claim 1 concerning the volume of the dumped imports

The Appellate Body found that Japan's claim 1 concerning the volume of the dumped imports, beyond paraphrasing Article 3.1, also included a reference to Article 3.2 and indicated that it related to "Korea's analysis of a significant increase of the imports", such that it identified Articles 3.1 and 3.2 as the provisions of the covered agreements alleged to have been breached. The Appellate Body also found that the panel request made it clear that this claim concerned the specific portion of the measure at issue relating to the Korean investigating authorities' consideration of the volume of the dumped imports and its alleged inconsistency with Articles 3.1 and 3.2. Regarding the nature of the provisions at issue, the Appellate Body found that the obligation established by Article 3.1 and the first sentence of Article 3.2 is distinct and welldelineated, in that it requires investigating authorities to make an objective examination of whether there has been a significant increase in dumped imports on the basis of positive evidence. Thus, by referring to Articles 3.1 and 3.2 as the provisions of the covered agreement alleged to have been breached by Korea, and by indicating specifically which of the elements in Article 3.2 it concerned, namely the consideration of the volume of dumped imports, the Appellate Body found that Japan's claim, while brief, plainly connected the challenged measure with the obligation in question. The Appellate Body therefore reversed the Panel's finding that Japan's claim 1 concerning the volume of the dumped imports was not within its terms of reference.

3.4.1.3 Terms of reference – Japan's claim 2 concerning the price effects of the dumped imports

With regard to claim 2 concerning the price effects of the dumped imports, the Appellate Body indicated that the Panel correctly noted that the panel request identified both Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions alleged to have been breached. The Appellate Body noted that the Panel then divided Japan's claim into two different "elements" in order to assess its consistency with Article 6.2 of the DSU, namely, one regarding the obligation under Article 3.1 of the Anti-Dumping Agreement, and the

other regarding the obligation under Article 3.2. The Appellate Body noted in particular that, with regard to the first of these elements, the Panel relied on its earlier finding that merely paraphrasing Article 3.1 of the Anti-Dumping Agreement will not normally suffice to present the problem clearly. However, contrary to the Panel's finding in this regard, the Appellate Body indicated that whether Japan's paraphrasing of Article 3.1, together with the remainder of the narrative in the panel request, complies with the requirements of Article 6.2 should be assessed on a case-by-case basis, taking into account the specific circumstances of each claim, including the nature of the measure and that of the obligation alleged to have been breached.

The Appellate Body then noted that, with regard to the nature of the measure at issue, Japan's panel request clearly indicated that this claim concerned the specific portion of the measure at issue that related to the Korean investigating authorities' consideration of the price effects of the dumped imports, more precisely significant price depression and suppression, and its alleged inconsistency with Articles 3.1 and 3.2. With regard to the nature of the provisions at issue, the Appellate Body found that the second sentence of Article 3.2, in conjunction with Article 3.1, sets out an obligation that is distinct and welldefined, with, at its core, the requirement to consider, on the basis of an objective examination of positive evidence, whether the effect of the dumped imports on domestic prices consists of the economic phenomena contained therein. Therefore, the Appellate Body found that, by identifying the relevant portion of the measure concerned by this claim, listing Articles 3.1 and 3.2 of the Anti-Dumping Agreement as the provisions of the covered agreement alleged to have been breached by Korea, and indicating specifically which of the phenomena in Article 3.2 the claim concerns, Japan's claim, while brief, plainly connected the challenged measure with the obligation in question. The Appellate Body therefore reversed the Panel's finding that Japan's claim 2 concerning the price effects of the dumped imports was not within its terms of reference.

3.4.1.4 Terms of reference – Japan's claim 3 concerning the impact of the dumped imports on the domestic industry

The Appellate Body recalled that the Panel found the first part of Japan's claim 3 to paraphrase the first part of Article 3.1, which, to the Panel, is not normally sufficient to present the problem clearly. The Appellate Body noted that the Panel then proceeded to determine whether the second part of the claim – the assertion of an alleged failure to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue" – complied with the requirements of Article 6.2 of the DSU. The Appellate Body observed that, noting that Article 3.4 of the Anti-Dumping Agreement sets forth a mandatory list of factors that must be evaluated in each case, the Panel found that the panel request, on its face, presented the problem clearly by indicating that the failure by the KTC to evaluate one or more of these factors constituted a violation of Articles 3.1 and 3.4. However, the Appellate Body also noted that the Panel found three other allegations not to fall within its terms of reference, specifically that: (i) the KTC did not establish a logical link between its findings on the volume and price effects under Article 3.2 and its finding of adverse impact under Article 3.4; (ii) with respect to certain factors listed in Article 3.4, the KTC failed to demonstrate any explanatory force of dumped imports for understanding domestic industry trends; and (iii) the KTC attached a high degree of importance to the relevant factors highlighting negative aspects, while disregarding or downplaying without any explanation the factors suggesting that the Korean industry was not suffering injury. This is because, to the Panel, the panel request did not indicate or suggest that Japan's claim regarding Korea's analysis of the impact of the imports under investigation on the domestic industry extends to include these allegations.

The Appellate Body considered that Japan's panel request identified Articles 3.1 and 3.4 of the Anti-Dumping Agreement as the provisions alleged to have been breached. Furthermore, the Appellate Body noted that Japan challenged, under claim 3, only the specific portion of the measure at issue that related to the Korean investigating authorities' analysis of the impact of the imports under investigation on the domestic industry. With regard to the nature of the provisions at issue, the Appellate Body considered that Article 3.4, together with Article 3.1, establishes a distinct obligation that essentially requires the investigating authorities to objectively examine the impact of the dumped imports on the domestic industry on the basis of positive

evidence concerning all relevant economic factors and indices having a bearing on the state of the domestic industry. To the Appellate Body, therefore, Japan's claim 3 provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Furthermore, the Appellate Body indicated that the three allegations that the Panel found to be outside its terms of reference served to explain the manner in which the Korean investigating authorities would have breached the distinct obligation established by Articles 3.1 and 3.4, such that Japan was not required to include in its panel request this level of detail. The Appellate Body therefore reversed the Panel's finding that these three allegations were not within its terms of reference.

3.4.1.5 Terms of reference – Japan's claims 4, 5, and 6 concerning causation

With regard to Japan's claim 4 concerning causation, the Appellate Body noted that the Panel found that this claim, on its face, contained two aspects, and that the first aspect – relating to the alleged failure to conduct an objective examination on the basis of positive evidence – was qualified by the second aspect, that is, the assertion that Korea failed to demonstrate any causal relationship. The Appellate Body also noted that the Panel then analysed the nature of obligation regarding the demonstration of the causal relationship established by Article 3.5, and noted that Japan's panel request unequivocally presented the problem as one that relates to the failure to demonstrate this causal relationship. To the Appellate Body, the Panel's analysis reflected its consideration of both the nature of the measure and that of the obligation at issue, consistently with the applicable standard under Article 6.2 of the DSU. In particular, with regard to the nature of the measure at issue, the Appellate Body observed that Japan's claim 4 related specifically to the Korean investigating authorities' alleged failure "to demonstrate that the imports under investigation were … causing injury to the domestic industry".

With regard to the nature of the provisions at issue, the Appellate Body indicated that Article 3.5, together with Article 3.1, establishes obligations that are multi-layered. At the same time, the Appellate Body noted that Japan presented three claims under Articles 3.1 and 3.5, each with its distinct scope. The Appellate Body considered that Japan's claim 4 concerned the alleged failure to demonstrate the causal relationship on the basis of an objective examination and all relevant evidence before the authorities as required under Article 3.5, in particular its second sentence, as well as under Article 3.1. Thus, by indicating in the narrative of its claim which aspect of Articles 3.1 and 3.5 was concerned by its claim, together with the relevant aspect of the measure at issue, the Appellate Body found that Japan's claim 4, while brief, plainly connected the challenged measure with the provision alleged to have been breached such that Japan's claim 4 complied with the requirements of Article 6.2 of the DSU. The Appellate Body therefore upheld the Panel's finding that Japan's claim 4 was within its terms of reference.

With regard to Japan's claim 5, the Appellate Body noted that the Panel found the panel request to provide a brief explanation of how or why Japan considers the measure at issue to be violating the specific WTO obligations in question, with respect to the alleged failure of the Korean investigating authorities to adequately examine certain known factors. The Appellate Body considered that Japan's claim 5 related specifically to the Korean investigating authorities' examination of the non-attribution factors. While, as the Appellate Body recalled, Article 3.5, together with Article 3.1, establishes obligations that are multi-layered, the Appellate Body nonetheless found that Japan had identified in the narrative of its panel request precisely which aspect of the provision its claim concerned. Thus, the Appellate Body found that, by identifying the specific aspects of both the measure at issue and the provision concerned, Japan's claim 5 plainly connected the challenged measure with the provisions of the covered agreements alleged to have been breached, in accordance with the requirements of Article 6.2 of the DSU. The Appellate Body's findings did not extend, however, to the Panel's findings that other allegations raised by Japan under claim 5 were not within its terms of reference, given that neither participant had appealed this aspect of the Panel Report. Thus, the Appellate Body found that the Panel did not err in finding that part of Japan's claim 5, with regard to Korea's alleged failure to consider adequately all known factors other than the dumped imports as causing injury, was within its terms of reference.

With regard to Japan's claim 6, the Appellate Body noted that the Panel found this claim to be sufficiently precise on its face to present the problem clearly, namely that, in Japan's view, the KTC's causation determination was undermined by certain aspects of its volume, price effects, and impact analyses whether or not those aspects were inconsistent with Articles 3.1, 3.2, or 3.4 of the Anti-Dumping Agreement. The Appellate Body further observed that the Panel then considered the nature of the claim in light of the "irrespective and independent" language it contained and found that this claim was independent in nature. The Panel considered this claim to rest on three premises, namely: (i) certain aspects of the KTC's volume, price effects, and impact analyses were "flawed"; (ii) these "flaws" were either unrelated to the obligations under Articles 3.1, 3.2, and 3.4, or did not, in themselves, constitute violations of Articles 3.1, 3.2, and 3.4; and (iii) these "flaws" nevertheless have a sufficient impact on the KTC's causation determination to require the conclusion that that determination is inconsistent with Articles 3.1 and 3.5.

The Appellate Body found that Japan's claim 6 concerned a specific aspect of the Korean measure, namely the determination of causation by the Korean investigating authorities within the meaning of Article 3.5 of the Anti-Dumping Agreement, and more specifically the alleged "lack[]" of "foundation" for the causation determination in the Korean investigating authorities' volume, price effects, and impact analyses. Recalling that Articles 3.1 and 3.5 establish obligations that are multi-layered, the Appellate Body found that Japan had identified in the narrative of its claim the particular aspect of the provision concerned, namely the demonstration of the causal relationship between the dumped imports and the domestic industry as provided in the first sentence of Article 3.5. The Appellate Body also noted that the wording of the claim indicated that it was brought "irrespective and independent of" whether such "flawed" volume, price effects, and impact analyses would be inconsistent with Articles 3.1, 3.2, and 3.4. Thus, the Appellate Body found that the reference to Articles 3.1 and 3.5, along with the narrative of claim 6 on its face, identified with sufficient precision which part of Articles 3.1 and 3.5 Japan's claim 6 concerned, so as to meet the minimum requirement under Article 6.2 of the DSU.

In response to Korea's argument that the Panel itself was uncertain as to the precise nature of Japan's claim 6, and developed its own theory regarding the "premises" underlying Japan's claim, the Appellate Body found that the Panel, in the statements referred to by Korea, was responding to Korea's argument regarding the alleged ambiguity of the term "irrespective and independent" in Japan's panel request. The Appellate Body observed in any event that the considerations regarding the nature of the claim were not essential for the assessment of the consistency of the panel request with the requirements of Article 6.2 of the DSU. This is because whether a claim is related to, contingent on, or independent from another claim does not detract from the requirement under Article 6.2 of the DSU to consider the panel request on its face to determine whether it provides the legal basis of the complaint sufficient to present the problem clearly. The Appellate Body thus found that the Panel did not err in finding that Japan's claim 6 was within its terms of reference.

3.4.1.6 Terms of reference – Japan's claims 8 and 9 concerning the confidential treatment of information

With regard to Japan's claims 8 and 9 concerning the confidential treatment of information, the Appellate Body observed, like the Panel, that Japan's claims identified Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as the provisions of the covered agreement alleged to have been breached. The Appellate Body also noted that, with respect to the nature of the measure at issue, the narrative included in these claims indicated that they concerned specifically Korea's treatment of certain information as confidential under Article 6.5 of the Anti-Dumping Agreement, and Korea's treatment of summaries of confidential information under Article 6.5.1 of the Anti-Dumping Agreement. Turning to the nature of the provisions concerned, the Appellate Body found that Article 6.5 establishes a clear and well-delineated obligation by requiring an authority to treat certain information as confidential only "upon good cause shown", such that referencing this provision in a panel request, and connecting it to the specific portion of the measure at issue, suffices to comply with the requirements of Article 6.2 of the DSU.

With respect to claim 9, which was made pursuant to Article 6.5.1, the Appellate Body noted that it referred specifically to the first two sentences of Article 6.5.1, which oblige the investigating authorities to require non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. The Appellate Body found this portion of the provision to establish a clear and well-delineated obligation, such that referencing these sentences sufficed to provide a clear indication of the legal basis of Japan's complaint under this claim. More specifically, the Appellate Body noted that the narrative in Japan's claim made clear that it took issue with the alleged failure of the Korean investigating authorities: (i) to require the applicants to furnish non-confidential summaries of their submissions, questionnaire responses, and amendments thereof; and (ii) where such summaries were provided, to ensure that they were in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. The Appellate Body therefore upheld the Panel's findings that Japan's claims 8 and 9 were within its terms of reference.

3.4.1.7 Terms of reference – Japan's claim 10 concerning the disclosure of essential facts

With regard to claim 10 concerning the disclosure of essential facts, the Appellate Body noted that the Panel considered that the claim merely paraphrased the language of Article 6.9 of the Anti-Dumping Agreement, which did not explain how or why Japan considered the measures at issue to be inconsistent with this provision. However, the Appellate Body indicated that the Panel did not provide any further analysis on the circumstances of this case, such as the nature of the measure or that of the provision at issue, which it should have done in order to determine whether, despite its brevity, claim 10 fulfilled the requirements of Article 6.2 of the DSU.

The Appellate Body considered that, with regard to the nature of the measure, the claim related specifically to the Korean investigating authorities' alleged failure "to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose definitive anti-dumping measures". Regarding the nature of the provision concerned, the Appellate Body found that Article 6.9 established a distinct and well-delineated obligation essentially requiring the investigating authority to disclose the essential facts to all interested parties in a timely manner, that is, before the final determination is made and in sufficient time for the parties to defend their interests. Thus, to the Appellate Body, by identifying the specific aspect of the measure at issue under this claim, and by referring to Article 6.9 of the Anti-Dumping Agreement, Japan's claim 10 plainly connected the challenged measure with the provision alleged to have been breached such that the panel request met the requirements of Article 6.2 of the DSU. The Appellate Body therefore reversed the Panel's finding that Japan's claim 10 concerning the disclosure of essential facts was not within its terms of reference.

3.4.2 Definition of the domestic industry – whether the Appellate Body can complete the analysis

Japan argued that, if the Appellate Body reverses the Panel's finding that Japan's claim under Articles 3.1 and 4.1 of the Anti-Dumping Agreement was not within its terms of reference, the Appellate Body should complete the legal analysis. According to Japan, the KTC acted inconsistently with Articles 3.1 and 4.1 by defining the domestic industry as the two applicants of the underlying anti-dumping investigation, whose production the KTC found to constitute a "major proportion" of the total domestic production of the like products. Japan alleged several defects in the KTC's calculation of the proportion of the total domestic output attributable to the two applicants. Japan further argued that the KTC provided no explanation at all to show whether and how the two applicants could be considered to represent the total domestic production as a whole. As a result, Japan contended that there was a material risk of distortion in the KTC's definition of the domestic industry. Korea contended that there

were no defects in the KTC's calculation. Furthermore, Korea maintained that all domestic producers were invited to participate and received questionnaires, but only the two applicants responded, and that nothing in the process of defining the domestic industry at issue was skewed or biased in any way.

The Appellate Body recalled that in defining the domestic industry as a major proportion of the total domestic production, an investigating authority is required to assess both quantitative and qualitative aspects, and ensure that it does not act in a manner that gives rise to a material risk of distortion. The Appellate Body recalled that before the Panel, the parties made arguments similar to those raised on appeal, but the Panel neither explored these arguments nor scrutinized and weighed relevant evidence before it. In addition, the Appellate Body noted that neither the "Relevant facts" section in the Panel Report nor undisputed facts on the Panel record allows the Appellate Body to assess Japan's claim in light of the parties' arguments. Specifically, the Appellate Body found that it did not have sufficient factual findings by the Panel or undisputed facts on the Panel record to assess whether the KTC considered the available evidence objectively in calculating the proportion of the total domestic production accounted for by the applicants, whether the two applicants included in the definition of the domestic industry were sufficiently representative of the total domestic production, or whether the Korean investigating authorities' process of defining the domestic industry introduced a material risk of distortion. Consequently, the Appellate Body was unable to complete the legal analysis.

3.4.3 Magnitude of the margin of dumping

Japan appealed the Panel's conclusion that Japan failed to demonstrate that the KTC's evaluation of the magnitude of the margin of dumping was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Japan argued that an investigating authority must evaluate the dumping margin in light of the interaction of the prices between the dumped imports and the domestic like products, and the Panel erred in its interpretation to the extent it suggested otherwise. Regarding the Panel's application of these provisions, Japan contended that the KTC did not explain its finding that the dumping margins were significant, and consequently that dumping had a significant impact on prices of both the dumped product and the domestic like product. In addition, Japan argued that the KTC was required to conduct some form of counterfactual analysis in this case given the overselling of dumped imports. In response, Korea contended that the Panel correctly found that the KTC did more than merely list or indicate the existence of margins of dumping, and instead evaluated the magnitude of the margin of dumping as a substantive matter.

The Appellate Body considered that Articles 3.1 and 3.4 require an investigating authority to evaluate the magnitude of the margin of dumping, and to assess its relevance and the weight to be attributed to it in the injury assessment. However, the Appellate Body did not consider that these provisions require any one of the factors listed in Article 3.4 to be evaluated in a particular manner or given a particular relevance or weight. Accordingly, the Appellate Body disagreed with Japan that Article 3.4 *requires* an investigating authority to evaluate the dumping margin in light of the interaction of the prices between the dumped imports and the domestic like products, and considered the Panel's articulation of the legal standard to comport with a proper interpretation of Article 3.4. Regarding the Panel's application of Articles 3.1 and 3.4, the Appellate Body recalled the Panel's finding that the KTC observed that the dumping margins were significant, and consequently that dumping had a significant impact on prices of both the dumped product and the domestic like product. In addition, the Appellate Body recalled that the KTC found evidence of a competitive relationship between the dumped imports and domestic like product, and that the Panel found no error in this regard. Consequently, the Appellate Body found that Japan failed to establish that the KTC's finding was "not explained at all". In addition, the Appellate Body did not consider that the overselling by dumped imports itself necessarily *requires* the magnitude of the margin of dumping to be evaluated in a particular manner, such as through some form of a counterfactual

analysis. For these reasons, the Appellate Body upheld the Panel's finding that Japan failed to establish that the KTC acted inconsistently with Articles 3.1 and 3.4 with respect to its evaluation of the magnitude of the margin of dumping.

3.4.4 Causation – Japan's claim 6

3.4.4.1 Whether the Panel erred in its interpretation or application of Article 3.5 by subsuming all of the obligations of Articles 3.2 and 3.4 under Article 3.5 of the Anti-Dumping Agreement

On appeal, Korea argued that the Panel "effectively" interpreted Article 3.5 of the Anti-Dumping Agreement as setting forth an independent, comprehensive obligation to examine the volume, price effects, and consequent impact of the dumped imports as part of the causation obligation of Article 3.5. Korea contended that the Panel "walk[ed] through" the exact same questions of volume, price, and overall impact that one would normally consider in the analyses under Articles 3.2 and 3.4 of the Anti-Dumping Agreement.

The Appellate Body explained that claims regarding alleged deficiencies in an investigating authority's analyses of the volume and price effects, and its examination of the impact of the dumped imports on the state of the domestic industry, are reviewable by a panel under Articles 3.2 and 3.4, respectively, as these provisions contain the requirements pursuant to which the investigating authority conducts such analyses. In contrast, with respect to a claim under Article 3.5, a panel is tasked with reviewing an investigating authority's ultimate demonstration that the "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry. In so doing, a panel is called upon to review whether the investigating authority properly linked the outcomes of its analyses conducted pursuant to Articles 3.2 and 3.4, taking into account the evidence and factors required under Article 3.5, in coming to a definitive determination regarding the causal relationship between dumped imports and injury to the domestic industry. A panel's review of a claim under Article 3.5, therefore, concerns the investigating authority's ultimate determination of causation on the basis of a proper linkage among the various components, in light of all evidence and factors set out in that provision. A panel's review does not call for revisiting the question whether each of the interlinked components of this determination itself meets the applicable requirements set out in Article 3.2 or 3.4. Examining such consistency in the context of a claim under Article 3.5 would effectively require a panel to incorporate and apply requirements and disciplines set out in other paragraphs of Article 3, which are not contained in the text of Article 3.5.

Turning to the present dispute, the Appellate Body recalled that, in explaining its understanding of the phrase "irrespective and independent" in claim 6, the Panel noted that it could not preclude the possibility that an investigating authority's determination of causation may be inconsistent with Article 3.5 due to inadequacies in its analysis of the volume, price effects, or impact of dumped imports, even if these do not demonstrate a violation of Articles 3.2 and/or 3.4. The Appellate Body explained that by virtue of the phrase "through the effects of dumping, as set forth in paragraphs 2 and 4" in the first sentence of Article 3.5, to the extent that a panel finds that an investigating authority's volume, price effects, and impact analyses are inconsistent with its obligations under Articles 3.2 and 3.4, such inconsistencies would likely undermine an investigating authority's overall causation determination and *consequentially* lead to an inconsistency with Article 3.5. However, the Appellate Body noted that the "possibility" referred to above by the Panel appeared to concern a different scenario, in which an investigating authority's analyses of the volume, price effects, and impact do not themselves demonstrate an inconsistency with Article 3.2 or Article 3.4, but nonetheless contain "inadequacies" that "independently" constitute a violation of Article 3.5. The Appellate Body explained that the totality of the evidence and factors stipulated under Article 3.5, including the evidence underpinning an investigating authority's volume, price effects, and impact analyses, may be reviewed under Article 3.5 for the purpose of examining whether an investigating

authority has demonstrated the requisite causal relationship. The Appellate Body did not exclude the possibility that, based on such a review, a panel might find that an investigating authority erred under Article 3.5 in its demonstration of causation due to its failure to link properly its consideration of volume and price effects, and its examination of the impact on the state of the domestic industry, even where these elements, individually, may not breach the obligations set out in Articles 3.2 and 3.4, respectively. To that extent, the Appellate Body did not find the Panel to have erred in its approach merely because it identified the "possibility" referred to above and proceeded to examine Japan's "independent" causation claim as set out in claim 6 in Japan's panel request.

However, the Appellate Body considered that in order for it to determine whether, in *applying* Article 3.5 for the purpose of examining Japan's claim 6, the Panel erroneously "walk[ed] through" the exact same questions of volume, price effects, and overall impact that one would normally consider in the analyses under Articles 3.2 and 3.4, the Appellate Body would have to review the Panel's findings under claim 6 in light of the claims and arguments raised on appeal by Japan and Korea.

3.4.4.2 Whether the Panel failed to consider volume as an essential building block for any finding of causation

On appeal, Japan argued that the Panel rejected its argument by focusing too narrowly on the requirements of the first sentence of Article 3.2 regarding volume, and not on the proper analysis under Article 3.5 regarding causation. According to Japan, in order to determine whether the KTC conducted a proper causation analysis under Article 3.5, it was for the Panel to consider the volumerelated facts and other facts as part of a holistic analysis of the KTC's finding of causation and how the KTC explained that finding.

The Appellate Body recalled that, as the Panel noted, Japan's allegation that certain flaws in the KTC's analysis of the volume of dumped imports "independently" undermined its causation determination was based on the fact that: (i) the volume of dumped imports decreased during two years of the three-year period of trend analysis; and (ii) the volume of dumped imports increased only modestly in absolute terms and decreased in terms of market share in 2013 compared with 2010. The Panel noted that the KTC considered whether there was a significant increase in dumped imports in absolute terms, relative to domestic consumption, and relative to domestic production. According to the Panel, the KTC neither relied on, nor was required to show, a significant increase of dumped imports from 2010 to 2012 or over the entire period of trend analysis. The Panel further found that the KTC examined the trends in volume and market share on an end-point to end-point basis as well as on a year-on-year basis, and did not ignore the decline in dumped imports from 2010 to 2012.

The Appellate Body noted that Article 3.5 does not prescribe a particular methodology for evaluating the volume of imports for the purposes of demonstrating the causal link between dumped imports and injury to the domestic industry. Rather, Article 3.2, first sentence, requires an investigating authority to consider "whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption". The Appellate Body considered that the Panel's above analysis in the context of Japan's claim 6 reviewed the requirements set out in Article 3.2, first sentence, as opposed to those under Article 3.5. The Appellate Body found that in the absence of any specific requirements concerning the volume of dumped imports, Article 3.5 could not have guided the Panel's assessment of whether the KTC adequately explained the decrease in the volume of imports from 2010 to 2012 in reaching its finding of a significant increase of the volume of dumped imports. The Appellate Body found that in reviewing the causation claim at issue, the Panel effectively incorporated the requirements in Article 3.2, first sentence, concerning the volume of dumped imports. Thus, the Appellate Body found the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement. The Appellate Body, however,

found that it did not consider Japan to have substantiated its "independent" claim that the KTC acted inconsistently with the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement by focusing solely on one of the years of the three-year period of investigation (POI).

3.4.4.3 Whether the Panel failed to consider price effects as an essential building block for any finding of causation

Before the Panel, Japan advanced three grounds in support of its claim that the KTC's analysis of the price effects of dumped imports "independently" undermined its causation determination, namely that: (i) there was a divergence between the trends in prices of dumped imports and domestic like product; (ii) dumped imports consistently and significantly oversold the domestic like product; and (iii) there was no competitive relationship between the dumped imports and the domestic like product, such that their prices were not comparable. The Panel found that the KTC acted inconsistently with Articles 3.1 and 3.5 on the basis of the second and third grounds advanced by Japan.[41] As for diverging price trends, the Panel rejected Japan's arguments.

Japan appealed the Panel's findings on diverging price trends and contended that the Panel: (i) incorrectly viewed its findings about diverging price trends in isolation of its other findings about price comparability and price overselling; and (ii) incorrectly accepted allegations about the alleged fierce competition.

The Appellate Body noted that the Panel understood Japan to assert that the diverging price trends showed that there was no market interaction between the dumped imports and the domestic like product, and thus undermined the KTC's price suppression and price depression analyses, which in turn formed the basis of the ultimate causation determination under Article 3.5. The Appellate Body recalled that the Panel noted that the prices of the dumped imports and the domestic like product moved in generally the same direction from 2010 to 2011. However, from 2011 to 2012, the average price of dumped imports increased, while that of the domestic like product decreased. The Panel recognized that an increase in the price of the dumped imports might be expected to be accompanied by an increase in domestic prices. The Panel therefore considered that, in such a situation, it was expected of a reasonable investigating authority to explain why, nonetheless, it considers that the dumped imports affect the domestic like product prices.

The Appellate Body considered that the Panel's analysis reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like products, in order to ascertain the effects of the former on the latter. This, in the Appellate Body's view, corresponded to an examination properly conducted pursuant to Article 3.2, second sentence. According to the Appellate Body, the Panel's conclusion that the diverging price trends do not, in and of themselves, demonstrate that the KTC's determination of a causal relationship is inconsistent with Articles 3.1 and 3.5 was a mere consequence of its analysis as to whether the KTC's price effects analyses were objective and reasoned, and compatible with the requirements set out in Article 3.2, second sentence. The Appellate Body explained that the Panel's analysis of the issue of diverging price trends was based on the applicable requirements under Article 3.2, rather than those concerning causation under Article 3.5, even though it was addressing a claim under the latter provision. In so doing, the Appellate Body found the Panel to have effectively incorporated the requirements of Article 3.2, rather than applying properly the requirements set out in Article 3.5. Thus, the Appellate Body found the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement. The Appellate Body, however, found that apart from arguing that the Panel's review of the KTC's examination of diverging price trends was not properly done, Japan has not demonstrated why the KTC's examination contains flaws that vitiate its causation determination pursuant to the requirements set out in Articles 3.1 and 3.5.

[41] Korea challenged these findings on appeal, which is detailed in section 3.4.4.6 below.

3.4.4.4 Whether the Panel failed to consider impact as an essential building block for any finding of causation

On appeal, Japan argued that the Panel's conclusion that the KTC need not establish a link between volume and price effects under Article 3.2 and the impact of the dumped imports on the domestic industry under Article 3.4 is wrong, and that the failure to establish this logical link undermined the KTC's causation finding.

The Appellate Body noted that Japan's claim rested on its argument that the KTC's failure to establish a "logical link" between its evaluation of certain factors having a bearing on the state of the domestic industry and its consideration of the volume of the dumped imports and the effect of the dumped imports on prices under Article 3.2 for the purposes of its impact analysis under Article 3.4 rendered its causation analysis inconsistent with Article 3.5. The Appellate Body further recalled that the Panel explained that, while there may be some overlap between the consideration of the effect of the dumped imports on domestic prices under the second sentence of Article 3.2 and the evaluation of "factors affecting domestic prices" under Article 3.4, this does not mean that, as Japan seems to suggest, "a flawed price effects analysis will necessarily preclude a proper examination of the impact of the dumped imports on the domestic industry under Article 3.4." The Panel also rejected Japan's argument that, by failing to examine two factors set out in Article 3.4, the Korean investigating authorities acted inconsistently with Article 3.5.

The Appellate Body agreed with the Panel that, "in order to properly examine the impact of dumped imports on the domestic industry *for purposes of Article 3.4*, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports." However, the Appellate Body found that the Panel's analysis rejecting Japan's position described above was ultimately based on its understanding of the relationship between the inquiries contemplated under Articles 3.2 and 3.4. Similarly, the Appellate Body saw no reason to disagree with the Panel's finding that there is no need "to undertake a fully reasoned causation and non-attribution analysis" as part of Article 3.4. Thus, the Appellate Body did not consider Japan to have demonstrated an "independent" violation of Article 3.5 on the basis of its arguments that the Panel rejected.

Nonetheless, the Appellate Body considered that the Panel's above analyses indicated that the Panel reviewed Japan's arguments in light of the requirement set out in Article 3.4 even though it was addressing a causation claim under Article 3.5. According to the Appellate Body, the Panel's examination of the alleged flaws in the Korean investigating authorities' impact analysis primarily related to the issue of whether the KTC's impact examination was in line with the requirements set out in Article 3.4, as opposed to those under Article 3.5. In so doing, the Appellate Body found the Panel to have effectively incorporated the requirements of Article 3.4, rather than properly applying the requirements set out in Article 3.5. Thus, the Appellate Body found the Panel to have erred in applying Article 3.5 of the Anti-Dumping Agreement.

3.4.4.5 Whether the Panel erred under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by failing to consider Japan's rebuttal arguments on the issue of "reasonable sales price"

On appeal, Japan contended that, in accepting the KTC's explanation for the diverging price trends based on the constraints imposed by the "so-called 'reasonable sales price'", the Panel ignored Japan's rebuttal arguments about this issue. In Japan's view, the Panel had an obligation to address Japan's rebuttal arguments.

The Appellate Body recalled that, in connection with Japan's claim under Articles 3.1 and 3.2 with respect to price effects, the Panel noted that "[t]he 'reasonable sales price' is a target domestic industry price constructed by the OTI." The Panel further noted that in considering price suppression, "the KTC referred to the difference between the 'reasonable sales price' and the actual average domestic prices in the Final Resolution." However, because the Panel found that Japan's claim under Articles 3.1 and 3.2 with respect to price effects was outside its terms of reference, it did not address Japan's argument that the Korean

investigating authorities never explained why the profit margins selected to construct the reasonable sales price were in fact a reasonable proxy for the prices that the Korean producers should have been able to charge as "reasonable sales prices". The Appellate Body found that Japan's references to several paragraphs of the Panel Report in support of its argument were misplaced, because these paragraphs contain neither the Panel's findings, nor the parties' arguments, concerning the relevance of the "reasonable sales price" in the context of Japan's claim 6. Thus, the Appellate Body rejected Japan's claim that the Panel erred under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement.

3.4.4.6 Whether the Panel erred in its findings concerning price comparability and overselling when addressing Japan's claim 6 under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

On appeal, Korea advanced two main grounds, claiming that: (i) the Panel relieved Japan of its burden to demonstrate that the KTC failed to ensure price comparability and, instead, made the case for Japan; and (ii) the Panel imposed a price comparison requirement not found in Article 3.5 of the Anti-Dumping Agreement and that is more demanding than the standard under Article 3.2 of the Anti-Dumping Agreement.

The Appellate Body recalled that Article 3.1 provides that a determination of injury shall be based on positive evidence and involve an objective examination of "the effect of the dumped imports on prices in the domestic market for like products". Article 3.2, second sentence, lists three price effects that are distinct from each other, in that, even if prices of the dumped imports do not significantly undercut those of the domestic like products, such imports may nevertheless have a pricedepressing or suppressing effect on domestic prices. Under Article 3.2, second sentence, an investigating authority therefore has a measure of discretion in how it chooses to assess price effects. However, the Appellate Body recalled its prior finding that "a failure to ensure price comparability" could not be considered to be consistent with the requirement under Article 3.1 that "a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products". According to the Appellate Body, "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices." For this reason, the Appellate Body stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue." Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons.

Turning to the first of Korea's arguments, the Appellate Body noted that Korea's contentions are based on the premise that Japan's arguments before the Panel concerning price comparability were limited to Japan's view that there was a lack of competitive relationship, or substitutability, between the dumped imports and domestic like products. The Appellate Body recalled that the Panel noted Japan's argument that, i*n its price effects analysis*, the KTC failed to ensure price comparability between specific products or product segments of the dumped imports and the domestic like product. The Appellate Body further noted that Japan contended before the Panel that the KTC never explained in its reports how the conclusions of price suppression and price depression were supported by the comparison between the prices of subject imports and the "high-end prices" of domestic like products. In so doing, the Appellate Body found Japan to have made out a *prima facie* case regarding the requirement on the KTC to ensure price comparability in its price effects analysis under Article 3.2, second sentence. The Appellate Body further found that, in light of Japan's argument that the KTC failed to conduct an objective examination of the overall extent of price competition in reaching its price suppression and price depression findings, the Panel correctly considered that, to the extent an investigating authority's consideration of price suppression or price depression may involve comparison of prices, the investigating authority must ensure that the prices being compared are properly comparable. However, the Appellate Body explained that the Panel's analysis was more directly relevant in the context of Article 3.2, second sentence, rather than Article 3.5.

The Appellate Body next turned to Korea's argument that the Panel erred in law by imposing a price comparison requirement not contained either under Article 3.2 or Article 3.5. The Appellate Body noted that the Panel understood the Korean investigating authorities to have considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers (i.e. individual instances of "underselling") led to price suppression and price depression of the domestic like product. The Appellate Body recalled that the Panel set out in a table what Korea referred to as a series of comparisons between individual resale transaction prices of two models of dumped imported valves and the average prices of corresponding models of the domestic like product reported by the OTI in its Final Report. This table underlined those transactions in which the dumped import price to certain customers was lower than the average domestic price for the corresponding model produced and sold by the Korean producers. The Panel found that the listed transactions "took place on different dates and involved different quantities". The Panel observed that, in general, the lower the quantity involved in a transaction, the higher the unit price of the dumped imported valve(s). The Panel took the view that, in light of the possible effect on the comparisons made, an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average domestic like product price of a corresponding model without further consideration and explanation of the relevance or significance of these differences.

The Appellate Body noted that the Korean investigating authorities conducted and relied on these price comparisons, including evidence of price discrimination and aggressive pricing behaviour, to make the point that, despite the higher average prices of the imported products, a finding of price suppression and price depression could nonetheless be sustained by the evidence. The KTC's transaction-to-average comparison analysis was thus aimed at assessing whether the prices of dumped imports were lower than the prices of domestic like products for determining price effects within the meaning of Article 3.2, second sentence. Thus, in the Appellate Body's view, price comparability became an important issue as the probative value of the comparison depended on the degree of price comparability and concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. The Appellate Body agreed with the Panel that the KTC was required to ensure price comparability in these price comparisons inasmuch as it relied on the price differentials to find that dumped imports had pricesuppressing and -depressing effects on domestic prices. However, the Appellate Body found that the Panel's above analysis was pertinent to a claim under Article 3.2, and in line with the requirements of that provision, rather than to a claim under Article 3.5.

The Appellate Body next addressed Korea's argument that the Panel imposed a requirement to demonstrate how and to what extent underselling in certain competitive sales affected the prices of the domestic like product "as a whole" or "overall", and that such a requirement has no basis in either Article 3.2 or Article 3.5. The Appellate Body noted that, as the Panel found, the KTC relied on individual instances of "underselling" to address the argument by the interested parties that the consistent overselling by dumped imports based on the average price undermined the findings of price suppression and price depression. The KTC reached the conclusion that these individual instances of "underselling" had the effect of suppressing and depressing the prices of domestic like product despite the overall overselling by the dumped imports. The Appellate Body recalled that in assessing whether the KTC provided sufficient reasoning for the above conclusions, the Panel found that "it is not clear" that the KTC considered whether, and if so how, the individual instances of "underselling" with respect to certain models affected "the prices of other models of the domestic like product, the extent of total domestic sales affected by such 'underselling', or how these instances of 'underselling' affected domestic like product prices as a whole".

The Appellate Body explained that although the Panel spoke of price suppression or price depression of the domestic like product "as a whole", it did not consider the Panel to have imposed a legal requirement "to demonstrate how and to what extent underselling in certain competitive sales affected the prices of the domestic like product 'as a whole'", as Korea argued. Rather, the Appellate Body recalled that,

in response to Korea's argument that Panel Exhibit KOR-57[42] demonstrated how the KTC considered the extent to which the domestic like product prices were affected by individual instances of dumped imports' pricing, the Panel queried whether Panel Exhibit KOR-57, in conjunction with the OTI's Final Report and the KTC's Final Resolution, supported Korea's contention. The Appellate Body considered that this was the context in which the Panel analysed Panel Exhibit KOR-57 and found that it does not show whether, and if so how, the Korean investigating authorities examined the extent to which domestic like product prices were affected by the individual instances of lower dumped import prices, noting further that "this Exhibit does not identify the corresponding models of the domestic like product whose prices are being 'undersold', or the quantity or value of the sales of those models." The Appellate Body agreed with the Panel that without such information it was not clear how the Korean investigating authorities could have assessed the extent to which domestic like product prices were affected by the pricing of the dumped imports in the selected transactions, such that a finding of price suppression and price depression could be reached.

The Appellate Body further found that the Panel did not err in examining whether the KTC took into account the evidence of consistent price overselling and the relevant arguments raised by the interested parties, especially "in light of the consistent … overselling by the dumped imports and the fact that the *average* prices of the models of dumped imports involved in these individual instances of 'underselling' were still higher than the average prices of the corresponding domestic models." Thus, the Appellate Body saw no reason to disagree with the Panel that an explanation and analysis of how and to what extent the prices of the domestic like product were affected was necessary.

However, the Appellate Body found that the Panel's analysis was pertinent to a claim under Article 3.2, and in line with the requirements of that provision, rather than to a claim under Article 3.5. Thus, while the Appellate Body did not find any error in the Panel's analysis insofar as it related to the applicable requirements set out in Article 3.2, the Panel, in the Appellate Body's view, effectively incorporated and applied the requirements of Article 3.2, rather than properly applying the requirements set out in Article 3.5, even though it was reviewing a claim under the latter provision. Accordingly, the Appellate Body found the Panel to have erred in its application of Article 3.5 of the Anti-Dumping Agreement. Nonetheless, as further described below, the Appellate Body found that the Panel's findings regarding the KTC's price effects analysis provided a sufficient basis for it to complete the analysis regarding Japan's claim under Articles 3.1 and 3.2, second sentence, of the Anti-Dumping Agreement.

3.4.4.7 Whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement

On appeal, Korea raised several arguments under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement with respect to the Panel's substantive findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement concerning Japan's "independent" claim of causation. The Appellate Body rejected these arguments, *inter alia*, on the grounds that: (i) Korea's claim under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement is subsidiary to its claim concerning the Panel's failure to construe or apply correctly Articles 3.1 and 3.5; (ii) Korea has failed to make out a case that the Panel engaged in a *de novo* analysis in violation of Article 17.6(i) of the Anti-Dumping Agreement; (iii) the Panel did not make internally inconsistent findings such that it acted inconsistently with Article 11 of the DSU; and (iv) Korea's argument essentially suggested that the Panel should have accorded to Panel Exhibit KOR-57 the same evidentiary weight that Korea itself would have accorded.

[42] Panel Exhibit KOR-57 was submitted by Korea during the Panel proceedings, containing a list of comparisons, by the KTC, of the prices of all of the resale transactions of the Japanese respondent SMC Korea during 2013 with the average and high-end prices of the corresponding models of the Korean domestic like product.

3.4.4.8 Conclusion

In light of the foregoing considerations, the Appellate Body reversed the Panel's finding, in paragraph 8.4.a of the Panel Report, that Japan had demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market.

3.4.5 Causation – Japan's claim 4

On appeal, Japan contended that the Panel erred in dismissing Japan's arguments, in support of its claim 4, regarding volume correlation and price correlation, by simply citing earlier Panel findings on Japan's "independent" causation claim. Japan averred that the lack of sufficient correlation – that domestic industry volume and price trends did not correlate well with the import volume and price trends and, therefore, called into doubt the existence of any causal relationship.

The Appellate Body noted that with respect to the alleged lack of correlation in volume trends, the Panel noted that Japan contended that the existence of any causal relationship between the dumped imports and the alleged injury was undermined because: (i) the volume and the market share of the dumped imports decreased from 2010 to 2012 (i.e. during the first two years of the three-year period of trend analysis); and (ii) the domestic industry's market share remained stable in 2013 as compared with 2010. In the context of Japan's claim 6, the Panel reviewed and rejected these two identical arguments. On the basis of the same considerations, the Panel dismissed these arguments in the context of the present claim. The Appellate Body recalled that in addressing Japan's volume-related arguments in the context of claim 6, the Panel reviewed the requirements under Article 3.2, first sentence, as opposed to those under Article 3.5. The Appellate Body noted that, in so doing, the Panel had effectively incorporated the requirements of Article 3.2, first sentence, rather than properly applying the requirements set out in Article 3.5. Given that the Panel relied on the same considerations in rejecting Japan's arguments concerning the lack of correlation in volume trends in the context of the causation claim at issue (claim 4), the Appellate Body found the Panel's finding in this regard to be in error.

With respect to correlation in price trends, the Appellate Body noted that, in the context of the present causation claim (claim 4), the Panel stated that Japan argued that the lack of parallelism between dumped import prices and domestic like product prices does not support the existence of a causal relationship between the dumped imports and the injury allegedly suffered by the domestic industry. In particular, the Panel noted that Japan argued that: (i) dumped import prices increased from 2011 to 2012 while domestic like product prices decreased; and (ii) dumped import prices fell sharply from 2012 to 2013 whereas domestic like product prices decreased only slightly. The Panel considered that Japan's arguments in support of this aspect of the causation claim at issue were identical to its price effects-related arguments under claim 6 which it had rejected. Based on the same considerations, the Panel concluded that, in the causation claim at issue (claim 4), Japan failed to establish that insufficient price correlation sufficed to demonstrate that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

The Appellate Body recalled its finding that the Panel's analysis of the diverging trends in the context of Japan's claim 6 focused on whether there was a competitive relationship between dumped imports and domestic like products despite diverging price trends, and whether the diverging price trends could, in and of themselves, undermine the causal relationship under Article 3.5. The Appellate Body further recalled that it had found that the Panel's analysis reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like product, in order to ascertain the effects of the former on the latter, which corresponded to an examination properly conducted pursuant to Article 3.2, second sentence. The Appellate Body noted that it had found that the Panel's

analysis of the issue of diverging price trends was based on the applicable requirements under Article 3.2, rather than those concerning causation under Article 3.5, even though it was addressing a claim under the latter provision. Thus, given that the Panel relied upon the same considerations in rejecting Japan's arguments concerning the lack of correlation in price trends in the context of the causation claim at issue (claim 4), the Appellate Body found the Panel's finding in this regard to be in error.

Finally, concerning profit trends, on appeal, Japan contended that there was insufficient correlation in the trends regarding the domestic industry's condition to demonstrate a causal relationship. The Appellate Body considered that Japan's argument appeared to mischaracterize the KTC's findings. The KTC did not state that it found "increased" competition in 2012. Rather, as the Panel noted, the KTC acknowledged that the domestic industry's operating loss worsened from 2011 to 2012, at a time when dumped import prices increased and their volume and market share declined. However, the Panel noted that the KTC explained that one of the reasons for the increased operating loss ratio was due to the increase of operating costs "in response to the competition with the dumped imports". The Appellate Body found that the Panel took into account these statements by the KTC in considering Japan's arguments, noting in particular that, according to the KTC, the worsening operating loss "was a result not only of the decrease in domestic like product prices … but also of the increase of operating costs". Thus, the Appellate Body considered that neither the Panel nor the KTC ignored the alleged lack of correlation between the domestic industry profit, dumped import prices, and the volume and market share of the dumped imports. Consequently, the Appellate Body did not find any error in the Panel's finding that Japan failed to establish that the insufficient correlation between dumped imports and trends in domestic industry profits demonstrates that a reasonable and unbiased investigating authority could not have properly found the required causal relationship between the dumped imports and injury to the domestic industry in light of the facts and arguments that were before the KTC.

In light of the foregoing considerations, the Appellate Body upheld the Panel's finding that Japan had not demonstrated that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to their conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry, insofar as Japan's argument regarding insufficient correlation between dumped imports and trends in domestic industry profits was concerned.

3.4.6 Whether the Appellate Body can complete the analysis under Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement

3.4.6.1 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of the volume of dumped imports

On appeal, Japan contended that the part of the Panel Report titled "Relevant facts" sets forth all of the key facts needed to resolve this claim. Japan argued that the KTC "improperly" found a "significant increase" in the dumped imports even though the volume of such imports actually fell in two out of three of the comparison periods, and increased slightly on an absolute basis and decreased on a relative basis over the POI.

The Appellate Body noted that certain arguments raised by Japan in support of its claim under Articles 3.1 and 3.2 are identical to those addressed by the Panel in the context of claim 6. Specifically, like its argument in the context of claim 6, Japan focused on the alleged failure by the KTC to take into account the decrease of import volumes in absolute terms during the first two years of the POI, and the decrease of import volumes in relative terms, in finding that there was a "significant increase" in the volume of imports. The Appellate Body further recalled that the Panel's analysis of Japan's identical arguments in the context of claim 6 properly reviewed the requirements set out in Article 3.2, first sentence. In particular, the Appellate Body considered that the Panel did not accept the KTC's findings on its face. Rather, the Panel critically examined the KTC's findings concerning the volume of dumped imports.

However, the Appellate Body considered that Japan's arguments in the context of its present claim under Articles 3.1 and 3.2 concerning the volume of dumped imports encompassed broader considerations than those contained in the above findings by the Panel, namely that: (i) the KTC improperly assumed a competitive relationship between domestic products and subject imports; and (ii) the KTC improperly found a "significant increase" in subject imports without examining whether the increased imports actually replaced domestic like products through market competition. The Appellate Body found that the Panel did not sufficiently explore these issues with the parties in its analysis of the volume of dumped imports in the context of claim 6. Moreover, the Appellate Body considered that the underlying factual bases pertaining to these issues were contested between the parties. Confronted with these circumstances, the Appellate Body was of the view that completion of the legal analysis with respect to these issues was hindered by the absence of relevant factual findings, sufficient undisputed facts in the panel record, as well as a sufficient exploration by the Panel.

Consequently, the Appellate Body found itself unable to complete the legal analysis as to whether the Korean measures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to the Korean investigating authorities' consideration of the volume of dumped imports.

3.4.6.2 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in their consideration of price effects

On appeal, Japan requested the Appellate Body to complete the analysis and find that the Korean investigating authorities failed to meet their obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement because: (i) the KTC failed to ensure the price comparability; (ii) the KTC failed to consider the implications of the overselling by the dumped imports; and (iii) the KTC largely ignored the diverging price trends. Japan also contended that the KTC erred in its findings because it failed to address the counterfactual question of how prices might have been different in the absence of dumping and the KTC never considered whether the alleged price depression and suppression were significant. Finally, Japan contended that the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient".

With respect to price comparability and price overselling, the Appellate Body noted that Japan raised identical arguments in the context of claim 6. The Appellate Body recalled that the Panel's analyses and findings with respect to these two issues, although made in the context of claim 6, were nonetheless in line with and properly conducted under the requirements set out in Article 3.2, second sentence. The Appellate Body noted that the Korean investigating authorities considered that individual cases of dumped import resale prices for some models that were lower than average domestic prices and high-end domestic prices for corresponding models to certain customers (i.e. individual instances of "underselling") led to price suppression and price depression of the domestic like product. Price comparability thus became an important issue in the KTC's consideration of price effects since the KTC relied upon the price differentials in these comparisons in finding that dumped imports had price-suppressing and -depressing effects on domestic prices. The Panel found that the transactions "took place on different dates and involved different quantities". The Appellate Body stated that the Panel rightly considered that an unbiased and reasonable investigating authority could not have properly compared these individual transaction prices with the average price of the corresponding model of the domestic like product without further consideration and explanation of the "relevance or significance" of these differences.

The Appellate Body further recalled that the KTC relied upon the evidence regarding the individual instances of "underselling" in order to respond to the interested parties' arguments concerning the existence of price overselling based on the average prices of all the products. The Appellate Body noted that the Panel examined the KTC's determination and, on that basis, understood the KTC to have found that the effects of these individual instances were on domestic like product prices as a whole, and not only on the prices of certain models of the domestic like product. The Panel, however, found that the explanation and analysis

lacked how and to what extent the prices of the domestic like product were affected. The Appellate Body saw no reason to disagree with the Panel and considered that in identifying the price-suppressing and depressing effects of the dumped imports, it was incumbent upon the Korean investigating authorities to have provided an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by the dumped imports. The Appellate Body explained that the flaws that the Panel identified concerned the objectivity and evidentiary foundation of the KTC's price suppression and price depression findings under Articles 3.1 and 3.2. Therefore, the Appellate Body confirmed the Panel's finding that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because they: (i) found price-suppressing and -depressing effects of dumped imports based on the transaction-to-average price comparisons without ensuring price comparability; and (ii) failed to provide an explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports.

With respect to diverging price trends, the Appellate Body noted that Japan raised an identical argument in the context of claim 6. The Appellate Body considered that the Panel's findings, although made in the context of claim 6, properly reviewed the Korean investigating authorities' examination of the relationship between the prices of the dumped imports and those of the domestic like product, in order to ascertain the effects of the former on the latter. This, the Appellate Body found, corresponded to an examination properly conducted pursuant to Article 3.2, second sentence. The Panel properly reviewed the Korean investigating authorities' consideration of the diverging price trends in light of the requirements set out in Article 3.2, second sentence, and found it reasonable and supported by facts. Therefore, the Appellate Body rejected Japan's allegation that the KTC "largely ignored" the diverging price trends, and found that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends.

With respect to Japan's arguments concerning (i) the KTC's failure to address the counterfactual question of how prices might have been different in the absence of dumping, (ii) the KTC's failure to address whether the alleged price depression and suppression were significant, and (iii) whether the "reasonable sales price" analysis conducted by the KTC was "flawed and insufficient", the Appellate Body noted that the Panel never explored these arguments with the parties. Moreover, the Appellate Body noted that the parties disagree with respect to the factual bases underlying these arguments. Therefore, given the limited scope and nature of the Panel's factual findings and the limited undisputed record evidence in this regard, the Appellate Body considered that its attempt to complete the legal analysis involving such competing arguments would require the Appellate Body to review and consider evidence and arguments that were not sufficiently addressed by the Panel or sufficiently explored and developed before the Panel.

Consequently, the Appellate Body found that it was able to complete the legal analysis in part. For the reasons explained above, the Appellate Body found that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement: (i) to the extent that they found price-suppressing and -depressing effects of dumped imports based on the relevant price comparisons without ensuring price comparability; and (ii) in the absence of any explanation and analysis of how and to what extent the prices of the domestic like product were affected in light of the consistent overselling by dumped imports when finding price suppression and price depression. The Appellate Body also found that the Korean investigating authorities did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement with respect to their consideration of diverging price trends. However, the Appellate Body found itself unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.2 on the basis of Japan's arguments that: (i) the KTC failed to address the counterfactual question of how prices might have been different in the absence of dumping; (ii) the "reasonable sales price" analysis was flawed and insufficient, as the KTC failed to examine market interactions between the subject imports and domestic like products; and (iii) the KTC never considered whether the alleged price depression and suppression were significant.

3.4.6.3 Whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their consideration of the impact of dumped imports on the state of the domestic industry

On appeal, Japan advanced three arguments in support of its claim that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4, namely that: (i) the KTC did not establish any logical link between its findings regarding the volume and price effects under Article 3.2 and its finding of impact under Article 3.4; (ii) the KTC "more generally" failed to show any explanatory force from dumped imports regarding the trends related to the condition of the domestic industry; and (iii) the KTC failed to adequately explain how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.

With respect to the first argument, the Appellate Body recalled that in reviewing the Panel's finding in the context of claim 6, where Japan raised an identical argument, it had agreed with the Panel that, in order to properly examine the impact of dumped imports on the domestic industry for purposes of Article 3.4, an investigating authority is not required to link that examination with its consideration of the volume and the price effects of the dumped imports. Turning to the second argument, the Appellate Body considered that Japan's argument appeared to suggest that the Korean investigating authorities were required to undertake a full-fledged causation and nonattribution analysis in their examination under Article 3.4. The Appellate Body noted that several of Japan's arguments alleged that factors other than the dumped imports were responsible for the state of the domestic industry. The Appellate Body recalled that it had considered, in the context of claim 6, an identical legal question and found that the demonstration that subject imports are causing injury to the domestic industry is an analysis specifically mandated by Article 3.5, rather than Article 3.4.

With respect to the third argument, the Appellate Body recalled that, in the context of Japan's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Panel found that Japan's claim concerning the state of the domestic industry was limited to the allegation that the KTC failed to evaluate two of the specific factors listed in Article 3.4, one of which was the ability to raise capital or investment. The Panel found that Japan failed to demonstrate that the KTC's evaluation of the investment and funding ability of the domestic industry was not one that a reasonable and objective investigating authority could make in light of the evidence and arguments before it. The Appellate Body noted that Japan did not challenge on appeal this finding by the Panel. Accordingly, the Appellate Body was unable to see the basis on which Japan requested it to complete the legal analysis and find that the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 with respect to its argument concerning positive trends in *investment*, which stood addressed by the Panel and remained unappealed. The Appellate Body further recalled that, in the context of Japan's claim 6 under Articles 3.1 and 3.5, the Panel addressed Japan's argument that the KTC failed to take into account positive trends during the period of trend analysis with respect to sales such that it "disproved" the existence of a causal relationship between the dumped imports and the injury to the domestic industry. The Appellate Body noted that Japan did not appeal these findings made by the Panel.

That said, the Appellate Body considered that Japan's argument in the context of its claim under Articles 3.1 and 3.4 encompassed broader considerations than those addressed in the above findings by the Panel. The Appellate Body explained that not only did Japan make the argument about the positive trend experienced by domestic industry with respect to domestic sales, but it also asserted that the KTC attached a *high degree of importance to the other relevant factors* highlighting negative aspects of the domestic industry, while disregarding or downplaying those factors that showed positive trends. Thus, in the Appellate Body's view, Japan's contention that, in so doing, the KTC acted inconsistently with Articles 3.1 and 3.4 would require the Appellate Body to review the KTC's examination of, and the weight it attributed to, each of the factors listed in Article 3.4. The Appellate Body noted that the Panel did not have the occasion to engage with these arguments in the context of Japan's claim under Articles 3.1 and 3.4.

The Appellate Body considered that engaging in the completion exercise would require it to examine the relevance of each of the economic factors listed in Article 3.4 individually and conduct a collective assessment in order to review the consistency of the KTC's impact examination under Articles 3.1 and 3.4 regarding which the Panel made no findings. Consequently, the Appellate Body found itself unable to complete the legal analysis as to whether the Korean investigating authorities acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of Japan's argument that the KTC failed to adequately explain how imports had negatively impacted the domestic like products as a whole in light of positive trends experienced by the domestic industry.

3.4.7 Confidential treatment of information

3.4.7.1 Whether the Panel erred in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement

Korea maintained that the Panel erred in its interpretation of Article 6.5 of the Anti-Dumping Agreement "when considering that investigating authorities must make statements in the record demonstrating that 'good cause' was assessed and found to exist for the confidential treatment of certain pieces or categories of information". Korea argued that the Panel also erred in applying the law to the facts in finding that "[the] KTC failed to show that good cause was shown for certain pieces of evidence as there was no evidence on the record 'linking the information for which confidential treatment was granted to the categories of confidential treatment identified in Korean law'."

The Appellate Body began by recalling the legal standard under Article 6.5 of the Anti-Dumping Agreement. It stated that, while interested parties must make a "good cause" showing that certain information should be treated as confidential, it is ultimately for the investigating authority to conduct an "objective assessment" of this issue to determine whether the request for confidential treatment has been sufficiently substantiated such that confidential treatment should be granted. Article 6.5 does *not* prescribe *the particular* steps that investigating authorities should take in order to assess and determine whether "good cause" has been "shown". However, in the context of a WTO dispute settlement proceeding, a panel may be asked to examine a claim under Article 6.5 as to whether an investigating authority properly examined and determined that "good cause" had been shown in granting confidential treatment to certain information. To that end, an investigating authority is required to objectively assess whether the request for confidential treatment has been sufficiently substantiated such that "good cause" has been shown. The fact that the investigating authority has conducted this objective assessment must be *discernible* from its published report or related supporting documents.

The Appellate Body considered that, in articulating the legal standard under Article 6.5, the Panel did not pronounce on the specific manner in which investigating authorities should specify that "good cause" was shown when granting confidential treatment to certain information. In the Appellate Body's view, the Panel's articulation comported with the legal standard under Article 6.5. Consequently, the Appellate Body rejected Korea's argument that the Panel committed legal error in its interpretation of Article 6.5 of the Anti-Dumping Agreement.

With respect to the application of the law to the facts, Korea argued that the Panel erred because, under Article 6.5, the KTC was not obliged to make specific statements about each of the requests for confidentiality other than to satisfy itself that good cause was shown before treating the information in question as confidential. The Appellate Body disagreed with Korea to the extent it suggested that an investigating authority would comply with Article 6.5 in a situation where there is no *indication* on the record establishing that such authority conducted an objective assessment as to whether good cause was shown. Under Article 6.5, the fact that an investigating authority objectively assessed and determined

that "good cause" was "shown" must be *discernible* from its published report or related supporting documents. Without such indication, the Appellate Body failed to see how a panel would be expected to review a claim under Article 6.5.

Korea's claim that the Panel erred in finding an inconsistency with Article 6.5 was based on two related arguments regarding: (i) the conduct of the interested parties in the underlying investigation; and (ii) the role of the KTC. With respect to the showing of good cause by interested parties, Korea's position was that, in providing non-confidential summaries by way of deleting the relevant information from their submissions, the providers of the information "implicitly" asserted that such deleted information fell within the categories of "confidential information" set forth in the relevant Korean laws. As a consequence of that "implicit" assertion, Korea argued, "good cause" was "shown" for granting confidential treatment to that information.

The Appellate Body noted that, under the relevant Korean legislation, certain categories of information are entitled to confidential treatment in anti-dumping investigations (Article 15 of the Enforcement Rule of the Customs Act). The Appellate Body further observed that, while the Panel did not see a "reason *a priori* why a Member's legislation may not set out specific categories of information for which confidential treatment will normally be granted", it was ultimately not convinced that, in the present case, the existence of such a list sufficed to establish "good cause" for the confidential treatment of the information at issue. Indeed, the Panel highlighted that "there [was] no indication on the record that, in granting confidential treatment, either the applicants specified, or the Korean Investigating Authorities took into account, whether the information in question fell into any of those categories."

In the Appellate Body's view, the mere redaction of information does not establish, in and of itself, that such information falls within certain legal categories for confidential information, let alone that there is good cause for treating certain information as confidential. Thus, the Appellate Body agreed with the Panel that a total absence of any indication in the underlying investigation as to how the information redacted from the submissions related to the general categories of information set out in Korea's relevant legislation appeared insufficient to demonstrate the showing of good cause by the interested parties.

With respect to the role played by the KTC, Korea contended that, when the KTC received such nonconfidential summaries, it objectively assessed whether there was "good cause" by confirming whether the deleted information fell within a confidential information category set out in the relevant Korean legislation. The Appellate Body noted that Korea had already presented this line of argumentation before the Panel. However, the Panel was not convinced, given that it had found no supporting evidence on the record. In particular, the Panel pointed out that, "[w]hile such a procedure [by the KTC] may be sufficient to satisfy the requirements of Article 6.5, in the absence of anything in the submissions themselves, or evidence otherwise on the record, linking the information for which confidential treatment was granted to the categories of confidential information identified in Korean law, [it could not] conclude that the Korean Investigating Authorities actually engaged in the asserted procedure."

The Appellate Body highlighted that, on appeal, Korea offered no arguments challenging the Panel's factual findings regarding the lack of support on the record for the proposition that the Korean investigating authorities objectively assessed whether good cause had been "shown". Given those findings by the Panel, the Appellate Body stated that it was unable to agree with Korea's claim.

For the foregoing reasons, the Appellate Body found that the Panel did not err in its interpretation or application of Article 6.5 of the Anti-Dumping Agreement. Consequently, the Appellate Body upheld the Panel's finding, in paragraphs 7.441, 7.451, and 8.4.b of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to their treatment of information provided by the applicants as confidential without requiring that good cause be shown.

3.4.7.2 Whether the Panel erred in its application of Article 6.5.1 of the Anti-Dumping Agreement

Korea argued that the Panel erred in its application of Article 6.5.1 by finding that the KTC failed to require the applicants to furnish non-confidential summaries of the information submitted in confidence. According to Korea, the non-confidential summaries submitted by the applicants were in sufficient detail to permit a reasonable understanding of the substance of the confidential information.

The Appellate Body noted that, under Article 6.5.1 of the Anti-Dumping Agreement, "[t]he authorities shall require interested parties providing confidential information to furnish nonconfidential summaries thereof." With respect to the content of those summaries, Article 6.5.1 elaborates that they "shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". Thus, for the Appellate Body, the central issue on appeal was whether the Panel committed legal error under Article 6.5.1 in finding that the Korean investigating authorities failed to require that the parties submitting confidential information provide a "sufficient" non-confidential summary of the information at issue.

As found by the Panel, "the applicants filed 'Disclosed', or public, versions of at least three of their written submissions (the investigation application dated 23 December 2013, the summary of opinion from attorneys dated 23 October 2014, and the rebuttal opinion of applicants dated 13 November 2014) from which certain information was redacted either by totally removing it or by replacing it with an 'X' or asterisks." On appeal, Korea maintained that these three documents contain "non-confidential descriptive narratives … with respect to all confidential information", which "permitted a reasonable understanding of the substance of the information and thus enabled interested parties to defend their interests".

The Appellate Body noted that the Panel had rejected this view because "the 'Disclosed' versions of the three communications identified by Japan have entire sections from which information was removed." The Panel had also indicated that "[t]he information redacted from the submissions includes a significant amount of important data" and that "[t]here is no narrative in the 'Disclosed' version to summarize the specific information deleted from the text." In light of the above considerations, the Panel found that, "[i]n the complete *absence of data*, and with *no narrative summary* with respect to the deleted information, the 'Disclosed' versions of the three communications identified by Japan cannot be said to contain a summary in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence'."

The Appellate Body indicated that, in the above passages, the Panel made findings of fact with respect to the content of the documents that were treated as the "non-confidential summaries" in the underlying investigation. The Appellate Body highlighted that Korea did not challenge the Panel's appreciation of the facts under Article 11 of the DSU. Instead, Korea repeated certain arguments that the Panel had already rejected without explaining why the Panel's analysis constituted a misapplication of Article 6.5.1. Thus, the Appellate Body failed to see how the "non-confidential summaries" at issue could satisfy the legal standard of being "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

The Appellate Body then turned to address some additional argumentation by Korea. In particular, Korea argued that "non-confidential summaries are not required under Article 6.5.1 for every single figure and piece of data included in the parties' submissions, regardless of the relevant context." The Appellate Body was not convinced by this argument because the Panel did not fault Korea under Article 6.5.1 for failing to disclose individual data points. Instead, the Panel's conclusion was based on the fact that the "non-confidential summaries" did not meet the legal standard under Article 6.5.1 because there was a "complete absence of data" and "no narrative summary with respect to the deleted information".

Korea also asserted that "Article 6.5.1 does not provide any instruction on the method and extent of preparing non-confidential summaries. Thus, investigating authorities are entitled [to] certain deference to a reasonable degree in accepting or rejecting non-confidential summaries." In the Appellate Body's view, regardless of the degree of deference that an investigating authority may enjoy under Article 6.5.1, it must comply with the obligation to require summaries that are "in sufficient detail to permit a reasonable understanding of the information submitted in confidence".

Moreover, Korea contended that there was neither a violation of due process rights of the interested parties nor a failure to provide interested parties with an opportunity to defend their interests. However, the Appellate Body noted that this argument by Korea had been correctly rejected by the Panel, inasmuch as a panel's inquiry into whether Article 6.5.1 has been breached does not include a separate analysis of whether the parties' due process rights have been violated.

Finally, Korea argued that, "throughout the underlying investigation, [the] KTC analyzed and proactively disclosed the non-confidential summaries of the confidential information submitted by the interested parties." Before the Panel, Korea had presented a similar argument. The Panel was not convinced because "[t]he subsequent provision of a non-confidential summary by the investigating authority does not absolve it of having failed to comply with Article 6.5.1 in the first instance." The Appellate Body agreed with the Panel. In the Appellate Body's view, under Article 6.5.1, the authorities bear the obligation to require non-confidential summaries *from the parties*, and there appears to be no basis for the proposition that the authorities' obligation could be fulfilled through summaries provided by the authorities themselves.

For the foregoing reasons, the Appellate Body upheld the Panel's finding, in paragraphs 7.450, 7.451, and 8.4.c of the Panel Report, that Japan demonstrated that the Korean investigating authorities acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require that the submitting parties provide a sufficient non-confidential summary of the information for which confidential treatment was sought.

3.4.8 Disclosure of essential facts – whether the Appellate Body can complete the analysis

Having reversed the Panel's finding that Japan's claim under Article 6.9 of the Anti-Dumping Agreement was outside its terms of reference, the Appellate Body turned to Japan's request for the completion of the legal analysis under this provision. Japan requested the Appellate Body to complete the analysis and find that Korea acted inconsistently with Article 6.9 due to the KTC's failure to disclose the "essential facts" before its "final determination". In Japan's view, the KTC failed to adequately disclose the "essential facts" in the following "key disclosure documents": the OTI's Preliminary Report, the KTC's Preliminary Resolution, and the OTI's Interim Report. According to Japan, the Korean investigating authorities failed to disclose 14 sets of "essential facts", which were grouped into four main themes: price effects, volume of dumped imports, the state of the domestic industry, and causation.

The Appellate Body began by noting that Article 6.9 sets out "the requirement to disclose, before a final determination is made, the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures". Disclosing the essential facts under consideration "is paramount for ensuring the ability of the parties concerned to defend their interests". With respect to the temporal aspect of the obligation under Article 6.9, the investigating authorities must disclose the essential facts under consideration "before a final determination is made", and "in sufficient time for the parties to defend their interests".

In light of these considerations, the Appellate Body indicated that, in the present case, the application of the legal standard required determining, first, which is the "final determination" in the underlying investigation and, second, whether prior to such "final determination" the Korean investigating authorities properly disclosed the "essential facts" under consideration in accordance with Article 6.9.

In the present case, the Appellate Body observed that the participants disagreed on which documents issued by the Korean investigating authorities constituted the "final determination" and which were the "disclosure" documents. On the one hand, Japan asserted that the "KTC's Final Resolution dated 20 January 2015 constituted the 'final determination' for purposes of Article 6.9, as it encompassed the conclusion of the investigation of dumping and injury." Regarding the "disclosure" of essential facts, Japan argued that this was made in the following three documents issued prior to the KTC's Final Resolution: (i) OTI's Preliminary Report dated 26 June 2014; (ii) KTC's Preliminary Resolution dated 26 June 2014; and (iii) OTI's Interim Report dated 23 October 2014. On the other hand, Korea maintained that "the 'final determination' within the meaning of Article 6.9 in the present case was the Final Decision of MOSF" to impose definitive duties issued on 19 August 2015. Moreover, Korea submitted that the documents in which the "disclosure" of essential facts was made were (i) KTC's Final Resolution, and (ii) OTI's Final Report, both of which were issued prior to the MOSF's Final Decision to impose definitive duties. In light of these arguments, the Appellate Body highlighted that the participants disagreed as to when in the investigation the Korean investigating authorities reached the "final determination" within the meaning of Article 6.9. As a result, the participants also disagreed on which documents issued during the underlying investigation had to be examined for purposes of assessing the "disclosure" of essential facts.

Moreover, the Appellate Body highlighted that the question of whether the disclosure of "essential facts" was made through the documents alleged by Japan or those asserted by Korea encompassed a series of factual issues, with respect to which the Panel made no findings, and certain legal issues that were left unexplored by the Panel. For instance, the Panel made no findings on whether, under Korean law, the underlying anti-dumping investigation was concluded on substance when the MOSF decided to impose definitive measures or, alternatively, whether the Anti-Dumping investigation at issue was concluded on substance when the KTC issued its Final Resolution.

In light of the above considerations, the Appellate Body considered that there were no Panel findings, undisputed facts on the record, or a sufficient exploration by the Panel of certain key issues, for the purpose of determining when the "final determination" within the meaning of Article 6.9 was reached in the investigation at issue and which were the "disclosure" documents for purposes of Article 6.9. According to the Appellate Body, resolution of these issues was needed to determine whether Korea acted inconsistently with Article 6.9 by failing to disclose the relevant "essential facts". Consequently, the Appellate Body found itself unable to complete the legal analysis with regard to Japan's claim that Korea acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

3.5 Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/AB/R

This dispute concerned certain anti-dumping measures imposed by Ukraine on ammonium nitrate from Russia. Anti-dumping duties were originally imposed by Ukraine's Intergovernmental Commission on International Trade (ICIT) through a decision of 21 May 2008 (2008 original decision). Russian producer JSC MCC EuroChem (EuroChem), initially subject to an anti-dumping duty rate of 10.78%, successfully challenged the 2008 original decision before domestic courts in Ukraine. Following the Ukrainian court rulings, ICIT issued an amendment (2010 amendment) to the 2008 original decision (as amended, 2008 amended decision), reducing the anti-dumping duty rate for EuroChem to 0%. Following interim and expiry reviews conducted by the Ministry of Economic Development and Trade of Ukraine (MEDT), ICIT issued a decision (2014 extension decision), imposing anti-dumping duties at modified rates, including a duty of 36.03% on EuroChem.

Before the Panel, Russia challenged Ukraine's measures under various provisions of the Anti-Dumping Agreement and raised a consequential claim under Article VI of the GATT 1994.

With respect to the Panel's terms of reference, the Panel found that: (i) the 2008 amended decision and the 2010 amendment were within its terms of reference; (ii) certain claims under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement, and certain claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement were within its terms of reference; and (iii) certain claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fell outside its terms of reference. The Panel considered moot Ukraine's request for a ruling that certain claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fell outside its terms of reference.

With respect to Russia's claims concerning dumping and likelihood-of-dumping determinations in the interim and expiry reviews, the Panel found that Ukraine acted inconsistently with: (i) Article 2.2.1.1 of the Anti-Dumping Agreement because Ukrainian investigating authorities (ICIT and/or MEDT) had rejected the price of gas that the investigated Russian producers paid and reported in their records (reported gas cost) without providing an adequate basis to do so under the second condition in the first sentence of that provision; (ii) Article 2.2 of the Anti-Dumping Agreement because, when constructing normal value, Ukrainian investigating authorities had used a cost for gas that did not reflect the cost of production "in the country of origin" (i.e. Russia); (iii) Article 2.2.1 of the Anti-Dumping Agreement because, in conducting their ordinary-course-of-trade test, Ukrainian investigating authorities had relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement; and (iv) Articles 11.2 and 11.3 of the Anti-Dumping Agreement because Ukrainian investigating authorities had relied on dumping margins calculated inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement to make their likelihood-of-dumping determinations. The Panel further found that Russia failed to establish that Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, and exercised judicial economy with regard to certain additional claims under Articles 2.2, 2.2.1.1, 2.4, and 11.1 of the Anti-Dumping Agreement.

With respect to Russia's claims concerning the non-termination of the investigation against EuroChem, the Panel found that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because Ukrainian investigating authorities had: (i) failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision; (ii) imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment instead of excluding it from the scope of the anti-dumping investigation; and (iii) included EuroChem within the scope of the review determinations and imposed anti-dumping duties on it through the 2014 extension decision. The Panel exercised judicial economy in relation to certain claims under Articles 11.1 through 11.3 of the Anti-Dumping Agreement concerning the non-termination of the investigation against EuroChem. Moreover, the Panel found that Russia failed to establish certain inconsistencies with Articles 11.1-11.3 of the Anti-Dumping Agreement in connection with the investigating authorities' alleged determination of and reliance on injury not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in making their likelihood of injury determination.

With respect to Russia's claims challenging the investigating authorities' conduct in the interim and expiry reviews, the Panel found that Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because Ukrainian investigating authorities had failed to disclose certain essential facts and to give interested parties sufficient time to comment on MEDT's disclosure. The Panel further found that Russia failed to establish certain inconsistencies with Articles 6.2, 6.8, 6.9, and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement, and exercised judicial economy with regard to additional claims under Article 6.2 of the Anti-Dumping Agreement. Moreover, the Panel found that Russia failed to establish that Ukraine acted inconsistently with Article VI of the GATT 1994 as a consequence of alleged inconsistencies with the Anti-Dumping Agreement, and exercised judicial economy with respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement.

3.5.1 Claims under Articles 6.2, 7.1, and 11 of the DSU relating to the original investigation phase

3.5.1.1 Article 6.2 of the DSU: whether the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request

On appeal, Ukraine claimed that the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as "measures at issue" in Russia's panel request.

The Appellate Body began by recalling that a panel request governs a panel's terms of reference and fulfils a due process objective by notifying the respondent and third parties about the nature of the complainant's case and enabling them to respond accordingly. Compliance with the requirements of Article 6.2 of the DSU must be determined on the face of the panel request, in light of attendant circumstances, and on a case-by-case basis. Panels must conduct an objective examination, scrutinizing carefully the panel request, read as a whole, and on the basis of the language used including any footnotes. The requirement under Article 6.2 of the DSU to identify the specific measures at issue is satisfied, so long as the measures at issue are discernible from the panel request.

Next, the Appellate Body reviewed the Panel's analysis, which relied on language in two portions of Russia's panel request: (i) the opening paragraph, which indicated that Russia had requested consultations regarding the interim and expiry reviews, and noted in a footnote that those "Anti-Dumping measures" were imposed through a number of instruments, including the 2008 original decision, as amended by the 2010 amendment, resulting in the 2008 amended decision; and (ii) item number 1, which stated that Russia claimed violations under Article 5.8 and Articles 11.1-11.3 of the Anti-Dumping Agreement because of the alleged failure by Ukrainian authorities to exclude a certain Russian exporter from the "anti-dumping measures", referring in footnote to the 2010 decision as amending the 2008 original decision. The Panel considered that the references to the 2008 amended decision and 2010 amendment showed that Russia took issue in its panel request with the alleged failure to exclude EuroChem from the 2008 amended decision, and therefore sufficiently precisely identified the 2008 amended decision and 2010 amendment as measures at issue.

The Appellate Body considered that this matter related to Russia's claim under Article 5.8 of the Anti-Dumping Agreement as to whether Ukrainian investigating authorities – following successful court challenges by EuroChem – were required to have excluded EuroChem from the anti-dumping proceedings instead of imposing a 0% Anti-Dumping duty. The process by which the dumping margin assigned to EuroChem in the 2008 original decision was invalidated and a 0% anti-dumping duty imposed was through the 2010 amendment, which amended the 2008 original decision, resulting in the 2008 amended decision. The panel request referred in item number 1 to an allegation of inconsistency with Article 5.8 with respect to the "anti-dumping measures" at issue. To the Appellate Body, the only proper way to understand the legal question as to whether EuroChem should have been excluded from the subsequent interim and expiry reviews was to assess the basis for its non-exclusion at the time the 2008 amended decision and the 2010 amendment were issued. The Appellate Body therefore understood the Panel to have read the panel request as having established a link – through the reference to "anti-dumping measures" and footnote references to the relevant decisions – between the challenged interim and expiry reviews and the underlying instruments that related to EuroChem's status, including the 2008 amended decision and the 2010 amendment.

Moreover, the Appellate Body understood the Panel to have concluded that the basis for EuroChem's exclusion from the interim and expiry reviews was linked to the decision by Ukrainian courts to invalidate the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem, as reflected in the 2008 amended decision and the 2010 amendment. Therefore, the references to those

two instruments, including in the footnote detailing the "Anti-Dumping measures" in item number 1, were sufficiently precise to identify the specific measures at issue within the meaning of Article 6.2 of the DSU.

The Appellate Body then addressed Ukraine's arguments concerning language used in footnotes or provided as background in a panel request. The Appellate Body stated that while the location of certain information in a panel request may have some relevance for understanding whether the measures at issue are discernible, location itself is unlikely to be dispositive given the need to read the panel request as a whole. The Appellate Body therefore disagreed with Ukraine's submission that footnotes must employ explicit language to identify measures at issue. The Appellate Body also considered that whether background information can assist in the identification of measures at issue depends on the circumstances and facts of each case.

Finally, the Appellate Body noted that the 2014 extension decision, referred to in the opening paragraph of the panel request, itself referred to the 2008 amended decision and by implication the 2010 amendment. Further, the Appellate Body recalled the Panel's unchallenged analysis in relation to the second requirement of Article 6.2, to provide a brief summary of the legal basis of the claim sufficient to present the problem clearly. That analysis noted that the language in item number 1 of the panel request suggested Russia's challenge was twofold, namely that Ukraine: (i) failed to exclude EuroChem from anti-dumping measures; and (ii) subjected EuroChem to expiry and interim reviews. The panel request language, read in light of the footnotes, suggested that the first aspect of Russia's challenge concerned exclusion from the original anti-dumping investigation, and that the second aspect concerned the expiry and interim reviews.

The Appellate Body concluded that the language in Russia's panel request, including express references in footnotes, referred to the 2008 amended decision and the 2010 amendment, and sufficiently linked those measures to Russia's claim under Article 5.8 of the Anti-Dumping Agreement. The Appellate Body therefore agreed with the Panel's assessment that the 2008 amended decision and the 2010 amendment were discernible and accordingly identified as specific measures at issue in Russia's panel request. Therefore, the Appellate Body found the Panel did not err under Article 6.2 of the DSU because the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request, and upheld the Panel's finding in this respect.

3.5.1.2 Articles 7.1 and 11 of the DSU: whether the Panel erred by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement with respect to the 2008 amended decision and the 2010 amendment

Ukraine claimed that the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement with respect to the 2008 amended decision and the 2010 amendment, because such a claim was not made in Russia's panel request and therefore did not form part of the Panel's terms of reference. Ukraine considered that the Panel retroactively justified including this claim by referring to information provided by Russia subsequent to its panel request.

The Appellate Body recalled that the measures and claims identified in a panel request in accordance with Article 6.2 of the DSU constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU. The Appellate Body noted its finding that Ukraine had not established that the Panel erred under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as "measures at issue" in Russia's panel request. Moreover, Ukraine did not appeal the Panel's finding that Russia had provided, in accordance with Article 6.2 of the DSU, a brief summary of the legal basis for its claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment. Further, Ukraine did not advance other grounds in support of its challenge under Articles 7.1 and 11 of the DSU, and confirmed that if the Appellate Body were to uphold the Panel's finding that the 2008 amended decision and the 2010 amendment formed part

of the Panel's terms of reference, there would be no basis to entertain Ukraine's claims under Articles 7.1 and 11. The Appellate Body thus found that the Panel did not err under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.

3.5.2 Article 11 of the DSU: the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law

Ukraine claimed that the Panel acted inconsistently with Article 11 of the DSU by failing to examine properly the arguments and evidence it presented regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law. Ukraine's claim concerned the Panel's analysis regarding the second sentence of Article 5.8 of the Anti-Dumping Agreement, which requires immediate termination of an anti-dumping investigation, and therefore exclusion of a producer or exporter from the scope of that investigation, where a de *minimis* dumping margin has been determined for that producer or exporter. Ukraine principally maintained that the Panel failed to consider that neither Ukrainian investigating authorities nor Ukrainian courts recalculated, or in these circumstances had the competence to recalculate, EuroChem's dumping margin.

The Appellate Body examined the Panel's analysis, its reference to three Ukrainian court judgments and the 2010 amendment, and its conclusion that the "combined effect" of the Ukrainian court judgments and their implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*. The Appellate Body understood the Panel to have considered that, irrespective of whether the relevant court judgments and the 2010 amendment referred to a specific dumping margin, the outcome of these decisions was that there was, at that point, no basis for a dumping margin or an anti-dumping duty with respect to EuroChem, and that this therefore amounted to a determination of a *de minimis* dumping margin. According to the Panel, the error that was identified by Ukrainian courts, which resulted in the Ukrainian court orders to reverse the 2008 original decision with respect to EuroChem, related to the improper allocation of discounts by Ukrainian investigating authorities. The Panel further noted that this resulted in the District Court concluding that there was an "absence of dumping" by EuroChem and reaffirming that EuroChem's dumping margin had a "negative value/rate". Thus, the Appellate Body found that the Panel concluded that the Ukrainian court judgments and the 2010 amendment invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. It was on these grounds that the Panel found that the combined effect of the Ukrainian court judgments, and their implementation by ICIT's 2010 *amendment*, was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.

The Appellate Body then considered Ukraine's argument that because Ukrainian courts are not competent to calculate dumping margins, they could not have calculated a dumping margin for EuroChem, and that neither Ukrainian courts nor investigating authorities calculated a dumping margin for EuroChem. At the outset, the Appellate Body noted that the Panel had referred to Ukraine's submission, and considered that Ukraine had changed its factual arguments on whether, as a matter of Ukrainian law, Ukrainian courts or investigating authorities have the competence to make dumping determinations and concluded that these arguments did not support Ukraine's position. The Appellate Body did not regard the Panel as having sought to determine whether Ukrainian courts have the competence to, or in fact did, calculate dumping margins, or as having made such findings. Rather, the Appellate Body understood the Panel to have concluded that by rejecting MEDT's application of discounts in calculating dumping margins for EuroChem in the 2008 original decision, the Ukrainian court rulings invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. The Appellate Body did not see that the Panel took issue with Ukraine's submissions concerning the respective competence or actions of Ukrainian investigating authorities and courts regarding the calculation of dumping margins. Moreover, the Appellate Body did not see how the fact that ICIT did not refer in the 2010 amended

decision to a specific dumping margin was relevant to, or would have altered, the Panel's analysis, as the Panel's reasoning did not turn on whether a specific dumping margin was set by Ukrainian courts and/or Ukrainian investigating authorities. The Appellate Body also considered that Ukraine's arguments concerning ICIT's authority to recalculate a dumping margin for EuroChem following the court judgments were not germane to the Panel's reasoning that the "combined effect" of the Ukrainian court judgments and the 2010 amendment was that there was no basis at that point for a dumping margin or an Anti-Dumping duty with respect to EuroChem.

The Appellate Body concluded that the Panel had provided a reasoned and coherent explanation in finding that the combined effect of the Ukrainian court judgments and the implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*, triggering Ukraine's obligation under Article 5.8 of the Anti-Dumping Agreement to exclude EuroChem from the scope of the anti-dumping investigation. Therefore, the Appellate Body found that the Panel had not acted inconsistently with Article 11 of the DSU. Consequently, the Appellate Body found no reason to disturb the Panel's finding that the combined effect of the Ukrainian court judgments and the 2010 amendment meant that there was no basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem, and that this amounted to a *de minimis* dumping margin determination under Article 5.8 which required Ukraine to immediately terminate and exclude EuroChem from the scope of the investigation. The Appellate Body therefore upheld the Panel's finding that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in relation to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.

3.5.3 Claims under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement relating to MEDT's determinations of dumping in the interim and expiry reviews

On appeal, Ukraine made claims of error under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement with respect to MEDT's determinations of dumping in the interim and expiry reviews. Before addressing these claims, the Appellate Body recalled that, in the interim and expiry reviews, MEDT rejected the reported gas cost because the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and Gazprom's gas prices were below its cost of production. Instead, MEDT used the price of gas exported from Russia at the German border, adjusted for transportation expenses (surrogate price of gas) in constructing the normal value of ammonium nitrate and in conducting its ordinary-course-of-trade test.

The Appellate Body also made a number of general observations regarding Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement, noting that they form part of the disciplines concerning the determination of dumping.

Regarding Article 2.2, the Appellate Body observed that, while normal value is typically based on domestic sales prices, that provision identifies circumstances in which an investigating authority need not determine normal value on the basis of such domestic sales, namely: (i) when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country; and (ii) when domestic sales do not permit a proper comparison, either because of the particular market situation, or the low volume of the sales in the domestic market of the exporting country. Where such circumstances are present, the margin of dumping shall be determined by comparing the export price with: (i) a comparable price of the like product when exported to an appropriate third country, provided that this price is representative; or (ii) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits. With regard to the construction of normal value, the Appellate Body specified that the information or evidence used to determine the cost of production must be apt to yield or capable

of yielding a cost of production "in the country of origin". An investigating authority must therefore ensure that the information it collects is used to arrive at the cost of production in the country of origin, which may require it to adapt that information.

Regarding Article 2.2.1, the Appellate Body observed that this provision sets out when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining normal value.

Finally, regarding Article 2.2.1.1, the Appellate Body observed that the first sentence of this provision directs the investigating authority normally to base its calculations of costs on the records of the exporter or producer under investigation provided that such records: (i) are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. Given the reference to "normally" in the first sentence of Article 2.2.1.1, the Appellate Body did not exclude that there might be circumstances other than those in the two conditions, where the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, the Appellate Body did not consider it necessary to consider further whether there are indeed other circumstances in which that obligation would not apply and what these circumstances might be.

Addressing specifically the second condition in the first sentence of Article 2.2.1.1, the Appellate Body observed that it is the records of the individual exporter or producer under investigation that must reasonably reflect the costs associated with the production and sale of the product under consideration. The Appellate Body added that there is no "reasonableness" standard under that condition governing the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally. Considering the words "reasonably reflect", "costs", and "associated with", the Appellate Body considered that, under the second condition in the first sentence of Article 2.2.1.1, there must be a genuine relationship between the costs reasonably reflected in the records of the exporter or producer under investigation, and the production and sale of the specific product under consideration. The Appellate Body concluded that that second condition can be understood to refer to whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce the costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. The Appellate Body also emphasized that even where an investigating authority is justified under the first sentence of Article 2.2.1.1 in not calculating costs on the basis of the records kept by the exporter or producer under investigation, it remains subject to the disciplines set out in Article 2.2, including its relevant subparagraphs, regarding the construction of normal value.

3.5.3.1 The second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement: whether the Panel erred in finding that MEDT failed to provide an adequate basis for rejecting the reported gas cost

Ukraine's claim on appeal under Article 2.2.1.1 of the Anti-Dumping Agreement focused on the second condition in the first sentence of that provision, namely, the condition that the records kept by the exporter or producer under investigation "reasonably reflect the costs associated with the production and sale of the product under consideration". Ukraine contended that, in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, the Panel erred in its interpretation and application of that condition. Ukraine argued that these errors vitiated the Panel's findings under Article 2.2.1.1 as well as those under Article 2.2.1 of the Anti-Dumping Agreement.

The Appellate Body began by addressing Ukraine's argument that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized "nonarm's-length transactions" and "other practices" as exceptions

under the second condition in the first sentence of Article 2.2.1.1, as these transactions or practices may affect the reliability of records. According to Ukraine, despite referring to the panel report in *EU – Biodiesel (Argentina)*, the Panel refused to consider whether the conditions in the domestic Russian market and the conditions of sales of gas met its definitions of non-arm's-length transactions or other practices.

In that regard, the Appellate Body observed that "non-arm's-length transactions" and "other practices" are not terms found in Article 2.2.1.1 or elsewhere in the Anti-Dumping Agreement; rather, it is the panel in *EU – Biodiesel (Argentina)* that referred to "nonarmslength transactions or other practices which may affect the reliability of the reported costs". While noting Ukraine's understanding of arm'slength transactions, the Appellate Body did not read the panel or Appellate Body reports in *EU – Biodiesel (Argentina)* as having understood the second condition in the first sentence of Article 2.2.1.1 to contain open-ended "non-arm's-length transactions" or "other practices" "exceptions". The Appellate Body thus agreed with the Panel that the question under the second condition in the first sentence of Article 2.2.1.1 is whether the records of the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration and that this question is to be assessed on a case-by-case basis, in light of the evidence before the investigating authority and its determination. Consequently, the Appellate Body did not consider that the Panel erred in examining whether MEDT of Ukraine provided an adequate basis to find that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

Next, the Appellate Body addressed Ukraine's contention that the Panel erred because "the Panel seem[ed] to suggest that the records can only be deemed unreliable when the parties [to input transactions] are affiliated." The Appellate Body understood Ukraine to argue that the Panel appeared to have drawn a distinction between affiliated and non-affiliated parties to input transactions for the purposes of the second condition in the first sentence of Article 2.2.1.1. To Ukraine, however, the rationale for determining whether records are "unreliable" under that condition is the dependent and uncommercial character of the relevant input transactions, and any legal affiliation between transacting parties is only an "indication that these practices may more easily occur". In support of its understanding of the second condition in the first sentence of Article 2.2.1.1, Ukraine referred to: (i) several WTO disputes in which a panel or the Appellate Body allegedly assessed whether transactions were at arm's length by considering whether commercial principles had been respected or whether market prices were applied, instead of focusing on whether the parties to such transactions were affiliated; and (ii) the second Ad Note to Article VI of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement as relevant context, which in its view confirms that the Anti-Dumping Agreement does not preclude the possibility that certain government practices may render prices "unreliable".

In addressing these arguments by Ukraine, the Appellate Body recalled that MEDT had found that the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and Gazprom's gas prices were below its cost of production.

Regarding MEDT's consideration that, due to government regulation of gas prices in Russia, the costs incurred by the investigated Russian producers were lower than prices in other countries or export prices of gas from Russia, the Appellate Body recalled that, to the extent costs are genuinely related to the production and sale of the product under consideration, there is no additional or abstract standard of "reasonableness" that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1. Like the Panel, the Appellate Body considered that the examination under the second condition in the first sentence of Article 2.2.1.1 is not one that pertains to whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries. Moreover, the Appellate Body saw no reason to question the Panel's conclusion that MEDT's examination of the gas costs incurred by the investigated

Russian producers, as compared with prices in other countries or export prices of gas from Russia, pertained to whether the cost of gas incurred by these producers was reasonable, rather than to whether the records reasonably reflect the costs associated with the production and sale of ammonium nitrate.

Regarding MEDT's consideration that Gazprom sells gas in the domestic Russian market below cost, the Appellate Body observed that the Panel had made several key factual findings regarding MEDT's determinations as set out in its "Investigation Report" issued in the interim and expiry reviews. Among other things, the Panel considered that: (i) "there is nothing in [the Investigation Report] that shows that [Gazprom's below-cost domestic sales] affected the reliability of the records of the investigated Russian producers, such that the records did not reasonably reflect the costs associated with production and sale of ammonium nitrate"; (ii) there was no determination by MEDT that Gazprom was affiliated with the investigated Russian producers and MEDT did not even consider who supplied these producers with gas; (iii) "MEDT of Ukraine did not ask the investigated Russian producers the names of their gas suppliers" and "EuroChem had … suppliers" other than Gazprom; (iv) there was nothing in the Investigation Report supporting the view that prices of other gas suppliers were affected by the prices of Gazprom; (v) "[t]here is no reference to such suppliers of EuroChem in the Investigation Report, or any finding [by MEDT] that the records of the investigated Russian producers, insofar as they reflected the prices paid to these suppliers, were unreliable"; and (vi) "there is no correlation in MEDT of Ukraine's findings [in the Investigation Report] between alleged below-cost sales by Gazprom and the reliability of the records of the investigated Russian producers." These statements showed to the Appellate Body that the Panel's analysis was tailored to the specific circumstances of this case, where no determination was made by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected other gas suppliers' prices.

The Appellate Body acknowledged that the Panel did not limit its analysis to these factual findings; rather, the Panel went on to state that Article 2 of the Anti-Dumping Agreement is concerned with the pricing behaviour of individual exporters and producers. The Panel added that a producer may source inputs used to produce the product under consideration from multiple unrelated suppliers and that the prices paid by the producer to these unrelated suppliers would form part of the costs that it incurs to produce the product under consideration. The Panel did not consider that "the investigated Russian producers' own records could be said to be unreliable, or not reasonably reflect the costs associated with the production and sale of the product under investigation, because its unrelated suppliers' prices are government regulated, lower than the prices prevailing in other countries, or allegedly priced below their cost of production."

According to the Appellate Body, such references to "unrelated suppliers", read in isolation, could arguably be read to suggest that, in the Panel's view, records may not be disregarded under the first sentence of Article 2.2.1.1 on the sole basis that input prices are set by the government below cost of production when the producers or exporters of the product under investigation and the input suppliers are unrelated (but might be when these entities are related). To the extent the Panel Report suggests as much, the Appellate Body expressed reservations regarding the relevance of drawing a distinction between related parties to input transactions, on the one hand, and unrelated parties to such transactions, on the other hand, for the inquiry under the first sentence of Article 2.2.1.1. The Appellate Body considered that simply because parties to input transactions are considered to be unrelated does not mean that cost calculations should necessarily be based on records kept by the exporter or producer under the first sentence of Article 2.2.1.1. In this context, the Appellate Body recalled that, given the reference to "normally" in the first sentence of Article 2.2.1.1, it did not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, to the extent the Panel's statements regarding unrelated suppliers could be understood to have been made in the limited context of the second condition in the first sentence of Article 2.2.1.1, the Appellate Body did not take issue with the Panel's proposition that the prices paid by the producer to unrelated suppliers would form part of the costs that it incurs to produce the product under consideration.

In any event, the factual findings on which the Panel relied indicated to the Appellate Body that the Panel's analysis and conclusion with respect to MEDT's view that Gazprom sells gas below cost were tailored to the specific facts and arguments before it. Given the Panel's case-specific approach and given that the Panel's conclusion relied on the absence of a determination by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected these suppliers' prices, the Appellate Body saw no reason to find error with the Panel's conclusion that Gazprom's below-cost prices did not constitute a sufficient factual basis for MEDT to conclude that the records did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

Therefore, the Appellate Body found that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Consequently, the Appellate Body upheld the Panel's finding that Ukraine acted inconsistently with Article 2.2.1.1 because MEDT did not provide an adequate basis under the second condition in the first sentence of that provision to reject the reported gas cost.

Having reached this finding, the Appellate Body observed that Ukraine's claim under Article 2.2.1 of the Anti-Dumping Agreement was dependent on reversing the Panel's finding of inconsistency with Article 2.2.1.1. As the Appellate Body recalled, Ukraine challenged the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1. Specifically, Ukraine argued that the Panel's finding of inconsistency with Article 2.2.1 was vitiated by the Panel's errors of interpretation and application with respect to the second condition in the first sentence of Article 2.2.1.1. Given the consequential nature of Ukraine's appeal under Article 2.2.1, and having upheld the Panel's findings under Article 2.2.1.1, the Appellate Body also upheld the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

3.5.3.2 Article 2.2 of the Anti-Dumping Agreement: whether the Panel erred in finding that MEDT failed to calculate the cost of production "in the country of origin"

Ukraine claimed that the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that MEDT failed to calculate the cost of production "in the country of origin" when constructing normal value for two investigated Russian producers of ammonium nitrate on the basis of the surrogate price of gas.

The Appellate Body began by recalling that, in addressing Russia's claims concerning MEDT's gas cost calculations in constructing normal value in the interim and expiry reviews, the Panel assessed whether, having rejected the reported gas cost without providing an adequate basis to do so under that condition, MEDT failed to construct normal value on the basis of the cost of production in the country of origin within the meaning of Article 2.2 by using the surrogate price of gas. As the Appellate Body recalled, the Panel considered that Article 2.2 does not preclude the possibility that an investigating authority may have to use out-of-country evidence to construct normal value, provided that such evidence is apt to yield or capable of yielding the cost of production in the country of origin. However, the Panel did not see any explanation in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the "export price from Russia at the German border [] to reflect the cost of the investigated Russian producers in the country of origin". In these circumstances, the Panel did not consider that the adjustment for transportation expenses was sufficient to adapt the export price of gas from Russia at the German border to reflect the cost in Russia. The Panel then dismissed Ukraine's argument that MEDT could not use domestic gas prices in Russia because there was no undistorted domestic market for gas in Russia, relying on its earlier finding that MEDT had not provided a proper basis to reject the reported gas cost.

The Appellate Body considered that certain of Ukraine's arguments concerning the Panel's interpretation and application of Article 2.2 depended on Ukraine's claim that the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1. In particular, Ukraine drew on the Appellate Body reports in *EC – Fasteners (China) (Article 21.5 – China) and US – Softwood Lumber IV* to argue that it would be circular and void of economic logic to calculate the cost of production under Article 2.2 on the basis of costs adequately rejected under the second condition in the first sentence of Article 2.2.1.1. To the Appellate Body, this argument, while raised in relation to Article 2.2, assumed that MEDT provided an adequate basis to reject costs under the second condition in the first sentence of Article 2.2.1.1 and was thus dependent on finding error with the Panel's findings under Article 2.2.1.1. Having upheld the Panel's findings under Article 2.2.1.1, the Appellate Body rejected Ukraine's arguments on appeal concerning Article 2.2, insofar as they were dependent on alleged errors by the Panel in its interpretation or application under Article 2.2.1.1 of the Anti-Dumping Agreement.

The Appellate Body then addressed Ukraine's arguments on appeal concerning the Panel's interpretation and application of Article 2.2 that Ukraine identified as not being dependent on it finding error with the Panel's interpretation or application of the second condition in the first sentence of Article 2.2.1.1.

Starting with Ukraine's interpretative arguments, the Appellate Body observed that Ukraine challenged the Panel's interpretation of Article 2.2 by relying on certain Appellate Body findings with respect to Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV*. In that regard, the Appellate Body recalled that Article 14(d) of the SCM Agreement contains guidelines for the calculation of the amount of a subsidy in terms of the benefit to the recipient. In *US – Softwood Lumber IV*, the Appellate Body stated that a government's role in providing a financial contribution, in terms of the provision of goods, may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods. In these circumstances, the comparison of the price at which the government provides goods with the price at which private suppliers sell these goods in the domestic market could indicate a benefit that is artificially low, or even zero, such that the full extent of the subsidy would not be captured, thereby undermining the rights of Members under the SCM Agreement to countervail subsidies. The Appellate Body noted that although Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement have certain textual similarities (they refer respectively to the cost of production "in the country of origin" and the adequacy of remuneration "in the country of provision"), Article 14(d) contains the phrase "in relation to prevailing market conditions", which is not found in Article 2.2. Moreover, these two provisions do not serve the same function. The function of Article 14(d) is to ascertain the benefit conferred on the recipient of a subsidy by, *inter alia*, the governmental provision of goods and services, whereas Article 2.2 concerns the establishment of normal value when it cannot be determined on the basis of domestic sales. In light of these differences, the Appellate Body considered that the Appellate Body's findings with respect to Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* do not speak to the costs that may be used to construct normal value under Article 2.2 of the Anti-Dumping Agreement. The Appellate Body thus concluded that the Panel did not err in its interpretation of Article 2.2 in considering that these Appellate Body findings were not relevant to its interpretative exercise.

Next, the Appellate Body considered Ukraine's claim that the Panel erred in its application of Article 2.2 in finding that adjusting the export price of gas from Russia at the German border by accounting for transportation expenses was not sufficient to adapt the price to reflect prices in Russia. In that regard, Ukraine argued that none of the interested parties in the investigation had pointed to any differences in the market conditions in Russia (other than that prices were fixed by the State) and market conditions relating to the export prices, which would have necessitated further adjustments to the export gas prices. Accordingly, Ukraine considered that MEDT could not be faulted for limiting its adaptation to the gas export price to account for transportation expenses.

The Appellate Body recalled that the phrase "cost of production in the country of origin" indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to

yield or capable of yielding a cost of production "in the country of origin". Therefore, according to the Appellate Body, an investigating authority has to ensure that the information it collects is used to arrive at the "cost of production in the country of origin" and compliance with this obligation may require the investigating authority to adapt that information.

The Appellate Body then recalled the Panel's consideration that there was no explanation by MEDT as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin. The Appellate Body also recalled that the Panel had relied on its earlier finding under the second condition in the first sentence of Article 2.2.1.1, a finding with which the Appellate Body agreed. The Appellate Body considered that other than pointing to the deduction of transportation expenses, Ukraine had not asserted that MEDT had otherwise adapted the export price of gas used in its calculations to reflect the cost of production in Russia. The Appellate Body therefore saw no basis to question the Panel's conclusion that the adjustment for transportation expenses made by MEDT was not sufficient to adapt the export price from Russia to reflect the cost of production in the country of origin (i.e. Russia). The Appellate Body emphasized that it was mindful of the fact that, in the particular circumstances of this case, given that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, there may not have been a basis to rely on costs other than those reflected in the records of the investigated producers.

In light of the foregoing, the Appellate Body found that the Panel did not err in its interpretation or application of Article 2.2 of the Anti-Dumping Agreement. Consequently, the Appellate Body upheld the Panel's finding that Ukraine acted inconsistently with that provision because MEDT failed to calculate the cost of production "in the country of origin".

3.6 Appellate Body Report, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/AB/R

This dispute concerned the imposition of definitive anti-dumping measures by Morocco on imports of certain hot-rolled steel products from Turkey, and certain aspects of the investigations and determinations underlying those measures. The Panel Report in this dispute was circulated to WTO Members on 31 October 2018. The Panel found that Turkey had established that Morocco acted inconsistently with the following provisions of the Anti-Dumping Agreement: (i) Article 5.10 by failing to conclude the investigation within the 18-month time limit; (ii) Article 6.8 by rejecting the reported information and establishing the margins of dumping for the two investigated Turkish producers on the basis of facts available; (iii) Article 6.9 by failing to inform all interested parties of the essential facts relating to its use of facts available to determine the margins of dumping; (iv) Article 3.1 in determining that the domestic industry was "unestablished"; (v) Articles 3.1 and 3.4 by improperly conducting the injury analysis in the form of "material retardation of the establishment of the domestic industry"; and (vi) Articles 3.1 and 3.4 by failing to evaluate five of the 15 injury factors listed in Article 3.4, disregarding the captive market in the injury analysis, and relying in the injury analysis on a certain report without properly investigating the significance of inaccuracies in that report.

Morocco appealed the Panel's interpretation and application of Articles 3.1, 3.4, and 6.8 of the Anti-Dumping Agreement. Morocco also contended that the Panel erred in its findings under Article 4.4, and acted inconsistently with Article 11, of the DSU.

In its letter of 4 December 2019, Morocco informed the Appellate Body of its decision to withdraw the appeal, and requested the Appellate Body to inform the DSB of this decision, pursuant to Rule 30(1) of the Working Procedures. Morocco further requested the Appellate Body to reflect the reasons for Morocco's decision in the event the Appellate Body issued a report. Specifically, Morocco stated that the anti-dumping measure underlying the dispute expired on 26 September 2019. According to Morocco, although it

continues to believe that the Panel's findings suffer from serious flaws, those findings have become moot with the expiration of the underlying measure. Consequently, and in light of the heavy workload of the Appellate Body, Morocco stated that it had decided to withdraw the appeal. Upon receipt of the letter, the Appellate Body promptly informed the Chair of the DSB of Morocco's decision to withdraw the appeal.

On 4 December 2019, Turkey submitted a letter to the Appellate Body, in which it noted Morocco's decision to withdraw the appeal and joined Morocco in requesting the Appellate Body to notify the DSB of Morocco's decision. In addition, Turkey noted that, on the previous occasion in which an appeal was withdrawn, i.e. in *India – Autos* (DS146 and DS175), the Appellate Body issued a short report noting the withdrawal of the appeal. In that dispute, the Appellate Body Report, together with the Panel Report, was subsequently adopted by the DSB. Turkey considered that the Appellate Body should follow the same practice in the present dispute.

The Report of the Appellate Body describes the Panel's findings and summarizes the procedural history of the case. The Report does not address the substantive legal issues raised by Morocco in its appeal. The Report recalls the requirements of Articles 16.4 and 17.14 of the DSU regarding the adoption of panel and Appellate Body reports. The Report states that, in view of Morocco's withdrawal of the appeal by its letter of 4 December 2019, the Appellate Body has completed its work in the appeal. The Report further states that the 30-day period specified in Article 17.14 of the DSU for adopting the Appellate Body Report, together with the Panel Report, begins from the circulation of the Report.

3.7 Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R

This dispute concerned measures taken by the Russian Federation (Russia) with respect to railway products from Ukraine. In particular, at issue in this dispute were decisions: (i) to suspend conformity assessment certificates; (ii) to reject applications for new conformity certificates; and (iii) not to recognize conformity certificates issued by other member states of the Eurasian Economic Union.

In 2011, the Commission of the Customs Union of the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation approved a decision adopting CU Technical Regulations setting safety and technical requirements for placing on the market certain railway products. The CU Technical Regulations entered into force in 2014 with a transitional period during which the conformity assessment certificates issued prior to the entry into force of the CU Technical Regulations continue to be valid.

Ukraine alleged before the Panel that, since 2014, Russia has systematically suspended the conformity assessment certificates issued to Ukrainian producers of railway products prior to the entry into force of the CU Technical Regulations, and systematically rejected or returned without consideration applications submitted by Ukrainian producers of railway products to obtain new conformity assessment certificates based on the CU Technical Regulations. In addition, Ukraine claimed that the conformity assessment certificates issued by the authorities in other CU countries to Ukrainian producers of railway products have not been recognized by Russia. Before the Panel, Ukraine claimed that:

1. Russia acted inconsistently with Articles I:1, XI:1, and XIII:1 of the GATT 1994 by systematically preventing Ukrainian railway products from being imported into Russia through suspension of valid certificates issued for railway products, refusal to issue new certificates for railway products, and nonrecognition of certificates issued by other CU countries (systematic prevention – the first measure);

2. Russia acted inconsistently with Articles 5.1.1, 5.1.2, and 5.2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) by suspending certificates and rejecting applications for new certificates with regard to Ukrainian producers of railway products (suspensions and rejections – the second measure); and

3. Russia acted inconsistently with Articles 2.1, 5.1.1, and 5.1.2 of the TBT Agreement, and Articles I:1, III:4, and X:3(a) of the GATT 1994 by not recognizing certificates issued under CU Technical Regulation 001/2011 to Ukrainian suppliers of railway products in other CU countries (non-recognition of certificates – the third measure).

Russia disputed all of Ukraine's claims before the Panel. In addition, Russia requested a preliminary ruling from the Panel, alleging that Ukraine's request for the establishment of a panel (panel request) fell short of the requirements of Article 6.2 of the DSU.

3.7.1 Panel Report

In the Panel Report, the Panel made the following findings that were relevant to this appeal:

1. in respect of Russia's request for a preliminary ruling, the Panel found that Russia had failed to establish that Ukraine's panel request was inconsistent with Article 6.2 of the DSU;

2. in respect of the instructions suspending certificates (the first measure):

    i. Ukraine had failed to establish, in respect of each of the 14 instructions at issue, that Russia had acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement; and

    ii. Ukraine had failed to establish, in respect of each of the 14 instructions at issue, that Russia had acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement;

3. in respect of the decisions rejecting applications for certificates (the second measure):

    i. Ukraine had failed to establish, in respect of the two decisions through which the Russian Federal Budgetary Organization (FBO) "returned without consideration" applications for certificates submitted by Ukrainian producers under CU Technical Regulation 001/2011, and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia had acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement; and

    ii. Ukraine had failed to establish, in respect of both decisions through which the FBO "returned without consideration" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 001/2011 (decision 1 insofar as it relates to one of the products covered by application A3 and application A4, and decision 2), and in respect of the decision through which the FBO "annulled" applications for certificates submitted by a Ukrainian producer under CU Technical Regulation 003/2011, that Russia had acted inconsistently with its obligations under Article 5.1.2, first and second sentences, of the TBT Agreement;

4. in respect of the non-recognition of certificates issued in CU countries other than Russia (the third measure):

    i. the non-recognition requirement is properly before the Panel;

    ii. Ukraine had established that Russia had acted inconsistently with Article I:1 of the GATT 1994; and

    iii. Ukraine had established that Russia had acted inconsistently with Article III:4 of the GATT 1994; and

5. in respect of the systematic import prevention (the fourth measure), Ukraine had failed to establish its claims of inconsistency with Articles I:1, XI:1, and XIII:1 of the GATT 1994, because it did not demonstrate the existence of the systematic import prevention.

In addition, the Panel made a number of findings that were not appealed. In particular: (i) with respect to 13 out of 14 instructions suspending certificates, the Panel found that Ukraine had established that Russia had acted inconsistently with Article 5.2.2, third obligation, of the TBT Agreement; (ii) with respect to one out of three decisions rejecting applications for certificates (decision 1 insofar as it relates to applications A1 and A2 and one of the products covered by application A3), the Panel found that Ukraine had established that Russia had acted inconsistently with Article 5.1.2, first and second sentences, of the TBT Agreement; (iii) with respect to all three decisions rejecting applications for certificates at issue, the Panel found that Ukraine had failed to establish that Russia had acted inconsistently with Article 5.2.2, second obligation, of the TBT Agreement; (iv) with respect to two out of three decisions rejecting applications for certificates at issue, the Panel found that Ukraine had established that Russia had acted inconsistently with Article 5.2.2, third obligation, of the TBT Agreement; (v) with respect to the non-recognition of certificates issued in CU countries other than Russia, the Panel found that Ukraine had failed to establish that Russia had acted inconsistently with Article 2.1 of the TBT Agreement; and (vi) with respect to the non-recognition of certificates issued in CU countries other than Russia, the Panel made no findings regarding Ukraine's claims under Articles 5.1.1 and 5.1.2 of the TBT Agreement, and Article X:3(a) of the GATT 1994.

3.7.2 Appellate Body Report

On appeal, Ukraine claimed that the Panel erred: (i) in its analysis relating to the existence of a "comparable situation" under Article 5.1.1 of the TBT Agreement and in finding that Ukraine failed to establish that Russia acted inconsistently with its obligations under Article 5.1.1 with respect to the instructions suspending certificates and the decisions rejecting applications for certificates; (ii) in finding that Ukraine failed to establish that the proposed less trade-restrictive alternatives were reasonably available, and that Russia acted inconsistently with its obligations under Article 5.1.2 of the TBT Agreement with respect to the instructions suspending certificates and the decisions rejecting applications for certificates; and (iii) in its assessment of the existence of a systematic import prevention in relation with Ukraine's claims under Articles I:1, XI:1, and XIII:1 of the GATT 1994.

Russia, for its part, claimed on appeal that the Panel erred by: (i) finding that Russia has failed to establish that Ukraine's panel request is not consistent with Article 6.2 of the DSU; (ii) finding that Russia has failed to establish that the third measure, non-recognition of certificates, was not within the Panel's terms of reference; (iii) making findings with respect to an element related to the third measure that the Panel found to be outside its terms of reference; (iv) relieving Ukraine from the burden of establishing *a prima facie* case that the third measure exists as a single measure; and (v) finding that the third measure exists by finding that the "general" non-recognition requirement flows from the CU Technical Regulations.

3.7.2.1 Russia's claims regarding the Panel's preliminary ruling

Russia claimed that the Panel erred in finding in its preliminary ruling that Russia had failed to establish that Ukraine's panel request was inconsistent with Article 6.2 of the DSU in two respects: (i) in that it properly linked the measures at issue with the legal basis of its complaint; and (ii) in that it properly identified the third measure at issue.

With respect to the linkages between the measures at issue and the legal basis of the complaint, Russia took issue with the Panel's use of "weak auxiliary verbs", such as "*could* relate" or "*could* concern", and asserted that this language revealed that the linkages between the measures and the legal obligations were not as clear as the Panel found. The Appellate Body did not agree with Russia and instead found

that the Panel statements identified by Russia in connection with this argument represented intermediate steps in the Panel's reasoning that, in connection with other elements of the Panel's analysis, provided the basis for the Panel's conclusion concerning linkages between the measures challenged by Ukraine and the WTO provisions allegedly infringed. In addition, Russia argued that the Panel had erred in failing to recognize similarities in the deficiencies of the panel requests in the present case and in *China – Raw Materials*. The Appellate Body found that the Panel had properly engaged with the same argument raised by Russia before the Panel and had provided a detailed explanation of why it did not see sufficient similarities between the panel requests in the present case and the panel requests in *China – Raw Materials*.

With respect to the identification of the third measure in Ukraine's panel request, Russia alleged that the Panel had failed to review the description of the third measure in the panel request "on its face". The Appellate Body recalled that, in order to determine whether a panel request complies with Article 6.2 of the DSU, a panel must carefully scrutinize the request, read as a *whole*. The Appellate Body considered that Russia's proposed reading of the panel request would not take account of certain parts of the panel request and that such a reading would thus not constitute a reading as a *whole*. The Appellate Body considered that, in the present case, the Panel assessed the panel request and the third measure in keeping with the standards of Article 6.2 of the DSU. In addition, Russia argued that the third measure identified by Ukraine consisted of a complex legal instrument, and that Ukraine was required to specify particular parts of that legal instrument that it wished to challenge before the Panel. The Appellate Body noted that the Panel had engaged with Russia's argument but found that Ukraine's panel request identified the measure at issue and that it did so with sufficient clarity to allow a reader to discern the measure.

In sum, therefore, the Appellate Body found that Russia had not established that the Panel erred in determining the scope of its terms of reference in this dispute.

3.7.2.2 Russia's claims concerning the Panel's findings relating to the third measure

3.7.2.2.1 Russia's claim that the Panel erred in finding the existence of the third measure

Russia claimed that the Panel failed to conduct an objective assessment pursuant to Article 11 of the DSU in finding that the third measure, described as a general non-recognition requirement which the Russian authorities considered to *flow from* CU Technical Regulation 001/2011, had been demonstrated to exist. Russia asserted that the third measure as found by the Panel did not exist, because the alleged non-recognition requirement was not general in nature and did not flow from CU Technical Regulation 001/2011.

Specifically, Russia argued that the text of CU Technical Regulation 001/2011 is origin neutral and that, under the Treaty on the Eurasian Economic Union (EAEU Treaty), products subject to CU technical regulations must be put into circulation within the CU without additional requirements. Russia also argued that, to the extent that the Russian authorities at issue interpreted CU Technical Regulation 001/003 and concluded that the non-recognition requirement flowed from that regulation, these authorities were not competent to interpret CU Technical Regulation 001/2011. With respect to these arguments, the Appellate Body recalled that the third measure was not CU Technical Regulation 001/2011 as such, but it was the alleged *decision* by the Russian authorities that they will not recognize the validity of certificates issued for Ukrainian railway products by certification bodies in other CU countries unless the products were manufactured within the CU. The Appellate Body did not see merit in Russia's arguments, relating to the meaning of CU Technical Regulation 001/2011 as such, for determining whether the Panel erred in its analysis of whether the third measure as described by Ukraine existed. Russia also relied on the fact that its authorities had issued certificates concerning products produced outside the CU under CU Technical Regulation 001/2011 to argue that a general non-recognition requirement flowing from CU Technical Regulation 001/2011 did not exist. The Appellate Body recalled that the third measure

concerned only the *non-recognition* by Russia of certificates already issued to Ukrainian producers under CU Technical Regulation 001/2011 in other CU countries and thus saw no merit in this argument. In sum, the Appellate Body found that Russia had not established that the Panel acted inconsistently with Article 11 of the DSU in finding that the third measure was general in nature and flowed from CU Technical Regulation 001/2011. Thus, the Appellate Body upheld the Panel's finding that the third measure had been demonstrated to exist.

3.7.2.2.2 Russia's claim that the Panel erred by relieving Ukraine from the necessity of establishing a prima facie case that the third measure exists as a single measure

Russia claimed that the Panel erred under Article 11 of the DSU by relieving Ukraine of the burden to make a *prima facie* case with respect to the existence of a single measure composed of several different instruments. Russia argued that different documents identified in Ukraine's panel request with respect to the third measure have different legal force and scope of application. In Russia's view, Ukraine failed to explain how these different instruments operated together as a single measure. The Appellate Body recalled that Article 11 of the DSU requires a panel to identify a measure by thoroughly scrutinizing it, although exactly what is required varies depending on the circumstances of each case. In the present case, the Appellate Body noted that the Panel assessed the relationships and interactions among the different instruments submitted by Ukraine and confirmed that the third measure existed as a single measure. Accordingly, the Appellate Body found that Russia failed to establish that the Panel relieved Ukraine of its duty to establish a *prima facie* case that the third measure existed as a single measure.

3.7.2.2.3 Russia's claim that the Panel erred in finding that the third measure was within its terms of reference

Russia claimed that the Panel erred under Articles 6.2 and 7.1 of the DSU by finding that the third measure is within the Panel's terms of reference. In Russia's view, the third measure identified in Ukraine's panel request consisted of CU Technical Regulation 001/2011, as such, which was different from the third measure described by Ukraine and the Panel in the written submissions and the Panel Report, respectively. Russia contended that, as a consequence, the Panel assessed a measure that was not within its terms of reference and therefore acted inconsistently with Article 11 of the DSU. The Appellate Body noted that Russia's claim in this regard was based on the premise that the Panel erred in its identification of the third measure from Ukraine's panel request. Having rejected this premise already in addressing Russia's claim regarding the Panel's preliminary ruling, the Appellate Body upheld the Panel's finding that the third measure was within its terms of reference.

3.7.2.2.4 Russia's claim that the Panel erred by continuing to make findings with respect to the alleged registration condition

Russia claimed that the Panel acted inconsistently with Article 11 of the DSU by making findings with respect to a measure that was not within its terms of reference. Specifically, Russia argued that the Panel made findings regarding the alleged "registration condition" after having concluded that this measure was not within its terms of reference. The Appellate Body recalled that in past cases it had clarified that panels do not exceed their terms of reference when making purely descriptive comments that do not constitute legal findings or conclusions. In the present case, the Appellate Body found that the Panel's statements at issue were either merely descriptive statements or concerned, properly, the third measure. Accordingly, the Appellate Body found that Russia had failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

3.7.2.3 Ukraine's claim under Article 5.1.1 of the TBT Agreement

3.7.2.3.1 The Panel's interpretation of Article 5.1.1 of the TBT Agreement

Ukraine argued that the Panel erred in its interpretation and application of the phrase "in a comparable situation" in Article 5.1.1 by failing to elaborate on what exactly has to be compared, with respect to the instructions suspending certificates and the decisions rejecting applications for new certificates. Specifically, Ukraine considered that the Panel provided a very limited interpretation of the phrase "in a comparable situation" and did not clarify whether an assessment of the situation of a country as a whole or that of the relevant suppliers is required.

At the outset, the Appellate Body noted that Article 5.1.1 of the TBT Agreement consists of two clauses, the first clause establishing a national treatment obligation and a mostfavoured nation treatment obligation regarding the conditions of access to an assessment of conformity to suppliers of like products, and the second clause defining "access" to conformity assessment procedures for purposes of these obligations. The Appellate Body further observed that the "likeness" of the products at issue is central in defining the scope of the nondiscrimination obligations under Article 5.1.1, such that there is no obligation to grant access to conformity assessment under no less favourable conditions, if the products being supplied are not "like". Moreover, the Appellate Body considered that Article 5.1.1 requires an assessment of whether the conditions for access to conformity assessment granted by the regulating Member to suppliers of domestic or thirdcountry products modify the conditions of competition to the detriment of suppliers of like imported products. Finally, the Appellate Body noted that the national treatment and mostfavoured nation treatment obligations in Article 5.1.1 are qualified by the phrase "in a comparable situation". For the Appellate Body, even though the word "situation" could potentially encompass a large number of factors on the basis of which a comparison could be made, the relevant factors would be those with a bearing on the conditions for granting access to conformity assessment in a particular case. Moreover, in accordance with the second clause of Article 5.1.1, the rules of the conformity assessment procedure will also be relevant for defining the universe of situations to be compared.

The Appellate Body pointed out that the words "in a comparable situation" relate to the entire phrase "so as to grant access for suppliers … under conditions no less favourable", and not only to the phrase "in any other country" or the "suppliers of like products". Thus, "in a comparable situation" qualifies the entire requirement to grant access to suppliers of like products under no less favourable conditions, indicating that whether a situation is "comparable" should be assessed in relation to the measure at issue granting access to conformity assessment to suppliers of like products and in light of the particular circumstances of each case. In addition, the Appellate Body considered that the function of conformity assessment procedures, which is to determine that relevant requirements in technical regulations or standards are fulfilled, as indicated in Annex 1.3 to the TBT Agreement, provides guidance for the determination of a "comparable situation". Thus, factors that impact the ability of Members to make a determination that relevant requirements in technical regulations or standards are fulfilled may be relevant in the inquiry of "a comparable situation".

The Appellate Body further noted that the obligations under Article 5.1.1 concern "access for *suppliers* of like products" to conformity assessment, and that the second clause of Article 5.1.1 defines "access" as "*suppliers*' right to an assessment of conformity". For the Appellate Body, it is therefore the suppliers of like products that are entitled to an assessment of conformity under the rules of the procedure and under conditions no less favourable, and comparability of the situations has to be assessed by reference to the "suppliers". Thus, factors relating to an entire country may be relevant to the inquiry of whether a "comparable situation" exists insofar as they affect the suppliers of like products at issue in a particular case.

In sum, the Appellate Body found that the assessment of whether access is granted under conditions no less favourable "in a comparable situation" within the meaning of Article 5.1.1 should focus on factors with a bearing on the conditions for granting access to conformity assessment in that specific case and

the ability of the regulating Member to ensure compliance with the requirements in the underlying technical regulation or standard. In a particular case, such an assessment may involve the analysis of various factors, including the rules of the conformity assessment procedure; whether its preparation, adoption, or application is challenged; the nature of the products at issue; and the situation in a particular country or supplier. Nevertheless, the relevant factors for determining the existence of a "comparable situation" should ultimately relate to the Member's ability to make a positive assurance of conformity with respect to the specific suppliers of like products at issue, such that if no comparable situation existed for these suppliers, the obligation to grant nondiscriminatory access to conformity assessment would not apply to them.

Turning to review the Panel's analysis under Article 5.1.1, the Appellate Body considered that the Panel had correctly set out the interpretation of that provision. Thus, the Panel had correctly recognized that, in determining whether a situation is comparable, such that no less favourable access conditions must be granted, "it is necessary to identify relevant factors that render a situation comparable or not", and that relevant factors would include the ability of the importing Member to undertake conformity assessment activities under the rules of the procedure with adequate confidence. Specifically, the Appellate Body agreed with the Panel that the relevant aspects of a situation would include "aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities".

In light of the above, the Appellate Body concluded that the Panel adequately set out the interpretative framework of Article 5.1.1 of the TBT Agreement and did not err in its interpretation of the phrase "in a comparable situation".

3.7.2.3.2 The Panel's application of Article 5.1.1 of the TBT Agreement

Ukraine further argued that in its analysis under Article 5.1.1 the Panel relied on general considerations regarding the political or internal security situation in Ukraine that had no bearing on the situation of the relevant suppliers whose certificates were suspended or rejected. Ukraine specifically took issue with the focus of the Panel assessment on the risk to life or health of Russian *inspectors*, rather than on aspects specific to the *suppliers* at issue or the location of the suppliers' facilities. In Ukraine's view, the Panel had to compare the situations of the specific suppliers whose certificates were suspended, or applications rejected by the FBO with the situations of suppliers of like products originating in Russia and other countries.

The Appellate Body observed that, in its assessment of the evidence on the record, the Panel made only limited references to relevant factors relating to the specific suppliers at issue, such as the location of the suppliers' facilities. Importantly, while the Panel focused its analysis on the security situation in Ukraine in general, it did not assess the evidence on the record with a view to determining how the security situation related to the specific suppliers at issue, and did not in fact focus, as it stated in its interpretation, on "aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers' facilities". Thus, the Appellate Body did not see that, in its assessment of the existence of a "comparable situation", the Panel had taken into consideration the situation of the specific suppliers at issue or the regions where the relevant suppliers were located or provided an explanation as to how the evidence on the record concerning the existence of security concerns and antiRussian sentiment in Ukraine in general related to these regions and suppliers.

Furthermore, the Appellate Body pointed out that, in its overall assessment of the evidence, the Panel had referred to the importance of protecting human life and health and noted that "the importing Member in applying Article 5.1.1 may confront the need to weigh and balance the interests of suppliers of products originating in the territories of other Members in an assessment of conformity against its interest in *safeguarding the life or health of its employees* when undertaking conformity assessment activities, such as inspections, abroad." The Appellate Body recognized that the Panel did not rely on the protection

of human life and health as a legitimate objective relevant under Article 5.1.1 in general, but rather considered this objective to be a relevant factor to determine the existence of a "comparable situation" in the circumstances of the present case, to the extent that it could be seen as a factor impacting on the ability of Members to make a determination that relevant requirements in technical regulations or standards are fulfilled, thereby ensuring compliance with these requirements. At the same time, the Appellate Body noted that the question before the Panel was whether a comparable situation existed in the present dispute. According to the Appellate Body, the interest of safeguarding the life and health of governmental employees could only constitute a pertinent consideration for purposes of establishing the existence of a "comparable situation" to the extent that the situation applicable to *the specific suppliers at issue* impedes the conditions for granting access to conformity assessment.

The Appellate Body also disagreed with the Panel's conclusion that there was a need to "weigh and balance" the market access interests of suppliers of products originating in the territories of other Members against the interest in safeguarding the life and health of governmental employees. The Appellate Body considered that, while such a balancing test may be appropriate in assessing whether a measure is more trade-restrictive than necessary under Article 2.2 of the TBT Agreement, this was not the question under Article 5.1.1. Nor did the Appellate Body see a basis for the Panel's statement that the importing Member benefits from a "margin of discretion" in carrying out such a weighing and balancing of interests of suppliers and employees, insofar as the existence of a "comparable situation" had to be established based on evidence pertaining to the suppliers at issue. In light of these considerations, the Appellate Body concluded that, by focusing its analysis on whether the FBO acted "outside its margin of discretion by balancing the interests of Ukrainian suppliers and FBO employees", the Panel failed to consider how the interest of safeguarding the life and health of FBO employees related to the suppliers of the Ukrainian railway products at issue, and thus failed to address the question whether the security situation in Ukraine, as it related to the suppliers at issue, was comparable to the security situation in other countries and suppliers.

Finally, the Appellate Body observed that the Panel's error in applying the correct legal framework for examining the existence of a "comparable situation" was also reflected in its reliance on evidence that was either of general nature and did not relate to the existence of security concerns and antiRussian sentiment in the specific regions where the relevant suppliers were located, or reflected the situation in regions other than those of the suppliers. Moreover, some of the evidence relied on by the Panel explicitly referred to the armed conflict as confined to the Donbass and Crimea regions of Ukraine, i.e. regions different from the ones where the relevant suppliers were located. The Panel nevertheless considered this evidence to be relevant for its analysis of comparable situation, without examining how it applied to the regions where the suppliers at issue were located, even though such an analysis was of particular importance, for purposes of answering the question whether the security situation in certain regions of Ukraine, coupled with the existence of antiRussian sentiment in those same regions, resulted in the absence of a "comparable situation" with respect to suppliers located in those regions and for purposes of conducting onsite inspections by Russian FBO employees over the relevant period.

In light of the above, the Appellate Body found that the Panel erred in its application of Article 5.1.1 of the TBT Agreement to the facts of the present case in finding that, between April 2014 and December 2016, Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries. For the same reasons, the Appellate Body found that the Panel erred in finding that less favourable access conditions were granted to Ukrainian suppliers of railway products also with respect to the two decisions through which the FBO rejected applications submitted by Ukrainian suppliers under CU Technical Regulation 001/2011 (decisions 1 and 2). However, the Appellate Body did not have before it sufficient factual findings by the Panel or undisputed facts on the Panel record on which it could rely in completing the legal analysis.

3.7.2.4 Ukraine's claim under Article 5.1.2 of the TBT Agreement

Ukraine argued that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that there were no less trade-restrictive alternatives available to Russia within the meaning of Article 5.1.2 of the TBT Agreement, and that Ukraine had failed to establish that Russia acted inconsistently with its obligations under that provision, with respect to the instructions suspending certificates and the decisions rejecting applications for new certificates.

The Appellate Body began its analysis by highlighting that both sentences of Article 5.1.2 refer to the notion of "necessity", the meaning of which has to be determined in the specific context of this provision. Specifically, the qualification "[t]his means" at the beginning of the second sentence, followed by the conjunction "*inter alia*", indicated that the second sentence describes a situation in which a conformity assessment procedure is prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade, and provides useful context for understanding how the notion of "necessity" in Article 5.1.2 as a whole should be interpreted. The Appellate Body also noted that under the second sentence, whether a procedure is "more strict" or is "applied more strictly than is necessary" has to be assessed in relation to whether it gives the importing Member "adequate confidence" that products conform with the applicable technical regulations or standards. The Appellate Body further noted the relevant similarities and differences in the language of Articles 2.2 and 5.1.2 of the TBT Agreement and observed that both provisions set out obligations for WTO Members not to create unnecessary obstacles to international trade, and identify certain factors to be considered in a necessity analysis. The Appellate Body concluded that the existence of an "unnecessary obstacle[] to international trade" under the first and second sentences of Article 5.1.2 of the TBT Agreement, read together, may be established on the basis of an analysis of the following factors: (i) whether the conformity assessment procedure provides adequate confidence of conformity with the underlying technical regulation or standard; (ii) the strictness of the conformity assessment procedure or of the way in which it is applied; and (iii) the nature of the risks and the gravity of the consequences that would arise from non-conformity with the technical regulation or standard. Since the function of conformity assessment procedures is to ensure compliance with the underlying technical regulation or standard, the legitimate objective of this regulation or standard would also be relevant in determining the nature of the risks and the gravity of the consequences that would arise from nonconformity. Similarly to Article 2.2, the conformity assessment procedure may be compared to possible alternative procedures that are reasonably available, are less strict or applied less strictly, and provide an equivalent contribution to giving the importing Member adequate confidence. This analysis ultimately involves a holistic weighing and balancing of all relevant factors.

With respect to the burden of proof under Article 5.1.2, the Appellate Body recalled that while Article XX of the GATT 1994 provides for exceptions, Article 2.2 of the TBT Agreement contains positive obligations, and this difference must be taken into account in the allocation of the burden of proof imposed on respondents and complainants under the respective provisions. Since under Article 5.1.2 the burden is on the complainant to establish the elements of a breach of a positive obligation, the Appellate Body considered that the allocation of the burden of proof for complainants and respondents under this provision should be guided by similar considerations to the ones under Article 2.2. Specifically, while under Article XX of the GATT 1994 a respondent must establish that the alternative measure identified by the complainant is ultimately not reasonably available to the respondent, under Article 2.2 of the TBT Agreement a complainant must make a *prima facie* case that its proposed alternative measure is reasonably available. In any event, the fact that alternative measures serve as "conceptual tool[s]" in the assessment of the trade restrictiveness of a measure also informs the nature and amount of evidence required. Taking into account that the specific details of implementation may depend on the capacity and particular circumstances of the implementing Member in question, it would appear incongruous to expect a complainant to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail.

Turning to Ukraine's claim on appeal, the Appellate Body recalled that, before the Panel, Ukraine had put forward four alternative measures: (i) additional communications with the relevant Ukrainian producers; (ii) entrusting onsite inspections in Ukraine to the competent authorities from Kazakhstan and Belarus; (iii) accrediting nonRussian inspectors, either experts or organizations, to conduct inspections in Ukraine; and (iv) offsite inspections.

The Appellate Body first addressed Ukraine's claim, which took issue with the Panel's allocation of the burden of proof under the alternative consisting in the possibility for the FBO to conduct off-site inspections (fourth alternative). Specifically, in Ukraine's view, the Panel erred in finding that it was for Ukraine to submit evidence of compliance with the statutory requirements for conducting such off-site inspections as an alternative to on-site inspections. The Appellate Body recalled that, before the Panel, Ukraine had argued that Russia could have made use of off-site inspections instead of suspending certificates due to the impossibility to conduct on-site inspection control. For its part, Russia had submitted that offsite inspections could be conducted only if the conditions set out in Article 7.4.1 of the Organization Standard CTO Procedure of organization and implementation of inspection control of certified products (PCFZT 082013) were satisfied, *inter alia*, absence of facts of nonconformity during the previous inspection control and absence of consumer complaints as to the quality of certified products.

The Appellate Body noted that, for the Panel, in those instances where the evidence on the record did not unequivocally establish that both relevant conditions under Article 7.4.1 of PCFZT 082013 were complied with, Ukraine had failed to demonstrate that offsite inspections were reasonably available for the railway products covered by the relevant instructions. The Appellate Body observed that Ukraine challenged only the application of Russia's conformity assessment procedure to the certificates at issue, rather than the procedure itself. It was therefore possible for Ukraine to identify an alternative measure that coincides with an instrument that already existed under Russia's legislative framework. At the same time, the Appellate Body affirmed that alternative measures need not be already present in the legislation of the responding Member, even when a conformity assessment procedure is challenged "as applied", and not "as such". Indeed, the role of alternative measures is to assist in determining whether a conformity assessment measure taken by a Member is more strict or applied more strictly than is necessary to ensure conformity under Article 5.1.2, and not to positively establish that the conditions set out under national law for applying a different measure may have been present.

For the Appellate Body, the purpose of this relational analysis under Article 5.1.2 was to compare the measure at issue and an alternative measure, or their respective applications, in terms of strictness and the degree of contribution to the achievement of the objective to give adequate confidence of conformity. Such comparison could not be carried out with an alternative measure that is merely theoretical in nature, because, for instance, the implementing Member is not capable of taking it, or because it imposes an undue burden on that Member. At the same time, the comparison of the challenged measure with a hypothetical alternative measure remains at a conceptual level. Thus, the fact that a measure with the same or similar content as the proposed alternative already exists in the legislative framework of the respondent Member does not change the function of the alternative measure as a "conceptual tool" in the necessity analysis. Therefore, as part of making a *prima facie* case, the complainant should provide sufficient indication that the proposed alternatives would be reasonably available to the implementing Member, for instance, by showing that the costs of the proposed alternatives would not be *a priori* prohibitive, and that potential technical difficulties associated with their implementation would not be of such a substantial nature that they would render the proposed alternatives merely theoretical in nature. The burden would then shift to the respondent to submit evidence substantiating that the proposed alternative measures were indeed merely theoretical in nature, or entailed an undue burden, for instance, because they involved prohibitively high costs or would entail substantial technical difficulties.

The Appellate Body affirmed that, in the present case, the comparison between the measure actually taken by Russia and the alternative measure had to be undertaken at a conceptual level for purposes of

making a *prima facie* case as to whether the alternative was reasonably available to Russia. The Panel by contrast had considered that "it was for Ukraine to submit evidence of absence of nonconformities and consumer complaints concerning the railway products covered by the suspended certificates." Thus, the Panel's analysis conflated two distinct concepts: the alternative measure proposed by Ukraine; and the measure in existence under Article 7.4.1 of PCFZT 082013.

Specifically, the Appellate Body considered that the question before the Panel under Article 5.1.2 was whether a less strict manner of application of this procedure existed, other than the suspension of certificates, which would also make an equivalent contribution to the objective of providing Russia with adequate confidence that Ukrainian railway products conformed with Russia's technical regulations, and which would be reasonably available to Russia. The Panel, however, did not address the question whether the description of the measure provided by Ukraine was sufficient to demonstrate *prima facie* that Russia would not be incapable of taking such an alternative measure. According to the Appellate Body, the availability of certain information to Ukraine, as well as the issue of whether "it undertook reasonable efforts to obtain [this] information from Russia", was distinct from the issue of which a Member bears the burden of proof with respect to the application of the conditions in Article 7.4.1.

In light of the above, the Appellate Body did not see that, for purposes of establishing the reasonable availability of the alternative measure consisting in the conduct of offsite inspections, it was necessary for Ukraine to provide information about the compliance with the two requirements of Article 7.4.1, namely, the absence of nonconformities and consumer complaints with respect to the railway products covered by the suspensions at issue. Therefore, the burden of proof that the Panel placed on Ukraine went beyond what Ukraine was required to establish in making a *prima facie* case that a hypothetical measure would have been reasonably available to Russia in the circumstances of the case.

Accordingly, the Appellate Body found that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU in allocating the burden of proof under Article 5.1.2 of the TBT Agreement in its analysis of this alternative measure. With respect to the other three proposed alternative measures, however, the Appellate Body found that Ukraine failed to establish that the Panel erred in making an objective assessment of the matter before it in finding that Ukraine had failed to establish that these measures were reasonably available. In the absence of sufficient factual findings by the Panel and undisputed facts on the Panel record, the Appellate Body was not in a position to complete the legal analysis.

3.7.2.5 Ukraine's claim regarding the existence of systematic import prevention

Ukraine asserted that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU when examining the existence of an overarching measure consisting in the systematic prevention by Russia of importation of railway products from Ukraine. Specifically, Ukraine considered that the Panel erred in characterizing the measure at issue as comprising only specific decisions suspending certificates, rejecting applications for new certificates, and not recognizing certificates from other CU countries that were separately challenged on an individual basis by Ukraine. Ukraine contended that the individual decisions were only part of the evidence of the unwritten measure, and that the Panel erred in finding that the existence of the alleged unwritten measure was conditional on the WTOinconsistency of these decisions. In Ukraine's view, this led the Panel to review the individual measures in isolation from one another and prevented it from assessing whether a systematic import prevention existed on the basis of all evidence before it.

The Appellate Body recalled that, before the Panel, Ukraine had claimed that Russia maintains, since mid2014, a systematic prevention of Ukrainian railway products from being imported into Russia by means of: (i) suspending valid certificates held by Ukrainian producers; (ii) refusing to issue new certificates; and (iii) not recognizing certificates issued by other CU countries, and that this practice is inconsistent with

Russia's obligations under Articles I:1, XI:1, and XIII:1 of the GATT 1994. The Appellate Body also recalled that, in *US – Zeroing (EC)*, it had recognized that an "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document. In *Argentina – Import Measures*, the Appellate Body had further elaborated on the standard for establishing the existence of an unwritten measure and in particular observed that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant." The Appellate Body observed that, in contrast to a written measure, the existence of unwritten measures cannot be established by submitting to a panel the text of a legal instrument. Instead, the existence and content of an unwritten measure must be established based on other, often circumstantial, evidence and arguments. Moreover, the specific measure challenged and how it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must establish to exist, in order to determine the existence of the challenged measure.

With respect to Ukraine's argument that the Panel erred by failing to make conclusions with regard to the existence of an unwritten measure before assessing specific elements of that measure, the Appellate Body observed that the Panel in fact took note of the precise content of the alleged measure and listed its constituent elements, including Ukraine's characterization of the measure as "an overarching unwritten measure" that comprises several components and results in the "systematic prevention" of importation of Ukrainian products into Russia. Furthermore, it appeared logical, in light of the characteristics of the measure as described by Ukraine, that the Panel's subsequent analysis was focused on examining the existence of a single measure and its systematic nature.

With respect to the Panel's analysis regarding the existence of the alleged unwritten measure at issue, the Appellate Body observed that Ukraine's own description of the measure presupposed the need to focus on the rationale underlying the individual instances of suspensions, rejections, and nonrecognition of certificates. Thus, Ukraine had argued that "Ukrainian producers have been denied, or have been unable to use, certificates for *reasons other than the lack of conformity* with the relevant technical regulations", and that Russia, "through an organized effort", "put in place all means possible to *prevent imports* of Ukrainian railway products into Russia". Thus, the content of the measure, as described by Ukraine, required a finding that the individual elements of the measure are parts of an organized effort or policy with the objective of "*systematic import prevention*", as opposed to separate instances of instructions and decisions taken for reasons relating to the possibility of assessing conformity with the relevant technical regulations. Furthermore, the discussion before the Panel focused precisely on whether the suspensions and rejections were made for reasons related to achieving positive assurance of conformity, or instead for reasons related to import prevention.

The Appellate Body also recalled that "a complainant challenging a single measure composed of several different instruments will normally need to provide evidence of how the different components operate together as part of a single measure and how a single measure exists as distinct from its components." In the present case, it was therefore Ukraine's burden to establish that the separate instances of suspensions, rejections, and non-recognition functioned together and formed a single overarching measure, distinct from its parts, in pursuance of an import prevention policy. In this context, it appeared to the Appellate Body that the rationale behind the suspensions and rejections constituted an important factor for determining whether the components of the alleged overarching measure operated together as part of a single measure. Specifically, this rationale related to the impossibility for the FBO to assess conformity of Ukrainian railway products with the relevant Russian technical regulations due to the security situation in Ukraine, and thus to the absence of a comparable situation under Article 5.1.1 of the TBT Agreement. If this were the case, there would be no common policy or plan connecting the various suspensions and rejections, such that they operate together as part of one measure, and thus no proof that "the FBO used its powers with the aim or as part of a plan directed at preventing the importation of Ukrainian railway products into Russia." Instead, each of these individual measures would be based on a separate and independent rationale, namely, the

impossibility, in each particular instance, to complete the required steps in the conformity assessment procedure. This is how the Appellate Body understood the Panel's statement that "the fact that one of the three elements of the alleged systematic import prevention … unjustifiably restricts access to the Russian market is not sufficient to demonstrate the existence of systematic prevention of imports of Ukrainian products as an independent measure."

The Appellate Body considered that the Panel's language referring to the consistency or inconsistency of the suspensions and rejections to be somewhat imprecise. However, the Appellate Body understood that the Panel had actually been concerned with the rationale behind such decisions, which would reveal the relationship between them and thus the existence of a common plan. Thus, in the Appellate Body's view, while it may seem that the Panel's reasoning did not properly distinguish between existence and consistency of the alleged measure, in fact the Panel had considered the consistency of components of the measures only insofar as the *justification* underlying their consistency would lead to the conclusion that these decisions were taken independently from one another and not *as part of a common plan*. In turn, finding no evidence of a common plan or organized effort to prevent the importation into Russia of Ukrainian railway products would suggest that no overarching unwritten measure of systematic import prevention existed in the present case.

Moreover, the Appellate Body noted that the alleged measure, as described by Ukraine, contains in itself an element of inconsistency. Thus, because Ukraine's description of the measure incorporated the terms "import prevention" and because most individual components of the measure were found by the Panel to have a rationale different from "import prevention", the Panel's task of assessing the question of existence of the measure separately from the question of its consistency was rendered particularly difficult. Finally, the Appellate Body found that the Panel's finding as to the existence of the alleged unwritten measure was not based only on its assessment of the rationale behind the suspensions and rejections.

In sum, given the characteristics of the alleged unwritten measure, as presented by Ukraine, and the Panel's assessment of the evidence on the record, the Appellate Body did not consider that the Panel erred in its objective assessment of the matter before it under Article 11 of the DSU in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products into Russia.

3.8 Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R

3.8.1 Background and Panel findings

This dispute concerned the imposition by the United States of certain countervailing duty (CVD) measures on imports of supercalendered paper from Canada. Canada made multiple claims of inconsistency with the SCM Agreement and GATT 1994 in relation to the USDOC's CVD determinations regarding Canadian producers Port Hawkesbury Paper LP (PHP), Resolute FP Canada Inc. (Resolute), Irving Paper Ltd (Irving), and Catalyst Paper Corporation (Catalyst). Canada also challenged an alleged unwritten ongoing conduct measure that consisted of the USDOC asking the "other forms of assistance" (OFA) question and, where the USDOC discovers information during verification that it deems should have been provided in response to that question (i.e. "unreported assistance"), applying adverse facts available (AFA) to determine that the discovered information amounts to countervailable subsidies (the OFA-AFA measure). The United States disagreed with Canada's claims of inconsistency in their entirety.

With respect to Canada's claims concerning PHP, the Panel found that the United States acted inconsistently with Articles 1.1(a)(1)(iv), 1.1(b), 11.3, 12.8, and 14(d) of the SCM Agreement. With respect to Canada's claims concerning Resolute, the Panel found that the USDOC acted inconsistently with Articles 1.1(b), 10, 12.7, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. The Panel declined

to rule on certain of Canada's claims under Articles 1.1(b), 10, 11.211.3, 12.1-12.3, 12.8, 14, 19.1, and 19.3-19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. With respect to Canada's claims concerning Irving and Catalyst, the Panel found that the USDOC acted inconsistently with Articles 10, 19.1, 19.3-19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. The Panel declined to rule on certain of Canada's claims under Articles 11.2, 11.3, and 12.7 of the SCM Agreement. Finally, the Panel rejected certain of Canada's claims under Articles 10, 19.1, 19.3-19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

In relation to the OFA-AFA measure, the Panel found that Canada had adduced sufficient evidence to establish that the challenged OFAAFA measure constituted "ongoing conduct". The Panel did not consider it necessary to address Canada's argument that the challenged measure also amounted to a "rule or norm of general and prospective application". The Panel concluded that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement. Finally, the Panel declined to rule on Canada's claims under Articles 10, 11.1-11.3, 11.6, 12.1, and 12.8 of the SCM Agreement.

The United States appealed the Panel's findings that: (i) the OFA-AFA measure was "ongoing conduct" that can be challenged in WTO dispute settlement; and (ii) the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement. Canada asked the Appellate Body to dismiss the United States' claims on appeal.

3.8.2 Article 17.6 of the DSU: existence of the OFA-AFA measure

At the outset, Canada argued that the United States' claim that the Panel erred in finding that Canada had established the existence of the OFA-AFA measure fell outside the scope of appellate review. To Canada, the United States' claim concerned factual findings and implicated the Panel's appreciation of facts and evidence.

The Appellate Body noted that the application of rules to facts is a legal characterization, subject to appellate review under Article 17.6 of the DSU. To the Appellate Body, the United States' claim concerned the Panel's understanding and application of the legal standard for "ongoing conduct" as a measure that can be challenged in WTO dispute settlement. The Appellate Body concluded that the United States' claim concerned issues of law covered in the Panel Report and legal interpretations developed by the Panel, falling within the scope of appellate review.

3.8.3 Existence of the OFA-AFA measure as "ongoing conduct"

The United States claimed that the Panel erred in its assessment of the precise content, repeated application, and likelihood of continued application of the "ongoing conduct" measure.

With respect to precise content, the United States asserted that differences in language, fact patterns, and CVD proceeding segment in the evidence examined by the Panel precluded the Panel from identifying with precision the content of the measure. The Appellate Body considered that the Panel correctly focused on the substance of the USDOC's conduct for each element of the OFA-AFA measure, as evidenced by the examples before the Panel. The Appellate Body agreed with the Panel that the differences referred to by the United States did not detract from the fact that the substance of the USDOC's conduct remained the same in relation to the elements of the measure. The Appellate Body thus concluded that the Panel had not erred in finding that Canada had established the precise content of the OFA-AFA measure as the USDOC asking the OFA question and, where the USDOC discovers information during verification that it deems should have been provided in response to the OFA question, applying AFA to determine that such information amounts to countervailable subsidies.

With respect to repeated application, the United States contended that repeated application must be demonstrated by application of an alleged measure in a string of determinations made sequentially in successive proceedings over an extended period of time, as in *US – Continued Zeroing*. The Appellate Body disagreed with the United States' contention and stated that its reasoning in that appeal was connected to the European Communities' characterization of the measure in that dispute. To the Appellate Body, the Panel's analysis reflected Canada's characterization of the OFA-AFA measure by focusing on the repetition of the elements identified by Canada that formed part of the measure. Further, the Appellate Body was not persuaded by the United States' assertion that certain examples on the Panel record showed that the USDOC did not apply the OFA-AFA measure. The Appellate Body thus concluded that the Panel had not erred in finding that Canada had established the repeated application of the OFA-AFA measure.

With respect to the likelihood of continued application, the United States argued that a decision to follow particular conduct in the future was necessary to establish this element. The Appellate Body, however, noted that a complaining Member need not rely on a formal decision by the responding Member to demonstrate the existence of "ongoing conduct". The Appellate Body considered that likelihood of continued application could be demonstrated through a number of factors. The Appellate Body then agreed with the Panel that the consistent manner in which the USDOC referred to the OFA-AFA measure, the frequent reference to previous applications of the measure in USDOC determinations, the fact that the USDOC referred to the measure as its "practice", and the USDOC's characterization of a departure from the measure as an "inadvertent error" all supported the conclusion that the measure was likely to continue to be applied. The Appellate Body thus concluded that the Panel did not err in finding that Canada had established that the measure was likely to continue to be applied in the future. The Appellate Body therefore upheld the Panel's finding that the OFA-AFA measure exists as "ongoing conduct" that could be challenged in WTO dispute settlement.

3.8.4 Article 12.7 of the DSU: "basic rationale"

The United States claimed that the Panel erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement.

The Appellate Body recalled that, under Article 12.7 of the DSU, a panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes. The requirement to set out a "basic rationale" establishes a minimum standard for the reasoning that panels must provide in support of their findings. To satisfy this minimum standard, panels must provide explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings.

The Appellate Body found that the Panel appropriately incorporated relevant portions of its earlier "as applied" analysis under Article 12.7 of the SCM Agreement into its examination of the OFA-AFA measure. The Appellate Body considered that the Panel had therefore provided an interpretation of Article 12.7 of the SCM Agreement, addressed pertinent factual aspects of the OFA-AFA measure, and provided explanation sufficient to disclose the Panel's essential justification for its finding. The Appellate Body thus found that the Panel had not erred under Article 12.7 of the DSU by failing to provide a "basic rationale" for its finding that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement.

3.8.5 Article 12.7 of the SCM Agreement

The United States appealed the Panel's finding that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement. The United States claimed that the Panel erred by: (i) ignoring the "significantly impedes" ground for using "facts available" under Article 12.7; (ii) identifying conduct that was not contained in the measure as WTO-inconsistent; and (iii) finding that the OFA question could never be a request for "necessary information" under Article 12.7.

The Appellate Body observed that, under Article 12.7 of the SCM Agreement, the use of "facts available" may be based on three alternative grounds, namely, when an interested party or interested Member: (i) "refuses access to … necessary information within a reasonable period"; (ii) "otherwise does not provide … necessary information within a reasonable period"; or (iii) "significantly impedes the investigation". To the Appellate Body, the Panel's analysis of the OFA-AFA measure was limited to circumstances where an interested party fails to provide "necessary information". Consequently, the Panel's findings did not concern the USDOC's use of "facts available" where an interested party significantly impedes an investigation.

The Appellate Body further understood that the Panel had faulted the USDOC for mechanically concluding, without any further steps, that necessary information had not been provided and that the discovered assistance amounted to a countervailable subsidy, when the USDOC discovers unreported assistance during verifications (i.e. assistance discovered during verification that the USDOC deems should have been provided in response to the OFA question). The Appellate Body considered that this conduct, identified as WTO-inconsistent by the Panel, was part of the OFA-AFA measure. The Appellate Body also agreed with the Panel that the USDOC could not simply reach conclusions without further analysis and regard to the facts available on the record and the due process rights of interested parties. Pursuant to Article 12.7 of the SCM Agreement, determinations must be made on the basis of "facts" available, and not on the basis of non-factual assumptions or speculation.

Finally, the Appellate Body disagreed with the United States' assertion that the Panel had found that the OFA question could never be a request for "necessary information" under Article 12.7 of the SCM Agreement. Rather, the Appellate Body noted that the Panel had expressly observed that the OFA question might pertain to necessary information regarding additional subsidization of the product under investigation.

The Appellate Body thus found that the United States had not demonstrated that the Panel erred under Article 12.7 of the SCM Agreement. Consequently, the Appellate Body upheld the Panel's finding that the OFA-AFA measure was inconsistent with Article 12.7 of the SCM Agreement.

3.8.6 Separate opinion of one Division member

In a separate opinion, one Appellate Body member considered that the Panel and the majority's reasoning broadened the concept of "ongoing conduct" as used in *US – Continued Zeroing* into something akin to a rule or norm of general and prospective application. In particular, that Appellate Body member considered that the Panel erred by characterizing the USDOC's conduct in an unacceptably vague manner, and by employing inadequate evidentiary standards. To that Appellate Body member, the Panel did not examine the comparability of the CVD proceedings used as evidence of the "ongoing conduct". This in turn undermined the Panel's ability to define the precise content, repeated application, and likelihood of continued application of the measure.

Moreover, in its separate opinion, the Appellate Body member noted that the CVD order in the USDOC CVD proceedings in Supercalendered Paper from Canada 2015 had been revoked retroactively to its beginning. As this was the only CVD proceeding involving Canada that was examined by the Panel, that Appellate Body member considered there was no real dispute between the participants.[43]

[43] The majority noted, however, that the Panel issued its final Panel Report to the parties before the revocation of the CVD order; the United States filed its appeal after such revocation; and both the United States and Canada confirmed that there was a dispute between them regarding the existence and WTO consistency of the "ongoing conduct" measure.

3.9 Appellate Body Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS435/AB/R, WT/DS441/AB/R

These disputes concerned certain restrictions, imposed by Australia, on trademarks, geographical indications (GIs), and other plain packaging requirements, applicable to all tobacco products sold, offered for sale, or otherwise supplied in Australia.

Australia maintains a series of tobacco-control-related measures, most of which were not at issue in these disputes. The Panel identified the measures at issue in these disputes (the TPP measures) as comprising the following:

a. the Tobacco Plain Packaging Act 2011 (Cth) (TPP Act);

b. the Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth) (TPP Regulations); and

c. the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth) (TMA Act).

The TPP Act is an Act to discourage the use of tobacco products, and for related purposes. Pursuant to Section 3 of the TPP Act, this Act regulates the retail packaging and appearance of tobacco products in order to: (i) improve public health; and (ii) give effect to certain obligations in the World Health Organization (WHO) Framework Convention on Tobacco Control (2003) (FCTC). Thus, the TPP measures are one of the means by which the Australian Government gives effect to Australia's obligations under the WHO FCTC and, in particular, Articles 5, 11, and 13 of the FCTC.

The products at issue in these disputes are tobacco products. The term "tobacco product" is defined in the TPP Act to mean processed tobacco, or any product that contains tobacco that is manufactured to be used for smoking, sucking, chewing, or snuffing, and is not included in the Australian Register of Therapeutic Goods maintained under the Therapeutic Goods Act 1989. This definition encompasses not only cigarettes, but also noncigarette products, such as cigars, little cigars (also known as cigarillos), and bidis.

Tobacco products manufactured or packaged in Australia for domestic consumption were required to comply with the TPP measures from 1 October 2012. As of 1 December 2012, all tobacco products sold, offered for sale, or otherwise supplied in Australia were required to comply with the TPP measures. In this regard, it is noted that Australia's domestic market for tobacco products is supplied entirely through imported products.

Australia's TPP measures were initially challenged by five WTO Members, namely Honduras (DS435), the Dominican Republic (DS441), Cuba (DS458), Indonesia (DS467), and Ukraine (DS434). The DSB established separate panels to address the matters brought by each of the five complainants. However, following consultation among the parties to all five disputes, the Director-General composed five panels, with the same persons serving as panelists on each of the separate panels. Pursuant to Article 9.3 of the DSU, the parties agreed to the harmonization of the timetable for the Panel proceedings in all five disputes. However, following a request by Ukraine, the Panel suspended its work in DS434. The Panel in DS434 was not requested to resume its work during the 12 months following suspension. Therefore, pursuant to Article 12.12 of the DSU, the authority for the establishment of the Panel in DS434 lapsed. Accordingly, the Panel only issued Reports with respect to the four remaining complaints by Honduras, the Dominican Republic, Cuba, and Indonesia (the complainants).

Honduras requested the Panel to find that Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 2.1 of the Agreement on Trade-Related Aspects of Intellectual

Property Rights (TRIPS Agreement) (incorporating Article *6quinquies* of the Stockholm Act of the Paris Convention for the Protection of Industrial Property of 14 July 1967) (Paris Convention (1967)) and Articles 15.4, 16.1, 17, 20, 22.2(b), and 24.3 of the TRIPS Agreement. Honduras also requested the Panel to find that the TPP measures are inconsistent with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement). Additionally, Honduras requested the Panel to find that Australia had acted inconsistently with Article 10bis of the Paris Convention (1967) (as incorporated into the TRIPS Agreement through Article 2.1) and Articles 22.2(b) and 24.3 of the TRIPS Agreement.

The Dominican Republic requested the Panel to find that, by its adoption and imposition of the TPP measures, Australia had acted inconsistently with Article 2.2 of the TBT Agreement, Article 10bis of the Paris Convention (1967) (as incorporated into the TRIPS Agreement through Article 2.1), and Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement.

Cuba requested the Panel to find that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement, Article 10*bis* of the Paris Convention (read with Article 2.1 of the TRIPS Agreement), Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, as well as Article IX:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Indonesia requested the Panel to find that the TPP measures, collectively and individually, are inconsistent with Article 2.2 of the TBT Agreement, Article 2.1 of the TRIPS Agreement (incorporating Article 10bis of the Paris Convention), and Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement. Indonesia also requested the Panel to find that the TPP measures, collectively and individually, are inconsistent with Article XXIII:1(a) of the GATT 1994 because they have nullified or impaired benefits accruing directly or indirectly to Indonesia under the TBT Agreement.

The Panel found that the complainants had not demonstrated that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement, Articles *6quinquies* and 10bis of the Paris Convention (1967) (read in conjunction with Article 2.1 of the TRIPS Agreement), Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, and Article IX:4 of the GATT 1994. In light of these findings, the Panel declined the complainants' requests that the Panel recommend that Australia bring its measures into conformity with its obligations under the TRIPS Agreement, the TBT Agreement, and the GATT 1994.

Honduras and the Dominican Republic (the appellants) appealed the Panel Reports. The appellants challenged aspects of the Panel's findings under Article 2.2 of the TBT Agreement, and Articles 16.1 and 20 of the TRIPS Agreement only. It is noted that, in addition to its own appeal, the Dominican Republic incorporated by reference, all of Honduras' claims and arguments on appeal.

3.9.1 Claims relating to the Panel's findings under Article 2.2 of the TBT Agreement

The Appellate Body recalled that for purposes of establishing that a measure is inconsistent with Article 2.2 of the TBT Agreement, a complainant must demonstrate that a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks nonfulfilment would create". The assessment of "necessity", in the context of Article 2.2, involves a relational analysis of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that it makes to the achievement of a legitimate objective; and (iii) the risks nonfulfilment would create. Moreover, establishing whether a technical regulation is "more trade-restrictive than necessary" may involve a comparison between: (i) the trade restrictiveness and the degree of contribution of the measure at issue to the legitimate objective; and (ii) the trade restrictiveness and the degree of contribution of possible alternative measures that are reasonably available to the legitimate objective, taking account of the risks non-fulfilment would create.

For the Appellate Body, the phrase in the second sentence of Article 2.2 that "technical regulations shall not be more trade-restrictive than necessary" implies that "some" trade restrictiveness is allowed. Establishing whether a technical regulation is "more trade-restrictive than necessary" may involve a comparison between:

(i) the trade restrictiveness and the degree of contribution of the measure at issue to the legitimate objective; and (ii) the trade restrictiveness and the degree of contribution of possible alternative measures that are reasonably available to the legitimate objective – taking account of the risks nonfulfilment would create. However, the Appellate Body recognized that there are certain instances when such a comparative analysis might not be required, such as, when the measure is not trade-restrictive at all, or when a trade-restrictive measure makes no contribution to the achievement of the relevant legitimate objective. Likewise, a comparative analysis might not be required where it can be demonstrated that, by its design, a trade-restrictive measure is incapable of contributing to the achievement of the relevant legitimate objective.

In its assessment of whether the complainants had demonstrated that the TPP measures are inconsistent with Article 2.2, the Panel had examined, *inter alia*: (i) the contribution of the TPP measures to Australia's objective; (ii) the trade restrictiveness of the TPP measures; and (iii) whether the alternative measures proposed by the complainants are less trade-restrictive than the TPP measures while making an equivalent contribution to Australia's objective. The Appellate Body addressed the appellants' claims of error regarding each of these three aspects of the Panel's analysis.

3.9.1.1 Panel's findings concerning the contribution of the TPP measures to Australia's objective

The Panel sought to determine the degree to which the TPP measures, as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products. Although the Panel conducted its analysis in several steps, it emphasized that its overall assessment would be based on the entirety of the relevant evidence, taken together. Following the Panel's examination of (i) the design, structure, and intended operation of the TPP measures, (ii) the actual application of the TPP measures, and (iii) the impact of the TPP measures on illicit trade, the Panel concluded that the complainants had failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. Rather, the Panel found that the evidence before it, taken in its totality, supported the view that the TPP measures, in combination with other tobacco control measures maintained by Australia (including the enlarged graphic health warnings (GHWs) introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.

On appeal, Honduras argued that, while the Panel had set out the correct legal standard under Article 2.2 of the TBT Agreement, the Panel erred in law as it failed to apply this legal standard to the facts of the case in making its findings on the degree of contribution of the TPP measures to Australia's objective. However, the majority of the appellants' claims of error relating to this aspect of the Panel's analysis challenged the Panel's objectivity in its assessment of the facts of the case, with the appellants arguing that the Panel failed in its duty under Article 11 of the DSU. Australia requested the Appellate Body to reject the claims under Article 2.2 of the TBT Agreement and under Article 11 of the DSU in their entirety.

3.9.1.1.1 Claims that the Panel erred in its application of Article 2.2 of the TBT Agreement

Honduras acknowledged that the Panel had set out the correct legal standard of how to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member. However, Honduras claimed that the Panel erred in law because it failed to apply this legal standard to the facts of the case. Honduras argued that the Panel considered that an examination of the totality of the evidence meant that it was relieved of its obligation to conduct a proper analysis of the probative value of the evidence regarding the measures' actual impact on the relevant smoking behaviour. Australia submitted that Honduras' claims related to the Panel's appreciation of the evidence and arguments and the relative weight that the Panel attributed to specific pieces of evidence,

rather than the Panel's engagement with issues of law and legal interpretation. Accordingly, Australia requested the Appellate Body to reject Honduras' claims that the Panel erred in its application of Article 2.2 of the TBT Agreement in its assessment of the contribution of the TPP measures to Australia's objective.

The Appellate Body acknowledged that it is sometimes difficult to distinguish clearly between issues that are purely legal or purely factual or are mixed issues of law and fact. However, in most cases, an issue will be *either one* of application of the law to the facts or an issue of the objective assessment of facts, but not both. In these appellate proceedings, the Appellate Body considered that Honduras' claims implicated the Panel's appreciation of the facts and evidence, rather than its application of the legal standard under Article 2.2 to the facts of this case. Accordingly, the Appellate Body found that Honduras had not substantiated its claims that the Panel erred in its application of Article 2.2 to the facts of this case.

Rather, the Appellate Body observed that in elaborating its claims that the Panel erred under Article 2.2 of the TBT Agreement in its analysis of the contribution of the TPP measures to Australia's objective, Honduras made arguments that overlapped entirely with those made in support of its claims under Article 11 of the DSU. Given the complete overlap between these two sets of arguments, and the focus of both sets of arguments on the Panel's engagement with the facts and appreciation of the evidence before it, the Appellate Body addressed all of Honduras' challenges to the Panel's contribution analysis under the rubric of its claims under Article 11 of the DSU.

3.9.1.1.2 Claims under Article 11 of the DSU

The appellants requested the Appellate Body to reverse the Panel's conclusion that the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. The appellants' request was based, primarily, on their claims that the Panel failed in its duty under Article 11 of the DSU to make an objective assessment of the matter before it, with the appellants' focus being on the Panel's assessment of the facts of the case. Honduras contended that the Panel failed to conduct an objective examination of the evidence on the plain packaging measures' contribution to the objective of reducing the use of tobacco products. The Dominican Republic, for its part, appealed the Panel's overall findings and intermediate findings resulting from its assessment of the: (i) post-implementation evidence on the *actual* impact of the TPP measures on smoking behaviours; (ii) pre-implementation evidence on the anticipated impact of the TPP measures; (iii) post-implementation evidence on the *actual* impact of the TPP measures on proximal and distal outcomes; and (iv) potential future impact of the TPP measures.

Australia asked the Appellate Body to reject all of the appellants' claims under Article 11 of the DSU, characterizing them as an "unprecedented assault" on a panel's performance of its factfinding function. In Australia's view, given both the scale and nature of the appellants' claims under Article 11 of the DSU, these claims are an invitation to the Appellate Body to determine whether the Panel's factual findings are *correct*, rather than whether the Panel was *objective* in making its assessment of the facts of the case.

Before addressing the claims of error, the Appellate Body highlighted certain preliminary considerations that informed its approach to the appellants' claims under Article 11 of the DSU. These considerations pertained to: (i) the burden of proof under Article 2.2 with respect to the assessment of the contribution of the TPP measures to Australia's objective; (ii) the nature of the Panel's overall conclusion, and the scope of the appellants' appeals in respect thereof; and (iii) cross-cutting themes underpinning the appellants' claims under Article 11 of the DSU.

With respect to the burden of proof, the Appellate Body recalled that before the Panel, the complainants had claimed that the TPP measures are inconsistent with Article 2.2 because they are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks nonfulfilment would create. The complainants submitted two sets of arguments in support of their claims under Article 2.2. In their main

set of arguments, the complainants asserted that the TPP measures are not apt to contribute and make no contribution to Australia's objective. In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create.

The Appellate Body noted that it is well settled that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Thus, the burden of proving that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement rested on the complainants. An implication of this allocation of the burden of proof was that, with respect to their main set of arguments, the complainants were required to adduce sufficient evidence to persuade the Panel that the TPP measures are not apt to, and do not, make any contribution to Australia's legitimate objective. The Appellate Body also recalled that the degree of contribution is only one factor of a panel's overall weighing and balancing for determining "necessity" under Article 2.2, and there is no predetermined threshold of contribution for purposes of demonstrating an inconsistency with Article 2.2. A panel's overall weighing and balancing exercise need not be quantitative and is often a qualitative assessment. Thus, with respect to the complainants' alternative set of arguments, the Appellate Body did not consider that the complainants needed to demonstrate a precise quantifiable degree of contribution that the TPP measures make to Australia's objective, in order to meet their burden of demonstrating that the TPP measures are "more trade-restrictive than necessary". Rather, the complainants had to demonstrate that the TPP measures are more trade-restrictive than necessary because an equivalent degree of contribution could be achieved through less trade-restrictive alternative means.

With respect to the nature of the Panel's overall conclusion and the scope of the appellants' appeals, the Appellate Body recalled that the Panel had concluded that: (i) the complainants had failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products; but rather (ii) the evidence before the Panel, taken in its totality, supported the view that the TPP measures, in combination with other tobacco control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products. The Appellate Body agreed with the participants that these two components of the Panel's overall conclusion, read together, are a rejection of the complainants' proposition that the TPP measures are not apt to, nor do they, make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.

The Appellate Body also took note of the further conclusion by the Panel that the TPP measures are apt to, and do, make *a meaningful* contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. The Appellate Body considered that this sentence in the Panel's conclusion spoke to the question of the "degree" of the contribution that the TPP measures, in concert with Australia's other tobaccocontrol measures, make to Australia's objective, and in so doing related to the alternative set of the complainants' arguments. Hence, the Appellate Body understood the Panel to have made this conclusion as a gateway to addressing the complainants' alternative proposition that, even if the Panel were to conclude that the TPP measures make a contribution to Australia's objective, the TPP measures would still be more trade-restrictive than necessary because various alternative measures would be available to Australia that are less trade-restrictive and could achieve an *equivalent* degree of contribution to Australia's objective.

With respect to the cross-cutting themes underpinning the appellants' claims under Article 11 of the DSU, the Appellate Body pointed out that, while the appellants had made numerous claims against specific statements, analyses, and findings of the Panel, they had largely addressed these claims under the rubric of broad cross-cutting themes, including: (i) the allocation of the burden of proof; (ii) denial of due process; (iii) the Panel's alleged failure to provide reasoned and adequate explanations; and (iv) the materiality of

the appellants' claims under Article 11 of the DSU. The Appellate Body indicated that the issue before them was whether the appellants demonstrated that the Panel, in conducting its analysis leading to its overall conclusion on the contribution of the TPP measures to Australia's objective, had made an objective assessment *of the facts* of the case in accordance with Article 11 of the DSU. Thus, for the Appellate Body, the appellants' myriad claims and arguments pertained to this single issue, and were not, in and of themselves, discrete "issues" within the meaning of Articles 17.6 and 17.12 of the DSU. Accordingly, the Appellate Body considered that it need not address, separately, each claim of error raised by the appellants under Article 11 of the DSU. Rather, the Appellate Body considered it sufficient to address, jointly, clusters of claims based on cross-cutting themes underpinning these claims.

Still in this regard, the Appellate Body observed that the Panel's analysis of the contribution of the TPP measures to Australia's objective was quite detailed, yet the appellants' claims under Article 11 of the DSU, challenging the Panel's analysis of the contribution of the TPP measures to Australia's objective, formed the bulk of their voluminous appeal. Moreover, with the exception of the Panel's findings on the impact of the TPP measures on illicit trade, the appellants had challenged all of the intermediate findings that the Panel made in its analysis, as well as the Panel's overall conclusion on the contribution of the TPP measures to Australia's objective. The Appellate Body noted that the sheer volume of the appellants' claims under Article 11 of the DSU in these appellate proceedings was unprecedented. The Appellate Body recalled that a claim that a panel has failed to conduct an objective assessment of the matter before it is a very serious allegation. Not every error by a panel amounts to a failure by the panel to comply with its duties under Article 11, but only those which, taken together or singly, undermine the objectivity of the panel's assessment of the matter before it. The Appellate Body also underlined that claims that a panel had distorted, disregarded, or misrepresented evidence implied not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. For these reasons, the Appellate Body recalled its caution that Members consider carefully when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11, in keeping with the requirement in Article 3.7 of the DSU that Members "exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful".

Furthermore, the Appellate Body recalled its past statement that within these parameters of Article 11 of the DSU, it is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings, and that when assessing the probative value of the evidence, a panel is not required to "accord to factual evidence the same meaning and weight as do the parties". As such, a challenge under Article 11 of the DSU cannot be made out simply by asserting that a panel did not agree with arguments or evidence. In this vein, the Appellate Body emphasized that it would not entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case. In the Appellate Body's view, entertaining such factual arguments would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement.

Based on these preliminary considerations, the Appellate Body considered it appropriate to address the appellants' claims on the basis of these three approaches: (i) a minority of the appellants' claims warranted discrete examination (the appellants' claims regarding anticipated effects of the TPP measures, as well as a few claims regarding the actual effects of the TPP measures); (ii) with respect to the majority of the appellants' claims under Article 11 of the DSU, the Appellate Body addressed, jointly, clusters of claims based on cross-cutting themes underpinning these claims; and (iii) with respect to the remainder of the appellants' claims under Article 11 of the DSU, the Appellate Body considered it unnecessary to rule on the substance of these claims in order to provide a positive solution to the dispute before it.

3.9.1.1.2.1 Claims that warranted discrete examination

In its analysis concerning the anticipated effects of the TPP measures, the Panel reviewed, *inter alia*, the body of studies – mostly predating the implementation of the TPP measures – that provided the evidentiary base

for the adoption of the measures (the TPP literature). The Panel found that, overall, the complainants had failed to demonstrate that the TPP measures would be incapable of contributing to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, through the operation of the three mechanisms identified in the TPP Act, in combination with other relevant tobacco control measures applied by Australia. Rather, the Panel considered that in a regulatory context where tobacco packaging would otherwise be the only opportunity to convey a positive perception of the product through branding, as is the case in Australia, it was reasonable to hypothesize some correlation between the removal of such design features and the appeal of the product, and between such reduced product appeal and consumer behaviours. According to the Panel, it also did not appear unreasonable, in such a context, in light of the evidence before the Panel, to anticipate that the removal of these features would also prevent them from creating a conflicting signal that would undermine other messages that seek to raise the awareness of consumers about the harmfulness of smoking that are part of Australia's tobacco control strategy, including those arising from GHWs.

The appellants claimed that the Panel failed to make an objective assessment of the facts of the case, as provided for under Article 11 of the DSU, in reaching its intermediate conclusions based on its assessment of the pre-implementation evidence. Specifically, the appellants claimed that the Panel: (i) inappropriately attached probative value to the TPP literature; and (ii) disregarded the Dominican Republic's evidence that allegedly contradicted the Panel's intermediate conclusions.

The Appellate Body did not agree with Honduras that the Panel had failed to offer a reasoned and adequate explanation, or treated evidence in a onesided manner, in reaching its conclusion that the TPP literature can be considered as coming from respected and qualified sources, and therefore should not be dismissed in its entirety. In any event, the Appellate Body considered that any such alleged error, had it occurred, would not have been so material as to undermine the objectivity of the Panel's assessment of the matter before it. In this regard, the Appellate Body emphasized that it was the complainants, not the Panel, who bore the burden of adducing credible evidence to prove their proposition that the TPP measures are incapable of contributing to Australia's objective. Accordingly, the Appellate Body found that Honduras had failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU by relying on the TPP literature as part of its broader evidentiary base for assessing the contribution of the TPP measures.

Additionally, the Appellate Body disagreed with the premise underlying the Dominican Republic's claim that the body of evidence that the Dominican Republic identified directly contradicted the Panel's finding that the branding elements on tobacco packaging can convey positive perceptions to consumers, such that their removal would be apt to reduce the appeal of packaging (the first mechanism) and enhance the effectiveness of GHWs (the second mechanism). To the contrary, based on a careful review of the Panel's findings, as well as of the nature and scope of the Dominican Republic's evidence, the Appellate Body found that the Dominican Republic's claim did not reflect a correct understanding of the Panel's reasoning or its own evidence. Accordingly, the Appellate Body found that the Dominican Republic had failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU by disregarding the evidence that contradicted the Panel's conclusion, or by offering incoherent reasoning when it failed to address the evidence pertaining to the issue that the Panel itself acknowledged was crucial to its analysis.

For these reasons, the Appellate Body upheld the Panel's intermediate conclusion regarding the evidence pertaining to the design, structure, and intended operation of the TPP measures (anticipated effects) that the complainants failed to demonstrate that the TPP measures are incapable of contributing to Australia's objective through the three mechanisms by which the measures are designed to operate (i.e. reducing the appeal of tobacco products, enhancing the effectiveness of GHWs, and reducing the ability of the pack to mislead consumers) and that, to the contrary, this evidence is consistent with the proposition that the TPP measures are apt to affect smoking behaviour through these three mechanisms.

With respect to the Panel's findings regarding the actual effects of the TPP measures, the Panel examined the post-implementation evidence before it pertaining to: (i) proximal outcomes (i.e. reducing the appeal of tobacco products, enhancing the effectiveness of GHWs, and reducing the ability of the pack to mislead consumers); (ii) quitting-related and other distal outcomes; (iii) impact of the TPP measures on smoking prevalence; and (iv) impact of the TPP measures on consumption and sales volumes of tobacco products. The Appellate Body considered that the appellants' claims concerning the following aspects of the Panel analyses of the latter two categories of post-implementation evidence (i.e. smoking prevalence and consumption and sales volumes of tobacco products) warranted discrete examination: (i) step 1 of the Panel's smoking prevalence analysis; (ii) step 2 of the Panel's cigarette consumption analysis; (iii) step 3 of the Panel's smoking prevalence and cigarette consumption analyses; and (iv) due process concerns regarding the Panel's use of certain econometric tools. The Appellate Body rejected all of the appellants' claims that it considered warranted discrete scrutiny except for two, namely: (i) the impact of tobacco costliness on smoking behaviour in step 3 of the Panel's cigarette consumption analysis; and (ii) the appellants' due process concerns regarding the Panel's use of certain econometric tools.

As regards the impact of tobacco costliness, in step 3 of its smoking prevalence analysis in Appendix C, the Panel observed that the Dominican Republic's econometric results could not be taken at face value, mainly because most of their model specifications are unable to detect the impact of tobacco costliness (including excise tax increases) on smoking prevalence, even though all parties considered tobacco excise tax to be one of the most effective tobacco control policies. In its cigarette consumption analysis in Appendix D, the Panel did not indicate whether any of the parties' models were able to detect the impact of tobacco costliness. On appeal, the Dominican Republic claimed that the Panel acted inconsistently with Article 11 of the DSU by: (i) treating the parties' evidence inconsistently; and (ii) failing to engage with the Dominican Republic's evidence and arguments.

The Appellate Body found the Dominican Republic's position that the Panel rejected certain models to be misleading. The Appellate Body observed that the Panel did not "reject" or "accept" any model *per se* on the basis of any individual criterion of robustness. Rather, the Panel assessed the parties' evidence, starting with the complainants' evidence, and noted multiple reasons to doubt the reliability of that evidence. The Appellate Body noted further that, in assessing the parties' smoking prevalence evidence, although the Panel had doubts about certain of the complainants' models on the ground that they were unable to detect the impact of tobacco costliness, the Panel did not explicitly indicate that Australia's models were able to detect this impact. Hence, the Panel did not rely on this as a reason for finding that Australia's models were more reliable than the complainants' models. Since the Panel did not rely on this as a reason to find Australia's models more credible than the complainants' models, the Appellate Body saw no inconsistency in the Panel's treatment of the parties' smoking prevalence evidence with respect to this "criterion" of robustness. Consequently, the Appellate Body did not consider that the Panel treated the parties' evidence inconsistently with respect to its assessment that Australia's smoking prevalence evidence was more credible than the complainants' evidence and its overall conclusion that there was some evidence suggesting that the TPP measures contributed to the reduction in smoking prevalence.

That said, the Appellate Body observed that it was uncontested that the Panel did not explicitly address the parties' arguments relating to the factual allegation that Australia's consumption model showed a positive effect of the 2013 tax increase on consumption. The Panel's decision not to address these arguments was notwithstanding the considerable debate between the parties over this issue and the fact that the Panel had explicitly indicated that such arguments and evidence were "on the record". For the Appellate Body, the Panel's decision not to explicitly address the Dominican Republic's arguments and evidence regarding Australia's consumption evidence was questionable given that the Panel relied on almost identical reasoning to critique the complainants' smoking prevalence models. The Appellate Body therefore considered that the Panel's failure to address the Dominican Republic's argument and supporting evidence alleging that Australia's consumption models showed that excise tax increases led to an increase in cigarette consumption constituted an error in the Panel's appreciation of the evidence.

However, the Appellate Body emphasized that the Panel's error in this respect was limited to the Panel's assessment of whether the TPP measures contributed to the decline in cigarette consumption. Thus, the Panel's error only implicated the Panel's conclusion in step 3 of its cigarette consumption analysis.

As regards the appellants' due process concerns, the appellants claimed that the Panel failed to make an objective assessment of the facts of the case, as provided for under Article 11 of the DSU, when assessing certain post-implementation econometric evidence submitted by the parties. Honduras clarified that its claim concerned both: (i) who undertook the analysis on behalf of the Panel (with Honduras alleging that it was a "ghost expert" instead of an expert or a group of experts appointed under Article 13 of the DSU or Article 14.2 of the TBT Agreement); and (ii) the alleged failure by the Panel to provide the parties with a meaningful opportunity to comment on the Panel's analysis. By contrast, the Dominican Republic indicated that its claim was narrower, limited to the second of the concerns raised by Honduras, i.e. the alleged failure by the Panel to provide the parties with a meaningful opportunity to comment on the Panel's analysis. Specifically, the Dominican Republic alleged that the Panel developed and executed certain econometric tests on its own, without giving the parties any opportunity whatsoever to comment. The focus of the Dominican Republic's claim was the Panel's employment of the econometric tools of "multicollinearity" and "non-stationarity". The Appellate Body observed that while Honduras had asserted that its claims pertained to the Panel's analysis in the entirety of Appendices A-E to the Panel Report (comprising 150 pages), in substantiating its claims on appeal, Honduras referred only to the Panel's reliance on "new" robustness criteria (i.e. multicollinearity and non-stationarity). Hence, the Appellate Body's analysis focused on the Panel's reliance on these two criteria.

Concerning Honduras' allegation that the Panel had an obligation to appoint experts, the Appellate Body recalled that Article 13.1 of the DSU identified the "right", not obligation, of a panel to seek information and technical advice from any individual or body which it deems appropriate. Similarly, both Article 13.2 of the DSU and Article 14.2 of the TBT Agreement employ the auxiliary verb "may" to express the permissive intent of these provisions. Moreover, a panel's authority under Article 13 of the DSU is comprehensive, and it includes the authority to decide not to seek such information or advice at all. In light of the comprehensive authority to seek information vested into a panel under Article 13 of the DSU, the Appellate Body considered that it was well within the Panel's discretion to decide whether to seek expert assistance. The Appellate Body did not agree with Honduras that the technical nature of the evidence addressed in Appendices A-E automatically implied that the Panel was "under an obligation" to seek external expert advice in order to assess this evidence. Furthermore, the Appellate Body observed that, with respect to the econometric evidence that the Panel assessed in Appendices A-E to its Report, none of the complainants requested the Panel to engage experts, pursuant to Article 14.2 of the TBT Agreement, to assist in questions of a technical nature. Absent such a request, the Appellate Body could not accept Honduras' argument on appeal that the Panel somehow compromised the parties' due process rights by failing to seek expert assistance on its own initiative. The Appellate Body posited that if the parties had been of the view that it was, as Honduras put it, "indispensably necessary" for the Panel to seek expert assistance, they had been free to request the Panel to do exactly that. Accordingly, the Appellate Body found that the Panel did not act inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU simply by seeking to assess the evidence put before it without engaging experts.

Turning to the allegations concerning the Panel's reliance on multicollinearity and non-stationarity, the Appellate Body noted that neither Honduras nor the Dominican Republic considered that the Panel's use of the econometric tools of multicollinearity and non-stationarity was prohibited under Article 11 of the DSU, *per se*. Rather, the appellants contended that the Panel's appreciation and assessment of the facts before it, leading to its factual findings, and particularly its reliance on multicollinearity and non-stationarity, should have been tested with the parties.

The Appellate Body recalled that, in its examination of the post-implementation evidence of smoking prevalence and consumption, multicollinearity and non-stationarity were two of the concerns identified by the Panel pertaining to certain evidence provided by the complainants. Moreover, the Panel relied on, *inter alia*, the fact that certain pieces of Australia's evidence did not suffer from these concerns, in order to conclude that the TPP measures contributed to reducing smoking prevalence and consumption. The Appellate Body's review of the Panel record suggested that these concerns were not identified by the parties but were introduced by the Panel itself. Furthermore, the Panel did not pose questions to the parties or otherwise invite them to comment on the use of these robustness criteria in addressing the parties' evidence. It appeared to the Appellate Body that the parties first became aware of possible concerns relating to multicollinearity and non-stationarity when the Panel issued its Interim Report to the parties. At the interim review stage, the complainants did not raise concerns regarding the Panel's identification of these concerns. The Appellate Body noted that, in order to identify the concerns regarding multicollinearity and non-stationarity in the parties' evidence, the Panel was obliged to conduct variance inflation factors (VIF) and unit-root tests. The Panel's reliance on these technical tests was relevant to its assessment of the credibility of the evidence, and its ultimate determination that the TPP measures contributed to reducing smoking prevalence and consumption. These complex technical tests thus had an important role in the Panel's assessment of the evidence. The Appellate Body noted further that the application of these tests involved a certain degree of discretion on the part of the Panel as to whether, and to what extent, concerns regarding multicollinearity and non-stationarity were legitimate reasons to question the reliability of the evidence. Given that these concerns were not introduced by the parties, but emanated from the Panel itself, and in light of their highly technical nature and of the Panel's discretion in relying on these concerns, the Appellate Body considered that the Panel should have explored these issues with the parties.

The Appellate Body took note of Australia's argument that the complainants could have used the interim review stage to request the Panel to review the relevant parts of the Panel Report pursuant to Article 15 of the DSU but chose not to do so. According to Australia, the conduct of the parties is a relevant consideration in the evaluation of a party's due process claim and such a claim should be rejected where the party failed to raise its objections notwithstanding an opportunity to do so. The majority of the Division hearing these appeals disagreed. In the majority's view, although Honduras and the Dominican Republic could have raised their concerns regarding the Panel's reliance on these econometric tools during the interim review stage, in the circumstances of the present disputes, their failure to do so did not detract from the Panel's due process violation in its treatment of certain evidence submitted by the complainants. While the majority acknowledged that interim review affords parties an opportunity to raise and address numerous aspects of a Panel's findings, in their view, the interim review process contemplated under Article 15 would not have been sufficient to enable the parties to adequately explore these issues, given the review's limited nature and late stage. For these reasons, the majority considered that, by introducing in its Interim Report novel econometric criteria that it had not tested with the parties in its examination of the post-implementation evidence of smoking prevalence and consumption, the Panel denied the parties their due process rights and thus failed to make an objective assessment of the facts under Article 11 of the DSU. Thus, the majority found that the Panel erred in the instances where it relied on multicollinearity and non-stationarity in its assessment of the parties' post-implementation evidence of smoking prevalence and consumption.

In sum, the Appellate Body found that the Panel erred with respect to its assessment of multicollinearity, non-stationarity, and the impact of tobacco costliness, in finding that Australia's econometric evidence was more credible than the complainants' econometric evidence.

With respect to the Panel's reliance on the impact of tobacco costliness to critique the parties' evidence, the Appellate Body considered that the Panel's failure to address the Dominican Republic's arguments fatally undermined the Panel's determination that Australia's evidence with respect to whether the TPP measures contributed to the decline in cigarette consumption was more credible than the complainants' evidence.

Therefore, the Appellate Body concluded that the Panel's error vitiated its factual finding in step 3 of the Panel's cigarette consumption analysis in Appendix D that there is some econometric evidence suggesting that the TPP measures contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption.

With respect to the Panel's reliance on multicollinearity and non-stationarity, the Appellate Body noted that the Panel partially relied on concerns related to non-stationarity and multicollinearity in step 3 of both its smoking prevalence and cigarette consumption analyses. As the Appellate Body had already concluded that the Panel's factual finding in step 3 of its cigarette consumption analysis was vitiated by the Panel's failure to address the Dominican Republic's assertion concerning tobacco costliness, the Appellate Body did not consider it necessary to further assess the implications for the Panel's consumption analysis of the Panel's errors with respect to non-stationarity and multicollinearity. Turning to the Panel's smoking prevalence analysis, the Appellate Body observed that the Panel had relied on multiple reasons to favour Australia's evidence. Accordingly, it followed that vitiating the Panel's reliance on multicollinearity had no impact on the Panel's conclusion that Australia's smoking prevalence evidence was more reliable than the complainants' evidence. By contrast, the Panel's only reason (in its smoking prevalence analysis) to prefer dummy variables to tax level variables was on the basis of non-stationarity. Consequently, vitiating the Panel's reliance on non-stationarity meant that an aspect of the Panel's reasoning fell away, in that there was no basis for the Panel's preference for dummy variables over tax levels. However, in the Appellate Body's view, this was not sufficient to call into question the Panel's determination that Australia's evidence was more credible than the complainants' evidence, as the Panel also relied on other criteria in reaching this determination. Thus, the Appellate Body found that vitiating the Panel's reliance on non-stationarity and multicollinearity had no impact on the Panel's conclusion that there is econometric evidence suggesting that the TPP measures contributed to the reduction in overall smoking prevalence in Australia.

3.9.1.1.2.2 Clusters of claims that the Appellate Body addressed jointly based on cross-cutting themes

The Appellate Body addressed, jointly, clusters of claims, challenging the Panel's analysis of the contribution of the TPP measures to Australia's objective, based on the following cross-cutting themes underpinning these claims: (i) misrepresentation of the Panel findings; (ii) allocation of the burden of proof under Article 2.2 of the TBT Agreement; (iii) the Panel's discretion as the trier of fact; (iv) allegations that the Panel disregarded, significantly misrepresented, or distorted evidence; (v) connection between the evidence and the arguments before the Panel; (vi) panels need not address every argument raised by the parties; (vii) allegations that the Panel findings were based on incoherent reasoning, or lacked a reasoned and adequate explanation; (viii) allegations challenging the Panel's graphical representation of the parties' evidence; (ix) submitting facts that are not on the Panel record; and (x) claims concerning the Panel's statements on the future impact of the TPP measures.

The Appellate Body rejected all of these claims by the appellants.

3.9.1.1.2.3 Claims with respect to which the Appellate Body exercised judicial economy

The Appellate Body took account of the following treaty provisions in its consideration of whether, in order to resolve these disputes, it was necessary for the Appellate Body to address certain allegations of error put forward by the appellants. The Appellate Body noted that Article 17.12 of the DSU provides that the Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding. At the same time, the Appellate Body recognized that Article 3.4 of the DSU indicates that recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter, while Article 3.7 of the DSU states that the aim of the dispute settlement mechanism is to

secure a positive solution to a dispute. For the Appellate Body, these overarching aims of the WTO dispute settlement mechanism suggest that, while the Appellate Body is required *to address* each issue on appeal, it has the discretion not to *rule* on certain claims when doing so is not necessary to resolve the dispute.

Based on these considerations, the Panel considered it unnecessary to rule on the following claims: (i) the Dominican Republic's claims concerning the Panel's assessment of the evidence relating to the National Tobacco Plain Packaging Tracking Survey (NTPPTS) and International Tobacco Control (ITC) datasets in proximal and distal outcomes; (ii) Honduras' claims relating to the effect of the enlarged GHWs on tobacco plain packaging; and (iii) the Dominican Republic's claims concerning the Panel's reliance of Figure C.19 in step 2 of its analysis on smoking prevalence.

3.9.1.1.2.4 The Panel's overall conclusion on the contribution of the TPP measures to Australia's objective

On appeal, Honduras claimed that the Panel erred under Article 11 of the DSU by failing to provide a reasoned and adequate explanation of how the facts supported the determination made. According to Honduras, the Panel's findings relating to the TPP measures' actual effects on smoking behaviour do not support its overall conclusion that the measures actually "do" make a meaningful contribution to Australia's objective. The Dominican Republic claimed that the Panel erred under Article 11 of the DSU by offering internally incoherent reasoning in relation to whether the actual effects of the TPP measures confirmed its findings on the measures' anticipated effects reached on the basis of the pre-implementation evidence. The Dominican Republic added that, if the Appellate Body were to reverse the Panel's findings on the actual effects of the TPP measures on smoking prevalence and consumption, none of the remaining intermediate Panel findings – i.e. neither the Panel's findings on the anticipated impact of the TPP measures nor its findings on the actual impact of the measures on "proximal" and "distal" outcomes – would be sufficient to sustain its overall conclusion on the contribution of the TPP measures.

The Appellate Body recalled that before the Panel, the complainants' main contention was that the TPP measures cannot contribute to Australia's objective through the mechanisms identified in the TPP Act, and that post-implementation evidence shows that smoking prevalence has not in fact been reduced as a result of the TPP measures. Hence, in addressing the parties' arguments, the Panel sought to determine the degree to which the TPP measures, as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products. In this regard, the Panel acknowledged that the fulfilment of this objective through the TPP measures is predicated on their ability to influence smoking behaviours, such as initiation, cessation, and relapse. For this reason, the Panel considered that the impact of the measures on such behaviours is, *a priori*, directly relevant to an assessment of the degree of contribution of the measures to this objective. Bearing in mind the TPP Act's depiction of the intended operation of the TPP measures, the Panel first assessed the anticipated effect of the TPP measures, based on their design, structure, and expected operation. Thereafter, the Panel assessed the evidence relating to the actual effects of the TPP measures following their entry into force. Specifically, the Panel assessed the impact of the TPP measures on: (i) "non-behavioural" or "proximal" outcomes (i.e. the appeal of packaging, the effectiveness of the GHWs, and the ability of packaging to mislead consumers); (ii) "distal" outcomes (i.e. intention and behavioural outcomes, such as increased intentions to quit and increased quit attempts); and (iii) smoking behaviour (i.e. prevalence and consumption). The Panel also examined the impact of the TPP measures on illicit trade. In carrying out this task, the Panel considered that it had a duty to examine and consider all the evidence before it and to evaluate the relevance and probative force of each piece thereof.

The Appellate Body observed that, in its summary of the bases for its overall conclusion, the Panel emphasized the significance of the pre-implementation evidence pertaining to the anticipated effects of the TPP measures, while highlighting the limitations of the post-implementation evidence pertaining to the actual impact of the TPP measures. The Appellate Body understood the Panel to have identified

the limited time following the entry into force of the TPP measures, as well as the difficulty of isolating the effects of the TPP measures, as factors undermining the quality of the available post-implementation evidence on the actual effects of the TPP measures. By contrast, the Appellate Body understood the Panel's explanations to suggest that the Panel accorded greater probative weight to the pre-implementation evidence pertaining to the anticipated effects of the TPP measures. Furthermore, the Appellate Body recalled the Panel's observation that the impact of the TPP measures may evolve over time. For the Appellate Body, given that the TPP measures had been in force for a very brief period by the time the Panel proceedings got under way, the Panel's observation that the impact of the TPP measures may evolve over time seemed reasonable. Thus, in the view of the Appellate Body, having examined properly all the relevant evidence before it, the Panel was well within the bounds of its discretion, as the trier of fact, to accord greater probative weight to the evidence of the anticipated effects of the TPP measures than to the evidence of the actual effects of the TPP measures. For these reasons, the Appellate Body rejected Honduras' assertion that, in reaching its overall conclusion on the contribution of the TPP measures to Australia's objective, the Panel failed to provide a reasoned and adequate explanation of the quality and probative value of the pre-implementation evidence in light of the post-implementation evidence.

Moreover, the Appellate Body recalled its finding that the complainants had not demonstrated that the Panel failed to make an objective assessment of the case with respect to its assessment of the evidence of the *anticipated* effects of the TPP measures. Likewise, with respect to the actual effects of the TPP measures, the Appellate Body recalled that it had not been persuaded by any of the appellants' challenges of the Panel's analysis of the post-implementation evidence relating to proximal and distal outcomes. Accordingly, the Panel's findings in Appendices A and B to its Report stood. As discussed above, the Appellate Body considered that the Panel, having examined properly all the relevant evidence before it, was well within the bounds of its discretion as trier of fact to accord greater probative weight to the evidence of the anticipated effects of the TPP measures than to the evidence of the actual effects of the TPP measures. Accordingly, for the Appellate Body, the Panel's findings on the *anticipated* effects, together with its findings on the *actual* impact of the TPP measures on proximal and distal outcomes supported the Panel's overall conclusion that the TPP measures, in combination with other tobacco control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.

Furthermore, the Appellate Body highlighted its rejection of the vast majority of the appellants' challenges to the Panel's analysis of *the actual* impact of the TPP measures on smoking behaviour. That said, the Appellate Body recalled that it had found two errors in the Panel's assessment of the post-implementation evidence on smoking prevalence and consumption. First, the Appellate Body found that the Panel erred in its reliance on non-stationarity and multicollinearity. However, the Appellate Body considered that this error by the Panel had no impact on the Panel's ultimate conclusion that there is econometric evidence suggesting that the TPP measures contributed to the reduction in overall smoking prevalence in Australia. Second, with respect to the Panel's reliance on the impact of tobacco costliness to critique the parties' evidence, the Appellate Body found that the Panel erred by failing to address the Dominican Republic's arguments regarding Australia's consumption model. The Appellate Body had found that this error fatally undermined, and therefore vitiated, the Panel's factual finding, in step 3 of its cigarette consumption analysis, that Australia's evidence was more credible than the complainants' evidence, on which the Panel based its conclusion that there is some econometric evidence suggesting that the TPP measures contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption.

Having found these errors in the Panel's analysis, the Appellate Body took note of Australia's contention that, even if the appellants could establish that the Panel exceeded the bounds of its discretion as the trier of facts, they would still need to demonstrate that the Panel's errors undermined the objectivity of the Panel's assessment. The Appellate Body recalled that, as it has stated in the past, not every error in the appreciation of evidence, or error of law, constitutes a failure on the part of the panel to make an

objective assessment of the matter before it. Rather, to succeed in its challenge under Article 11 of the DSU, an appellant must show that the statement was material to the panel's legal conclusion. Hence, in order to reverse a panel's finding on the basis of Article 11, the Appellate Body must be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment, such that the panel's factual finding no longer had a sufficient evidentiary and objective basis.

Turning back to the facts of this case, the Appellate Body observed that the Panel's reasoning with respect to smoking prevalence and consumption was formed on the basis of the Panel's conclusions in steps 2 and 3 of its smoking prevalence analysis (in Appendix C) and steps 2 and 3 of its cigarette consumption analysis (in Appendix D). The Panel also considered it relevant that the evidence indicated that the TPP measures had reduced the appeal of tobacco products. The Appellate Body highlighted that, of these five different aspects of its analysis that the Panel relied on in forming its conclusion that the post-implementation evidence was consistent with the hypothesized impact of the TPP measures, the appellants had demonstrated that the Panel erred with respect to one aspect only, namely, step 3 of the Panel's cigarette consumption analysis. The Appellate Body further noted that smoking prevalence and consumption were merely two metrics through which the Panel assessed whether the TPP measures had had an actual effect on smoking behaviours (initiation, cessation, and relapse). The Appellate Body considered that the appellants had not demonstrated how any errors by the Panel in its assessment of consumption would also demonstrate that the Panel erred in its assessment of smoking prevalence.

The Appellate Body also took note of Honduras' allegation that, even taking the Panel's findings as a given, the Panel's own limited findings relating to the TPP measures' actual effects on smoking behaviour did not support its overall conclusion that the measures actually do make a *meaningful* contribution to Australia's objective.

The Appellate Body recalled that the Panel's primary conclusion and rejection of the main claims by the complainants stated that: (i) the complainants had not demonstrated that the TPP measures are not apt to make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products; but rather (ii) the evidence before the Panel, taken in its totality, supported the view that the TPP measures, in combination with other tobacco control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), *are apt to, and do in fact, contribute* to Australia's objective of reducing the use of, and exposure to, tobacco products. The Appellate Body agreed with the participants that both of these findings, read together, are a rejection of the complainants' main proposition that the TPP measures are not apt to, nor do they make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.

However, the Appellate Body made a distinction between the conclusion above and a later statement in the Panel's overall conclusion in which the Panel found that, taken as a whole, the evidence before the Panel supported the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, the TPP measures *are apt to, and do, make a meaningful contribution* to Australia's objective of reducing the use of, and exposure to, tobacco products. The Appellate Body did not consider the Panel's addition of the word "meaningful" to be happenstance. Instead, the Appellate Body considered that this conclusion spoke to the question of the "degree" of the contribution that the TPP measures, in concert with Australia's other tobacco control measures, make to Australia's objective. In this regard, the Appellate Body understood the Panel to have concluded that the TPP measures *are apt to, and do, make a meaningful contribution* to Australia's objective of reducing the use of, and exposure to, tobacco products, as a gateway to addressing the complainants' alternative proposition – i.e. that, even if the Panel were to conclude that the TPP measures make a contribution to Australia's objective, the TPP measures would still be more trade-restrictive than necessary because various alternative measures would be available to Australia that are less trade-restrictive and could achieve an equivalent degree of contribution to Australia's objective. Hence, given the specific circumstances of this case and the manner in which the complainants

put forward their claims before the Panel, the Appellate Body was of the view that the degree of the contribution of the TPP measures (i.e. whether the contribution is "meaningful") was pertinent only to the Panel's comparison of the trade restrictiveness of, and the degree of achievement of Australia's objective by, the TPP measures, with that of the proposed possible alternative measures that may be reasonably available and that are less trade-restrictive than the TPP measures – taking account of the risks non-fulfilment would create. Accordingly, the Appellate Body found that in the specific circumstances of this case, the Panel's overall conclusion on the contribution of the TPP measures to Australia's objective was not affected by the adjective "meaningful".

For these reasons, the Appellate Body found that the appellants had not demonstrated that the Panel erred in its overall conclusion on the contribution of the TPP measures to Australia's objective.

3.9.1.2 The Panel's findings concerning the trade restrictiveness of the TPP measures

The Panel emphasized that assessing the trade restrictiveness of a measure entailed examining the degree to which it has a limiting effect on international trade. The Panel considered that the manner in which an assertion of trade restrictiveness is substantiated may vary from case to case. The Panel had further noted that how the existence and extent of trade restrictiveness is to be demonstrated with respect to technical regulations that are not alleged to be discriminatory will depend on the circumstances of a given case. In the absence of any allegation of *de jure* restriction on the opportunity for imports to compete on the market or of any alleged discrimination in this respect (between imports or between imported and domestic products), the Panel had considered that a sufficient demonstration will be required to establish the existence and extent of any limiting effect on international trade. The Panel had added that a demonstration of trade restrictiveness could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation.

Applying this standard to the facts of these disputes, the Panel had agreed with the complainants that the TPP measures would limit the opportunity for producers to differentiate their products. However, the Panel had considered that it needed to be shown how such effects on the conditions of competition in the market amount to a limiting effect on international trade. The Panel had proceeded to assess the complainants' arguments relating to: (i) the effects of the TPP measures on barriers to entry into the Australian market; (ii) the effects of the TPP measures on the volume and value of trade in tobacco products; (iii) compliance costs arising from the TPP measures; and (iv) penalties under the TPP measures. The Panel had rejected most of these arguments but concluded that the TPP measures are trade-restrictive insofar as they reduce the volume of imported tobacco products on the Australian market, thereby having a limiting effect on trade. The Panel had also considered it plausible that the measures could, over time, affect the overall value of tobacco imports, but did not consider that the evidence demonstrated that to have occurred to date.

On appeal, Honduras claimed that the Panel erred in its interpretation of Article 2.2 by failing to rely on a legal standard based on the conditions of competition and competitive opportunities. The Dominican Republic considered that the Panel correctly interpreted Article 2.2 such that the test of trade restrictiveness is focused on the competitive opportunities of imported products. Both the Dominican Republic and Honduras considered that the Panel erred in its application of Article 2.2 of the TBT Agreement by failing to find that a reduction in the opportunity for products to differentiate on the basis of brands sufficed to demonstrate the trade restrictiveness of the TPP measures. The appellants also claimed that the Panel erred in its application of Article 2.2 in determining the effect of the TPP measures on the value of imported tobacco products. The Dominican Republic also claimed that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had not shown that the decrease in sales of highend cigarettes relative to lowend cigarettes reveals "only" or "exclusively" consumer downtrading, as opposed to the results of other market phenomena.

3.9.1.2.1 Claims concerning the Panel's interpretation of Article 2.2

Honduras argued that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement by failing to rely on a legal standard based on the conditions of competition and competitive opportunities. According to Honduras, the Panel based its analysis on whether the TPP measures are discriminatory and favoured a trade effects test based on the extent to which the measures actually reduced the volume of sales and thus of imports. The Dominican Republic argued that the Panel articulated the correct interpretation of "trade-restrictive", within the meaning of Article 2.2, when it explained that prior assessments of trade restrictiveness were focused on whether a technical regulation had a limiting effect on the competitive opportunities available to imported products. The Dominican Republic considered that, had the Panel properly applied the legal standard of trade restrictiveness, it would have found that the loss of competitive opportunities for tobacco products arising from the design, structure, and intended operation of the TPP measures constitutes trade restrictiveness, within the meaning of Article 2.2 of the TBT Agreement.

The Appellate Body disagreed with the appellants' characterization of the Panel's interpretative findings as indicating that a determination of trade restrictiveness is focused on assessing the conditions of competition or competitive opportunities of products. The Appellate Body further noted a significant difference between, on the one hand, panels and the Appellate Body's reliance on the concept of conditions of competition in the context of Article 2.2 in prior disputes and, on the other hand, the appellants' reliance on that concept in these disputes. The Appellate Body considered that a showing of a reduction in the competitive opportunities of imported products is only relevant to the assessment of trade restrictiveness to the extent that it reveals a limiting effect on international trade. For instance, where a measure is shown to reduce the competitive opportunities of imported products as a group, from a Member, vis-à-vis competing domestic products, that would suffice for a panel to conclude that the measure is indeed trade-restrictive. The Appellate Body noted that the Panel's articulation of the legal standard under Article 2.2 reflected this understanding.

The Appellate Body further observed that the appellants appear to consider that a showing of a reduction in the competitive opportunities of some imported products visàvis all other products in the market, including other imported products from the same Member, would suffice to demonstrate trade restrictiveness. In this respect, the Appellate Body agreed with the Panel that the mere fact of a modification of the conditions of competition in a market would not necessarily suffice for a panel to conclude on the degree of trade restrictiveness of a particular technical regulation. The Appellate Body noted the Panel's finding that, when considering the effects of a technical regulation (including whether the technical regulation has a limiting effect on trade), consideration might be given to both import-enhancing and import-reducing effects on the trade of other Members. The Appellate Body did not see how, in a situation where a measure merely modifies the conditions of competition of individual producers within a market, and a panel is unable to anticipate the impact of the measure on the conditions of competition for imported products, as a group, from a Member, the panel could conclude that the measure would necessarily have a limiting effect on international trade.

The Appellate Body also disagreed with the appellants that the Panel effectively required that, in situations where a non-discriminatory measure is challenged under Article 2.2, it is necessary for a complainant to provide evidence of actual trade effects in order to demonstrate the trade restrictiveness of the measure. The Appellate Body further highlighted that, in certain circumstances, a measure's design and structure may be insufficient for a panel to anticipate whether and to what extent the measure will have a limiting effect on international trade, and emphasized that there is no obligation on a panel to cease its analysis of the trade restrictiveness of a measure after examining only a subset of the evidence.

3.9.1.2.2 Claims concerning the Panel's application of Article 2.2

3.9.1.2.2.1 The reduction in the opportunity to differentiate on the basis of brands

The appellants argued that the Panel erred in its application of Article 2.2 of the TBT Agreement by finding that, although the TPP measures reduced the opportunity for products to differentiate on the basis of brands, this did not demonstrate the trade restrictiveness of the TPP measures. The appellants also argued that the Panel erred in its application of Article 2.2 by requiring the complainants to adduce evidence of actual trade effects in order to find that the TPP measures are trade-restrictive.

The Appellate Body noted that the Panel considered that it was not able to determine, exclusively on the basis of its examination of the design and structure of the TPP measures, whether the TPP measures are trade-restrictive. The Appellate Body observed that, in forming this conclusion, the Panel highlighted that brand differentiation is valuable in international trade because differentiation engenders consumer loyalty and increases consumers' willingness to pay. The Appellate Body considered that this indicated that the impact of the reduction in the opportunity to differentiate would be different for different producers depending on the specific degree of customer loyalty associated with different producers' brands, such that while a reduction in the opportunity to differentiate might harm the competitive opportunities of some products, it would necessarily seem to improve the competitive opportunities of other competing products. The Appellate Body therefore concluded that the appellants did not demonstrate that the Panel erred by failing to find that the reduction in the opportunity to differentiate between different products caused by the TPP measures necessarily amounts to a limiting effect on international trade.

The Appellate Body also disagreed with the appellants that the Panel required evidence of actual trade effects or applied a higher evidentiary burden on the basis that the TPP measures were not shown to be discriminatory. The Appellate Body noted that the reduction in the opportunity to brand-differentiate was insufficient for the Panel to anticipate whether the net effect of the TPP measures would be trade-restrictive. For this reason, the Panel proceeded to examine the additional evidence and arguments adduced by the parties. The Appellate Body also highlighted that the Panel did not require such additional evidence or argumentation to be in the form of actual trade effects.

3.9.1.2.2.2 The effect of the TPP measures on the value of imported products

The appellants argued that the Panel erred by concluding that the TPP measures would not lead to a reduction in the value of imported products, even though (in the appellants' view) the qualitative evidence indicated that such an effect would occur in the future. The Dominican Republic also argued that: (i) the Panel erred by rejecting the argument that the TPP measures reduced the value of imported products through downtrading (i.e. downward substitution from higher- to low-priced brands) on the basis that the TPP measures were not the exclusive cause of downward substitution by consumers; (ii) any separate reasons that the Panel had for rejecting the complainants' downtrading argument were also in error; and (iii) the Panel erred by taking into account the reaction of producers to the TPP measures.

Regarding the appellants' argument that the qualitative evidence indicated that the TPP measures would reduce the value of imported products in the future, the Appellate Body highlighted that the Panel took into account the future impact of the TPP measures on value. The Appellate Body observed, however, that the Panel did not consider that the evidence was sufficient to conclude that the TPP measures did, or necessarily would, lead to a reduction in value. Recalling that there is no obligation on a panel to base its assessment of the degree of trade restrictiveness on a subset of the relevant evidence, and bearing in mind that the weighing and balancing of the evidence was the province of the Panel in its role as factfinder, the Appellate Body did not consider that this aspect of the appellants' arguments demonstrated that the Panel erred in applying Article 2.2.

As to the Dominican Republic's arguments regarding the Panel's findings on downtrading, the Appellate Body considered that these arguments were based on a misreading of the Panel Report by the Dominican Republic. The Appellate Body understood that the Panel did not dismiss the appellants' downtrading argument on the basis of causation, but rather because the evidence did not show that the TPP measures would maintain or increase cigarette prices. The Appellate Body also rejected the Dominican Republic's arguments, in the alternative, that the Panel's reasoning in this respect was in error. Finally, the Appellate Body considered that the Panel did not err by taking into account the reaction of producers to the TPP measures. The Appellate Body considered that, by looking at the impact of the TPP measures on prices, the Panel was effectively examining the relevant facts in order to conclude on the degree of trade restrictiveness of the TPP measures, based on the complainants' own arguments that the TPP measures led to a decrease in value.

3.9.1.2.3 Claims under Article 11 of the DSU

The Dominican Republic argued that the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU in finding that "the complainants had not shown that the decrease in sales of high-end cigarettes relative to low-end cigarettes reveals 'only' or 'exclusively' consumer downtrading, as opposed to the results of other market phenomena." The Dominican Republic referred specifically to the Panel's finding that part of the reduction in the ratio of sales was due to the overall reduction in the total wholesale sales volume following and due to the introduction of the TPP measures.

The Appellate Body understood that the Panel's finding that the reduction in the ratio of higher to lowpriced cigarette wholesale sales represented both downward substitution caused by the TPP measures as well as the overall reduction in the total wholesale sales volume following and due to the introduction of the TPP measures and enlarged GHWs was essentially an unnecessary finding of fact by the Panel. The Appellate Body also noted that the Panel failed to indicate any basis for this factual finding. Given that the Panel's unnecessary factual finding was not material to the Panel's conclusions with respect to trade restrictiveness, and lacked any basis in the Panel Report, the Appellate Body mooted that finding. Having mooted the relevant finding upon which the Dominican Republic's claims under Article 11 were based, the Appellate Body did not consider it necessary to address those claims.

3.9.1.3 The Panel's findings concerning two of the proposed alternative measures

Before the Panel, the complainants had proposed four alternative measures that they considered as being less trade-restrictive than the TPP measures while also being capable of making an equivalent contribution to Australia's objective: (i) an increase in the minimum legal purchasing age (MLPA) for tobacco products in Australia, from 18 to 21 years; (ii) an increase in taxation of tobacco products in Australia; (iii) improvements to, or effective, social marketing campaigns in Australia; and (iv) a prevetting mechanism for tobacco packaging. The Panel rejected all four of these alternative measures.

On appeal, the appellants challenged the Panel findings with respect to two of these alternative measures only: (i) an increase in the MLPA for tobacco products in Australia; and (ii) an increase in taxation of tobacco products in Australia. The appellants requested the Appellate Body to reverse the Panel's findings that these two alternative measures were not reasonably available alternative measures that would be less trade-restrictive than the TPP measures while making an equivalent contribution to Australia's legitimate objective. Specifically, the appellants claimed that the Panel had erred, in its application of Article 2.2 of the TBT Agreement, in finding that the complainants had failed to demonstrate that: (i) each of the two alternative measures would be less *trade-restrictive* than the TPP measures; and (ii) each alternative measure would make a contribution to Australia's objective *equivalent* to that of the TPP measures. The Dominican Republic also raised claims under Article 11 of the DSU.

3.9.1.3.1 Trade restrictiveness of the alternative measures

The appellants claimed that the Panel erred under Article 2.2 of the TBT Agreement, in finding that the complainants had not demonstrated that the two alternative measures at issue would be less trade-restrictive than the TPP measures, because those conclusions were based on the Panel's erroneous findings, made earlier in its Report, regarding the degree of trade restrictiveness of the TPP measures. According to the appellants, in its assessment of the trade restrictiveness of the TPP measures, the Panel adopted too narrow an understanding of the concept of "trade restrictiveness", and, rather than focusing on the measures' impact on the competitive opportunities for tobacco products based on their design, structure, and intended operation, it required empirical evidence of the TPP measures' actual trade effects. The appellants considered that, had the Panel properly found that the TPP measures are trade-restrictive in that they, by design, reduce the competitive opportunities arising from brand differentiation, it would have reached a different conclusion, namely, that the TPP measures are more trade-restrictive than the alternative measures because the latter measures do not similarly limit competitive opportunities for tobacco products.

The Appellate Body recalled its finding, with respect to the Panel's findings on trade restrictiveness of the TPP measures, that the appellants had not demonstrated that the Panel erred in its interpretation or application of Article 2.2 by rejecting, in the particular circumstances of these disputes, the complainants' propositions that: (i) the reduction in brand differentiation (i.e. a modification of the competitive environment in the tobacco-product market), in and of itself, sufficed to establish the requisite limiting effect on international trade; and (ii) the TPP measures are trade-restrictive due to their impact on the overall value of imported tobacco products. The Appellate Body recalled that the Panel had found that the Australian market is supplied entirely by imported tobacco products. The Appellate Body also highlighted the Panel's conclusion that the TPP measures are trade-restrictive insofar as they affect the volume of imported tobacco products. Thus, the Appellate Body agreed with the Panel's determination that an alternative measure that is capable of making a degree of contribution to the objective of reducing the use of, and exposure to, tobacco products equivalent to that of the TPP measures would be as trade-restrictive as the TPP measures, as far as the import volume is concerned. The Appellate Body considered that the appellants had not explained specifically why this is not the case with respect to the two alternative measures in question. Under these circumstances, the Appellate Body did not see a sufficient basis to find that the Panel had erred in finding that neither alternative measure was demonstrated to be less trade-restrictive than the TPP measures.

3.9.1.3.2 Relative contribution of the alternative measures

The appellants claimed that the Panel erred under Article 2.2 of the TBT Agreement in finding that the complainants had failed to demonstrate that each of the two alternative measures would make a contribution to Australia's objective equivalent to the contribution of the TPP measures.

The Appellate Body noted that all participants agreed with the Panel's formulation of the legal standard, applicable to an assessment of "equivalence", i.e. that what is relevant for such an assessment is the overall degree of contribution that the technical regulation makes to the objective pursued rather than any individual isolated aspect or component of contribution, and that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue and there is a margin of appreciation in this assessment. The participants also agreed that the standard by which to assess equivalence remains the same where the challenged measure is implemented as part of a responding Member's comprehensive policy to address a multifaceted problem, such as smoking. The Appellate Body also recalled that the Panel had determined that the objective of the TPP measures to improve public health by reducing the use of, and exposure to, tobacco products. In this regard, the Appellate Body took note of the Panel's rejection of Australia's proposition that the relevant objective also encompasses what Australia referred to as the three *specific objectives or mechanisms* of the TPP measures, namely: (i) reducing the appeal of tobacco products; (ii) increasing the effectiveness of GHWs; and (iii) reducing the ability of packages to mislead consumers about the harms of smoking.

The Appellate Body also noted that the Panel assessed the degree of contribution that the TPP measures and each of the alternative measures make to the above objective, and that, in the specific circumstances of these proceedings, the Panel decided to assess the respective degrees of contribution of the challenged and alternative measures in qualitative, rather than quantitative, terms. In each instance, the Panel qualified the measure's contribution by using the same adjective "meaningful". However, the Panel ultimately concluded that the complainants had failed to demonstrate that the contribution of each alternative measure would be equivalent to that of the TPP measures. Under these circumstances, the Appellate Body found it reasonable to understand the Panel's suggestion – that the ("meaningful") degree to which each alternative measure would be apt to contribute to Australia's objective – as being similar or comparable to the ("meaningful") degree to which the TPP measures contribute to the same objective. Indeed, having reviewed how the Panel reached its finding of a "meaningful" contribution in each instance, the Appellate Body saw no clear indication in the Panel's analysis that the overall degree of reduction in the use of, and exposure to, tobacco products achieved by each alternative measure (in addition to any reduction attributable to Australia's other existing tobacco control measures) would be materially smaller than that achieved by the TPP measures, such that the level of protection pursued by the TPP measures and Australia's other tobacco control measures necessarily goes beyond what could reasonably be achieved with one of the alternative measures used as a substitute for the TPP measures.

While noting that the Panel's specific reasoning for rejecting equivalence differed slightly for the two alternative measures, the Appellate Body generally shared the appellants' views that the Panel referred to the following two points in each instance: (i) the alternative measures do not address the design features of tobacco packaging that the TPP measures seek to address; and (ii) this would leave one aspect of Australia's comprehensive approach to tobacco control unaddressed, and reduce the "synergies" between the different components of that policy. The Appellate Body also agreed with the appellants that the two points mentioned by the Panel in rejecting equivalence did not reflect the correct legal standard under Article 2.2. Specifically, with respect to the first point (i.e. that the alternative measures do not address the design features of tobacco packaging), the Appellate Body recalled that what is relevant to an assessment of equivalence is the overall degree of contribution that the technical regulation makes to the objective pursued, and that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue.

With respect to the second point (i.e. that substituting one of the alternative measures for the TPP measures would undermine the comprehensiveness of Australia's policy and reduce the synergies), the Appellate Body considered that, even in the context of a comprehensive policy, what is relevant for assessing equivalence remains the overall degrees of contribution that the challenged and alternative measures make to Australia's objective. Therefore, the Appellate Body posited that if the alternative measure in question is found apt to achieve, in addition to any reduction in smoking attributable to Australia's other existing tobacco control measures, a degree of reduction in smoking similar or comparable to the degree of reduction achieved by the TPP measures, then whether the TPP measures form part of Australia's broader policy and whether their contribution arises partly from synergistic effects with the other components of that policy should not have been a decisive consideration in determining equivalence.

For these reasons, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, the Appellate Body found that the Panel erred in its application of Article 2.2 of the TBT Agreement. However, the Appellate Body cautioned that its conclusion was made in the particular circumstances of these disputes, and that it was reached on the basis of the uncontested Panel finding that the relevant objective pursued by the TPP measures did not encompass the specific objectives, or mechanisms, of addressing design features of tobacco packaging. The Appellate Body also highlighted the fact that Australia had not appealed the Panel's findings that both alternative measures

were reasonably available to Australia. Thus, the Appellate Body warned that it should not be extrapolated, from its conclusion, that an increased MLPA or taxation on tobacco products would necessarily qualify as a reasonably available alternative measure capable of making a contribution equivalent to that of a plain packaging measure in another case or in another jurisdiction.

3.9.1.3.3 Claims under Article 11 of the DSU

The Dominican Republic raised two claims under Article 11 of the DSU. First, with respect to the Panel's analysis of whether each of the two alternative measures would make an equivalent contribution to Australia's objective, the Dominican Republic claimed that the Panel failed to make an objective assessment of the matter under Article 11 in finding that the design features of tobacco packaging that convey messages would not be addressed at all in the absence of the TPP measures. The Appellate Body highlighted that it had already addressed the Dominican Republic's overlapping claim of error under Article 2.2 of the TBT Agreement that similarly challenged the Panel's reference to the failure of the alternative measures to address the design features of tobacco packaging. For this reason, the Appellate Body considered it unnecessary to address this aspect of the Dominican Republic's claim under Article 11 of the DSU.

Second, the Dominican Republic challenged the Panel's findings regarding the trade restrictiveness and relative contribution of an increase in the MLPA, arguing that the panel's reasoning was incoherent, or internally inconsistent, in its discussion of the potential future effects of an increased MLPA. The Appellate Body agreed with the Dominican Republic that the Panel had referred to certain future effects in its analysis of the trade restrictiveness of the proposed MLPA increase from 18 to 21 years. However, the Appellate Body disagreed with the Dominican Republic's assertion that the Panel neglected or denied such future effects in its analysis of the contribution of an increase in the MLPA. On the contrary, when reaching its finding that this alternative measure would be apt to make a "meaningful" contribution to Australia's objective, the Panel took account of evidence indicating that raising the MLPA will not only likely immediately improve the health of people within the targeted age group, but also reduce intermediate and longt-term adverse health effects as the initial birth cohorts, affected by the policy change, grow into adulthood. Therefore, the Appellate Body saw no inconsistency in the Panel's treatment of future effects in its assessment of the trade restrictiveness, on the one hand, and contribution, on the other hand, of an increase in the MLPA. Accordingly, the Appellate Body found that the Dominican Republic had not demonstrated that the Panel failed to make an objective assessment of the matter before it, in accordance with Article 11 of the DSU.

3.9.1.3.4 Conclusion on the alternative measures

In light of the foregoing, the Appellate Body concluded that the Panel erred in finding that the complainants failed to demonstrate that each of the two alternative measures would be apt to make a contribution equivalent to that of the TPP measures. At the same time, the Appellate Body recalled its conclusion that the Panel did not err in finding that the complainants failed to demonstrate that these two alternative measures are less trade-restrictive than the TPP measures. Consequently, despite its conclusion that the Panel erred in its application of Article 2.2 with respect to the equivalence of the contribution of each alternative measure, the Appellate Body concluded that the Panel's ultimate findings, that the complainants did not demonstrate that an increase in the MLPA and an increase in taxation would each be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective, stand.

3.9.1.4 Appellate Body's overall conclusion under Article 2.2 of the TBT Agreement

Based on the foregoing, the Appellate Body upheld the Panel's conclusion that the complainants had not demonstrated that the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Article 2.2 of the TBT Agreement.

3.9.1.5 Separate opinion of one Division Member

One Member of the Division concurred with the majority's ultimate findings and conclusions with respect to Article 2.2. However, this Member considered that it was unnecessary, and therefore inadvisable, for purposes of resolving these disputes, for the majority to have considered in detail the appellants' claims regarding the Panel's assessment of the TPP measures' contribution to Australia's objective.

This Member recalled that the complainants' main argument before the Panel was that the TPP measures are more trade-restrictive than necessary because they are trade-restrictive and they are not apt to, and do not, contribute to Australia's legitimate public health objective. In the alternative, the complainants argued that, even assuming that the TPP measures contribute to Australia's legitimate public health objective, they are still more trade-restrictive than necessary because there are alternative measures that are reasonably available to Australia and that would be less trade-restrictive while making an equivalent contribution to the objective.

This Member further noted that, in determining the degree of contribution of the TPP measures to Australia's objective, the Panel made two findings. First, the Panel found that the complainants had failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's objective. Second, the Panel found that the evidence, taken in its totality, supported the view that the TPP measures are apt to, and do in fact, contribute to Australia's objective. This Member noted that the appellants raised no arguments concerning the Panel's first finding and considered that the appellants had failed to demonstrate that any errors undermining the second finding would necessarily vitiate the Panel's first finding.

Since the Panel's first finding was undisturbed on appeal, and since measures are presumed to be WTO-consistent until shown otherwise, this Member considered that the TPP measures are presumed to be at least capable of making a contribution to Australia's objective, whether or not the Panel erred in forming the second finding. Consequently, this Member concluded that the appellants had failed to demonstrate that the Panel erred in rejecting their principal argument and, with respect to their alternative argument, whether or not the proposed alternatives make an equivalent contribution to the TPP measures, the appellants did not present an alternative that is less trade-restrictive than the TPP measures. Consequently, in the view of this Member, it was unnecessary, for purposes of resolving these disputes, to consider in detail the appellants' claims regarding the contribution of the TPP measures to Australia's objective.

This Member also disagreed with the majority's intermediate finding that, by introducing in its Interim Report econometric analyses that had not been tested with the parties, the Panel failed to observe due process in a way that constitutes a violation of Article 11 of the DSU. According to this Member, the Panel's reliance on multicollinearity and non-stationarity to test the robustness of the parties, evidence was part of the Panel's reasoning, with respect to which a panel enjoys considerable discretion. In this Member's view, the parties submitted to the Panel a large amount of econometric evidence, and it was appropriate for the Panel to assess the probative value of that evidence. Moreover, this Member observed that the complainants had an opportunity to raise their concerns regarding the Panel's analysis of multicollinearity and non-stationarity at the interim review stage. Since they did not do so, this Member disagreed with their claim that the Panel denied them due process by not "giving the parties any opportunity whatsoever to comment".

3.9.2 Claims relating to the Panel's findings under Article 16.1 of the TRIPS Agreement

The Panel understood the complainants to argue that, by prohibiting the use of certain tobacco-related trademarks on tobacco packaging and tobacco products, the TPP measures erode their distinctiveness, thereby constraining trademark owners' ability to exercise their rights under Article 16.1. For the Panel, this argument by the complainants hinged on whether a reduction in the distinctiveness of a registered trademark affects the rights that Members must provide to the trademark owner under Article 16.1. The Panel found that Article 16.1 provides only for a registered trademark owner's right to prevent certain

activities by unauthorized third parties under the conditions set out in the first sentence of Article 16.1. The Panel found that if the activities of an unauthorized third party meet the conditions set out in the first sentence of Article 16.1, then the trademark owner must have the right under a Member's domestic law to prevent such activities. Therefore, the Panel found that the essence of the Article 16.1 obligation is to ensure that rights are available to obtain relief against such infringing acts. In the Panel's view, it follows that, in order to show that the TPP measures are inconsistent with Article 16.1, the complainants would have to demonstrate that, under Australia's domestic law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision. In the Panel's view, the text of Article 16.1 does not formulate any other right of the trademark owner, nor does it mention the *use* of the registered trademark by its owner. Thus, the Panel agreed with the parties that Article 16.1 does not establish a trademark owner's *right to use* its registered trademark.

Honduras requested the Appellate Body to reverse the Panel's finding that Honduras did not demonstrate that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement, on the grounds that: (i) the Panel's interpretation of the "rights conferred" under Article 16.1 was in error; (ii) the Panel erred in its application of Article 16.1 to the TPP measures; and (iii) the Panel failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter.

At the outset, the Appellate Body recognized the unique nature of the TRIPS Agreement, observing that the TRIPS Agreement addresses intellectual property rights, which are *private rights* held by natural or legal persons. In addition, the TRIPS Agreement derives a significant proportion of its content from preexisting international intellectual property agreements or conventions that were negotiated outside the GATT 1947/WTO framework. Moreover, the TRIPS Agreement, as an agreement addressing intellectual property rights, is principally concerned with the creation and protection of *exclusive* private rights. By definition, these exclusive rights act to restrict commercial activity and require an active intervention of government to enforce these restrictions. The Appellate Body recalled that, as the panels in *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US*) stated, the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. The Appellate Body observed that Article 1.1 imposes an obligation on Members to "give effect to the provisions of" the TRIPS Agreement. Specifically, as regards trademarks, Members have an obligation to give effect to the provisions of Articles 15-21 of the TRIPS Agreement.

With respect to Honduras' claim that the Panel erred in its interpretation of Article 16.1, the reasoning underpinning Honduras' arguments, made in support of this claim, focused on three central and interconnected themes: (i) Article 16.1 of the TRIPS Agreement (read together with Articles 15, 17, 19, and 20 of the TRIPS Agreement) confers upon the owner of a registered trademark the *right to use* its trademark; (ii) the distinctiveness of a trademark and the "likelihood of confusion" in Article 16.1 are closely related concepts that impose a requirement on Members to protect the distinctiveness of a trademark through use; and (iii) pursuant to Article 16.1, Members must guarantee a minimum level of protection relating to the distinctiveness and use of trademarks, which then guarantees particular outcomes.

The Appellate Body observed that while Article 15 defines the subject matter that may be protected as a trademark and the rules governing the eligibility for registration of a sign as a trademark, Article 16 addresses the rights conferred on a trademark owner following such registration. Specifically, Article 16.1 grants a trademark owner the exclusive right to preclude unauthorized third parties from using, in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered, where such unauthorized use would result in a "likelihood of confusion". In the Appellate Body's view, the likelihood of confusion, which may result from the conduct of unauthorized third parties identified in Article 16.1, relates to the distinguishing function of the trademark in question. Nonetheless, while the Appellate Body agreed with Honduras that the risk of a "likelihood of confusion" in Article 16.1 relates to the distinguishing function of a trademark, the

Appellate Body cautioned against extrapolating too broadly from this relationship. In this regard, the Appellate Body indicated that it had not come across any language in the TRIPS Agreement that endorsed Honduras' position that the *purpose* of the exclusive right articulated in Article 16.1 is to allow a trademark owner to protect the *distinctiveness* of the trademark through the trademark owner's continued use of that trademark. Likewise, none of the provisions of the Paris Convention (1967), which are incorporated by reference into the TRIPS Agreement, grant a trademark owner a positive right to use its trademark, or a right to protect the distinctiveness of that trademark through use.

In sum, the Appellate Body found that Article 16.1 of the TRIPS Agreement grants a trademark owner the exclusive right to preclude unauthorized third parties from using, in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered. The owner of a registered trademark can exercise its "exclusive right" as against an unauthorized third party but not against the WTO Member in whose territory the trademark is protected. Neither the TRIPS Agreement nor the provisions of the Paris Convention (1967) that are incorporated by reference into the TRIPS Agreement confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use. Accordingly, there is no corresponding obligation on Members to give effect to such "rights". Moreover, contrary to what Honduras suggested, the Appellate Body found that Article 16.1 of the TRIPS Agreement does not require Members to guarantee particular outcomes, beyond what is expressly articulated in the provision. Instead, in accordance with Article 1.1 of the TRIPS Agreement, Members are required to give effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Hence, for purposes of WTO dispute settlement, in order to establish that a WTO Member has acted inconsistently with Article 16.1, the complaining Member must demonstrate that, under the responding Member's domestic legal regime, the owner of a registered trademark cannot exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties.

Based on its understanding of Article 16.1, the Appellate Body found that the Panel did not err in its interpretation of Article 16.1. Having found no error in the Panel's interpretation, the Appellate Body agreed with the Panel that there was no need to examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the distinctiveness of such trademarks, and lead to a situation where a "likelihood of confusion" with respect to these trademarks is less likely to arise in the market. The Appellate Body noted that Honduras' claims that the Panel erred in its application of Article 16.1 and failed to make an objective assessment of the matter as required by Article 11 of the DSU were conditioned on the Appellate Body's reversal of the Panel's interpretation. The condition on which Honduras' appeal was predicated, i.e. the reversal of the Panel's interpretation, had therefore not been satisfied, and the Appellate Body considered it unnecessary to address Honduras' remaining claims of error.

Consequently, the Appellate Body upheld the Panel's conclusion that the complainants had not demonstrated that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement.

3.9.3 Claims relating to the Panel's findings under Article 20 of the TRIPS Agreement

With respect to the complainants' claims under Article 20 of the TRIPS Agreement, the Panel concluded that the trademark requirements of the TPP measures amount to special requirements that encumber the use of a trademark in the course of trade. The Panel found, however, that the complainants failed to demonstrate that they do so "unjustifiably". The Panel therefore concluded that the complainants did not demonstrate that the TPP measures are inconsistent with Article 20 of the TRIPS Agreement. On appeal, Honduras claimed that the Panel erred in its interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement or, alternatively, that it erred in applying the legal standard that it had developed to the facts of the present disputes.

With respect to the interpretation of Article 20, the Appellate Body first noted that the fact that Article 20 presupposes that the use of a trademark may be encumbered "justifiably" indicates that there is no positive right of use of a trademark by its owner, nor is there an obligation on Members to protect such a positive right. According to the Appellate Body, the term "unjustifiably" in Article 20 of the TRIPS Agreement reflects the degree of regulatory autonomy that Members enjoy in imposing encumbrances on the use of trademarks through special requirements. In the Appellate Body's view, the reference to the notion of justifiability rather than necessity in Article 20 suggests that the degree of connection between the encumbrance on the use of a trademark imposed and the objective pursued reflected through the term "unjustifiably" is lower than it would have been had a term conveying the notion of "necessity" been used in this provision. Accordingly, a consideration of whether the use of a trademark has not been "unjustifiably" encumbered should not be equated with the necessity test within the meaning of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement. The Appellate Body further noted that the term "unjustifiably" connotes an action for which there is no fair reason, and which cannot be reasonably explained. Thus, a Member that imposes encumbrances on the use of trademarks through special requirements must be able to provide a reasonable explanation of how an objective pursued by introducing special requirements warranted the resulting encumbrances.

The Appellate Body agreed with the Panel that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements could involve a consideration of: (i) the nature and extent of encumbrances resulting from special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade; (ii) the reasons for the imposition of special requirements; and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.

The Appellate Body also considered that the Panel did not err by not including an examination of alternative measures as a requisite consideration for determining whether the use of a trademark has been "unjustifiably" encumbered by special requirements. According to the Appellate Body, while it may be possible that, in the circumstances of a particular case, an alternative measure that would lead to at least an equivalent contribution could call into question whether the reasons for the adoption of the special requirements sufficiently support the resulting encumbrances on the use of the trademark, such an examination is not a necessary inquiry under Article 20.

The Appellate Body also rejected Honduras' argument that the Panel erred in relying on the Declaration on the TRIPS Agreement and Public Health (Doha Declaration) in its interpretation of Article 20. The Appellate Body agreed with the Panel that paragraph 5(a) of the Doha Declaration reflects the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted. Accordingly, regardless of the legal status of the Doha Declaration, the Appellate Body saw no error in the Panel's reliance on this general principle of treaty interpretation. The Appellate Body further noted that the reliance on the Doha Declaration was not of decisive importance for the Panel's reasoning since the Panel had reached its conclusions about the contextual relevance of Articles 7 and 8 of the TRIPS Agreement to the interpretation of Article 20 before it turned to the Doha Declaration.

In its challenge of the Panel's application of the interpretation of the term "unjustifiably" to the facts of the dispute, Honduras focused on two elements: (i) the Panel's focus on the economic value of trademarks in its assessment of the nature and extent of encumbrances resulting from the TPP measures; and (ii) its determination that "good reasons" provide "sufficient support" for the encumbrance.

With respect to the first element, Honduras took issue with the Panel's observation that "[t]he practical implications" of the prohibitions on the use of design features of trademarks were "partly mitigated" by the fact that the TPP measures permitted the use of word marks. Honduras argued that the prohibition on the use of any figurative signs is the "ultimate encumbrance" on the use of a trademark. The Appellate Body rejected Honduras' argument that the Panel erred by not focusing on the use of a trademark in terms of its distinguishing function and by concluding that there was a mitigating effect resulting from the

permissible use of certain word marks. Having examined the relevant parts of the Panel's reasoning, the Appellate Body noted that, in its analysis, the Panel referred to both permissive (i.e. use of word marks in the form prescribed by the TPP Regulations) and prohibitive (i.e. prohibition on the use of non-word components of the trademarks) elements of the TPP measures. According to the Appellate Body, considering the two elements together, the Panel characterized the degree of the encumbrances at issue as "farreaching" as opposed to constituting an "ultimate encumbrance" on the use of trademarks. The Panel's observation that the "practical implications" of the prohibitions on the use of non-word elements of trademarks were "partly mitigated" by the permission to use word trademarks did not diminish this conclusion. With respect to Honduras' argument that the Panel erred by not focusing on the use of an individual trademark in terms of its distinguishing function, the Appellate Body recalled that the complainants had not sought to demonstrate before the Panel that, as a result of the trademarkrelated requirements of the TPP measures, consumers have been unable to distinguish the commercial source of tobacco products.

The Appellate Body further rejected Honduras' argument that the Panel erred by concluding that the reasons for special requirements under the TPP measures sufficiently support the resulting encumbrances. In doing so, the Appellate Body disagreed with Honduras' assertion that the Panel erred by rejecting the reasonably available, less trademark-encumbering alternative measures proposed by the complainant. In this respect, the Appellate Body recognized that the language that the Panel used in referring to the expected degree of contribution of the alternative measures in its analysis under Article 20 of the TRIPS Agreement was inconsistent. The Appellate Body noted, in particular, that the Panel first stated that the alternative measures should lead to "at least equivalent outcomes" as the challenged measure and then concluded that the complainants have not shown that the alternative measures "would be manifestly better" in contributing towards Australia's objective. However, because the Panel relied on its earlier findings under Article 2.2 of the TBT Agreement in reaching its conclusions regarding the contribution of the alternative measures under Article 20 of the TRIPS Agreement, the Appellate Body considered that the standard by which the Panel abided was the same as under Article 2.2, i.e. at least an equivalent contribution to the stated objective.

The Appellate Body recalled that it had previously found that the Panel erred in its findings regarding the equivalence of the contribution of each alternative measure under Article 2.2. As a result, the Appellate Body considered that the Panel could not have relied on these findings in assessing the contribution of these relevant alternative measures in the context of Article 20 of the TRIPS Agreement. However, the Appellate Body noted that, given the degree of regulatory autonomy provided to Members under Article 20 through the use of the term "unjustifiably", an analysis of alternative measures is not required in each and every case, and does not provide decisive guidance in determining whether the encumbrances in question are imposed "unjustifiably". The Appellate Body thus concluded that the Panel's overall finding that the complainants have not demonstrated that the trademarkrelated requirements of the TPP measures unjustifiably encumber the use of trademarks in the course of trade within the meaning of Article 20 would stand despite the Panel's error in its analysis of the alternative measures.

Honduras also claimed that the Panel attributed undue legal weight to Articles 11 and 13 of the FCTC Guidelines in its analysis by relying on those provisions to justify Australia's imposition of the TPP measures. The Appellate Body rejected Honduras' argument. Having examined the relevant parts of the Panel's reasoning, the Appellate Body considered that the Panel referred to Articles 11 and 13 of the FCTC Guidelines in recognizing, as a matter of fact, that Australia was the first country to implement tobacco plain packaging and that it did so in line with the FCTC. Moreover, the Appellate Body considered that the Panel referred to Articles 11 and 13 of the FCTC guidelines as additional factual support to its previous conclusion that the complainants failed to establish that Australia acted inconsistently with Article 20 of the TRIPS Agreement.

In addition to incorporating Honduras' claim under Article 20 of the TRIPS Agreement, the Dominican Republic raised an independent claim that the Panel failed to assess its claim under Article 20 of the TRIPS Agreement regarding the prohibition of all trademarks on individual cigarette sticks and thus acted inconsistently with Articles 7.1 and 11 of the DSU. According to the Dominican Republic, the prohibition on the use of

trademarks on cigarette sticks was materially different from the one on tobacco packaging and cigar sticks. The Appellate Body first noted that the Dominican Republic did not make a separate case of inconsistency with respect to the TPP measures' requirements regarding the appearance of cigarette sticks. Having reviewed the relevant parts of the Panel's analysis, the Appellate Body found that they covered the trademark requirements of the TPP measures as they apply to cigarette sticks. The Appellate Body thus did not consider that the Panel failed to address the Dominican Republic's claim that the TPP measures' requirements for individual cigarette sticks, which prohibit the use of any trademarks on a cigarette, are inconsistent with Article 20 of the TRIPS Agreement.

The Appellate Body thus concluded that the Panel did not err in its interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement and in its application of this interpretation to the facts of the present disputes. Consequently, the Appellate Body upheld the Panel's finding that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

3.9.4 Recommendation

The Appellate Body recalled that the Panel had declined Honduras' and the Dominican Republic's requests that the Panel recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring the measures at issue into conformity with the TRIPS Agreement and the TBT Agreement. Having upheld the Panel's findings under Article 2.2 of the TBT Agreement and Articles 16.1 and 20 of the TRIPS Agreement, it followed that the Appellate Body agreed with the Panel that Honduras and the Dominican Republic had not succeeded in establishing that Australia's TPP measures are inconsistent with the provisions of the covered agreements at issue. Accordingly, the Appellate Body made no recommendation to the DSB, pursuant to Article 19.1 of the DSU.

4. PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

A total of 44 WTO Members participated at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated during 2019 and the first half of 2020. Thirteen WTO Members participated at least once as a main participant, and 41 Members participated at least once as a third participant.

Eighty-one of the 164 WTO Members had participated in appeals in which Appellate Body reports were circulated between 1996 and the first half of 2020. Further information on the participation of WTO Members in appeals is provided in Annex 8.

5. PROCEDURAL ISSUES ARISING IN APPEALS

This section summarizes the procedural issues that were addressed in the Appellate Body reports circulated during 2019 and the first quarter of 2020.

5.1 Consolidation of appeal proceedings

The Appellate Body consolidated the appeal proceedings in *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)*. After Honduras filed its appeal but before the Dominican Republic did, the Appellate Body received a joint communication from Australia, Honduras, and the Dominican Republic (the participants) in relation to these appellate proceedings. This communication was also sent to Cuba and Indonesia and to all the third parties in the four disputes before the Panel. In their joint communication, the participants requested that, in the event of multiple appeals, the Appellate Body allow Australia to file a single Notice of Other Appeal, a single other appellant's submission, and a single appellee's submission in relation to all appeals. The participants also requested the Appellate Body to consider adopting a schedule for the filing of appellees' and third participants' submissions that would give all participants and third participants sufficient time to review and respond to possible appeals from any of the participants.

The Chair of the Appellate Body issued a Procedural Ruling on behalf of the Division hearing these appeals. Given the envisaged consolidation of Honduras' appeal with any other appeals that would be filed by the other three complainants, the Division agreed to modify the filing of a Notice of Other Appeal, other appellant's submission, appellees' submissions, and third participants' submissions in order to ensure fairness and orderly procedure in the conduct of these appeals. Moreover, in order to safeguard Australia's due process rights, which would risk being affected if a complaining party were to file its Notice of Appeal and appellant's submission after having seen Australia's first appellee's submission, the Division authorized Australia to file any Notice of Other Appeal and other appellant's submission in a single document after the Dominican Republic filed its appeal. In addition, the Division set a single deadline for appellees' submissions in these disputes. Likewise, with respect to the extension of the deadline for filing third participants' submissions, the Division set a single deadline for third participants' submissions in these disputes.

5.2 Treatment of confidential information

5.2.1 Additional procedures to protect confidential information

In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the European Union requested the Division hearing the appeal to adopt additional procedures to protect business confidential information (BCI) and highly sensitive business information (HSBI) in the appellate proceedings. the European Union proposed that additional procedures be adopted that track the additional procedures recently adopted by the Appellate Body in the appeal in EC and certain member States – Large Civil Aircraft (Article 21.5 – US). The European Union argued that, inter alia, disclosure of certain sensitive information on the record of the compliance Panel proceedings would be severely prejudicial to the large civil aircraft manufacturers concerned, and possibly to their customers and suppliers.

On the same day, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, invited the United States and the third participants to comment on the request by the European Union, and provided interim additional protection to all BCI and HSBI transmitted to the Appellate Body in this appeal pending a final decision on the European Union's request. Comments were received from the United States, Australia, and Canada in response to the Appellate Body's invitation. The United States broadly agreed with the European Union's request that the BCI and HSBI procedures adopted in the appeal in E*C and certain member States – Large Civil Aircraft (Article 21.5 – US)* should serve as the basis for BCI and HSBI procedures in

this appeal. It requested, however, a change regarding the deadline for submission of an HSBI appendix to any written submission, suggesting that if an HSBI appendix is sent by an expedited courier service, that it be deemed filed and served on the date it is sent, instead of on the date it is delivered. Australia did not object to the European Union's request but commented that support of both of the participants would be important. Canada stated that, while it agrees with the European Union's request that additional procedures to protect BCI and HSBI track the procedures adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, it considered that the requirement that note-taking by third participants in the designated reading room be handwritten was unnecessarily burdensome, and requested that the procedures be modified so as to provide for a stand-alone computer and printer to be made available to third participant BCI-approved persons in the designated reading room.

In consideration of the comments made by the participants, the Chair, on behalf of the Division, invited the participants and third participants to provide any further views on the request by the European Union, taking into account the changes proposed by the United States and Canada. The United States indicated that it did not favour Canada's request to allow note-taking on a computer with an attached printer because it increases the risk of disclosure and in particular given that the United States considered extensive notes on the facts to be unnecessary in this appeal. The European Union responded with respect to Canada's request by noting that the risks of disclosure are heightened if electronic devices are permitted in the designated reading room and that the provision of BCI was agreed under the express understanding that electronic devices would not be permitted in the designated reading room. For these reasons, the European Union considered that Canada's proposal would be acceptable only if certain heightened protections were put in place. With respect to the United States' comments, the European Union objected to the proposal that an HSBI appendix sent by expedited courier should be deemed filed the day it is sent. For the European Union, Article 18 of the Working Procedures makes clear that the "filing" of a submission is not a clerical formality, but an event of legal significance, because the very status of the participants to an appeal derives from the act of filing the required documents. In any event, the European Union added that, should the Appellate Body adopt any measures to address the United States' concerns, such measures should be even-handed and ensure that both participants have adequate time for filing.

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 the United States, but in consideration of the burden undertaken by participants, the Division announced that it will endeavour to set the filing date for the HSBI appendix three days following the deadline for the remainder of the submission itself. The Division adopted the adjustment proposed by Canada by allowing third participant BCI-approved persons to take notes on a stand-alone computer and printer in the designated reading room.

In *Korea – Pneumatic Valves*, Japan and Korea jointly requested the Appellate Body Division hearing the appeal to adopt additional procedures for the protection of BCI in the appellate proceedings pursuant to Rule 16(1) of the Working Procedures. The participants attached to the joint request a proposal on draft additional working procedures for the Appellate Body Division's consideration. The Division invited the third participants to comment on the joint request but received no comments. The Division did not consider that the procedures that the participants have jointly proposed unduly affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. The Division noted in this respect the absence of comments by third participants regarding the participants' joint request for additional protection of BCI. In light of these considerations, as well as similar procedures that were adopted in the past, the Division took into account the proposed procedures and issued a Procedural Ruling according additional protection, on specified terms, to the information that the participants marked as BCI and the information designated by the Panel as BCI in its Report and on the Panel record.

In *Russia – Railway Equipment*, the participants at the oral hearing jointly requested the Division hearing the appeal to continue treating the information designated as BCI by the Panel under its additional working procedures for the protection of BCI as confidential also on appeal. In particular, Ukraine referred to the protection of the identity of individual producers, information regarding the certificates, and the specific number of decisions at issue. No third party raised objections in connection with this request. The Division considered that, in the circumstances of this appeal, treating the relevant information as confidential does not unduly affect its ability to adjudicate this dispute, the participation rights of the third participants, or the rights and interests of the WTO Membership at large. The Division noted in this respect the absence of comments by third participants regarding the participant's joint request as well as limited extent of information designated as BCI. In light to these considerations, the Division decided to grant the participants' joint request to treat the information designated as BCI by the Panel as confidential on appeal pursuant to Rule 16(1) of the Working Procedures.

5.2.2 Objections to the designation of confidential information

In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the United States made a request to the Division hearing this appeal to extend the deadline for the United States to object to the inclusion of any BCI in the European Union's appellant's submission. On the next day, the Chair of the Appellate Body, on behalf of the Division, invited the European Union and the third participants to provide any comments on the United States' request. The European Union responded that it had no objections. The Division noted that the European Union's submission subject to the United States' review was over 400 pages and that the European Union did not object to the United States' request. Based on these considerations, the Division issued a procedural ruling granting the request of the United States. In the interest of fairness, the Division also extend the deadline for the European Union to file an objection to the inclusion of any BCI in the United States' other appellant's Submission. Neither the European Union nor the United States raised any objections regarding the inclusion of any BCI in the appellant's and other appellant's submissions.

Subsequently, the European Union requested the Division to extend the deadline for it to object to the inclusion of any BCI in the United States' appellee's submission. The European Union indicated that, due to the volume of the United States' submission, it needed one additional day in order to complete the necessary review regarding BCI. The Division invited the United States and the third participants to provide any comments on the European Union's request. The United States responded that it would have no objection to an extension of the deadline for both participants to object to the inclusion of any BCI in the other participant's appellee's submission. Brazil, China, and Russia also stated that they do not object to the extension request, but Brazil and China indicated that third participants should be granted an extension of the deadline for their submissions. Having considered the request by the European Union and the comments from the United States, Brazil, China, and Russia, the Division decided to extend the time period for both the European Union and the United States to file an objection to the inclusion of any BCI to each other's appellee's submission by the same duration. The Division noted that this extension would result in the third participants receiving the redacted versions of participants' appellee's submissions later. Accordingly, the Division also decided to extend the deadline for the filing of third participants' submissions and executive summaries (and any BCI redacted versions of such documents), and notifications by third participants under Rule 24(2) of the Working Procedures.

The United States did not raise any objections regarding the designation of confidential information in the European Union's appellee's submission. The Appellate Body received a communication from the European Union, in which the European Union objected to the inclusion of certain HSBI in the HSBI-redacted version of the United States' appellee's submission, without proper designation of that information as HSBI. The Division invited the United States to comment on the European Union's request. The United States responded that the relevant information should be treated as HSBI, and requested that it be allowed to submit replacement pages for the BCI versions (HSBI-redacted) and non-BCI versions (BCI- and HSBI-redacted) of its appellee's submission, and a corrected HSBI Appendix. Having considered the request

by the European Union and the comments from the United States, the Division granted additional time for the United States to submit the replacement pages for the BCI versions (HSBI-redacted) and non-BCI versions (BCI- and HSBI-redacted) of its appellee's submission, as well as the corrected HSBI Appendix. The Division also noted that this decision would result in the third participants receiving the redacted versions of participants' appellee's submissions later. Accordingly, the Division also decided to extend the deadline for the filing of third participants' submissions and executive summaries (and any BCIredacted versions of such documents), and notifications by third participants under Rule 24(2) of the Working Procedures.

5.3 Treatment of late submissions

In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the United States made a request on the date when its other appellant's submission was due to the Division hearing this appeal to extend the deadline to file the HSBI Appendix to the submission. The United States explained that it had couriered the HSBI Appendix to the Appellate Body and European Union with the expectation that it would arrive by the deadline, but it had not. The United States submitted the HSBI Appendix to the Appellate Body one day after the initial due date. The Chair of the Appellate Body, on behalf of the Division, invited the European Union and the third participants to comment on whether the Division should accept the late-filed HSBI Appendix of the United States. The European Union responded that the United States' explanation was insufficient and that it would welcome additional explanation and evidence. The Division requested that the United States provide relevant documentation relating to the time and date on which the HSBI Appendix was delivered to the courier service for transmission to Geneva. In response, the United States provided a printout of the tracking information for shipment of the HSBI Appendix, together with additional details and explanation. The United States maintained that, while it was unfortunate that the package arrived a day later than expected, a decision to grant its extension request would not result in prejudice. Having considered the request by the United States, with the additional information supporting the request, and the comments by the European Union, the Division decided to accept the late-filed HSBI Appendix to the United States' other appellant's submission.

In *US – Supercalendered Paper*, the Division hearing this appeal received a communication from China, containing the executive summary of China's third participant's submission in this appeal. China originally filed its third participant's submission earlier in accordance with the working schedule for appeal. China indicated that the executive summary was inadvertently omitted from its third participant's submission. The Chair of the Division invited the participants and other third participants in this appeal to comment in writing on China's communication. Canada indicated that it had no objections for China to submit the executive summary of its third participant's submission at this stage of the appeal. Mexico noted that, as China's third participant's submission was filed on time, the participants' and other third participants' due process rights were not affected. The Division issued a Procedural Ruling to accept the executive summary of China's third participant's submission.

5.4 Time limits for the filing of written submissions

In *Korea – Pneumatic Valves*, the European Union requested the Appellate Body Division hearing the appeal to modify the deadline for the filing of third participants' submissions. In its letter, the European Union noted that the Working Schedule set the date for the submission of appellees' submissions as Friday, 15 June 2018, and the date for the filing of the third participants' submissions as Monday, 18 June 2018. The European Union highlighted that this allowed third participants less than one working day to consider and react to the appellees' submissions in their third participants' submissions. The Division invited the participants to comment on the European Union's request and received responses from Korea and Japan stating that they did not have any specific comments on the request. In consideration of the European Union's request and the responses from Korea and Japan, the Division issued a Procedural Ruling pursuant to Rule 16(2) of the Working Procedures extending the deadline for filing third participant's submissions and notifications under Rule 24(1) and (2) of the Working Procedures.

As discussed above, in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the Division hearing the appeal granted additional time for the United States to submit replacement pages in order to make corrections to its designation of confidential information contained in its appellee's submission. As a result, the Division also decided to extend the deadline for the filing of third participants' submissions and executive summaries, and notifications by third participants under Rule 24(2) of the Working Procedures.

In *US – Supercalendered Paper*, the Chair of the Appellate Body received a communication from the European Union requesting that the Division hearing this appeal modify the deadline for the filing of third participants' submissions to allow third participants four full working days following the submission of the appellee's submission. The Chair of the Appellate Body, on behalf of the Division hearing this appeal, invited the participants and other third participants in this appeal to comment on the European Union's request. Brazil, Canada, China, India, Japan, Korea, Mexico, and the United States indicated that they had no objections to the European Union's request for an extension. On behalf of the Division hearing this appeal, the Chair of the Appellate Body issued a Procedural Ruling to extend the deadline for filing third participant's submissions, notifications, and executive summaries as requested by the European Union.

As discussed above, owing to the consolidation of the appeal proceedings in *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)*, the Division authorized Australia to delay the filing of any Notice of Other Appeal and other appellant's submission in a single document until after the Dominican Republic had filed its appeal. In addition, the Division set a single deadline for appellees' submissions in these disputes. Likewise, with respect to the extension of the deadline for filing third participants' submissions, the Division set a single deadline for third participants' submissions in these disputes.

5.5 Requests regarding the conduct of the oral hearing

In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the Division hearing this appeal invited the participants to indicate whether they wished to request the sessions of the oral hearing to be open to public observation, and, if so, to propose specific modalities in this respect. In response, the European Union and the United States jointly requested that the Division hearing this appeal to allow observation by the public of the oral hearing and adopt additional procedures to protect BCI and HSBI during the oral hearing. The participants proposed that the Division adopt the same additional procedures that the Appellate Body adopted in E*C and certain member States – Large Civil Aircraft (Article 21.5 – US)*. In particular, 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. Regarding HSBI, the participants suggested that the oral hearing be momentarily suspended for non-HSBI approved persons to vacate the hearing room if/when one of the participants or the member of the Division wishes to refer to HSBI, or that the hearing to be divided into two parts, one designed to address without referring to HSBI and another for addressing HSBI. In response to the joint request, comments were received from Canada and China. Canada expressed its support for the joint proposal. China made its own request that its oral statement and its responses to questions at the oral hearing be treated as confidential.

The Division recalled the additional procedures adopted in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* and *EC and certain member States – Large Civil Aircraft and US – Large Civil Aircraft (2nd complaint)*, as they related to the public observation of the oral hearing. Having considered these additional procedures, the Division issued a procedural ruling adopting additional procedures to protect BCI and HSBI during the oral hearing, and to authorize the participants' request to open the sessions dedicated to the delivery of opening statements (and potentially closing statements pending subsequent confirmation) for public observation. As for third participants, the Division authorized observation by the public of their opening and closing statements only to the extent that they indicated no objections. Moreover, the Division

granted the joint request to authorize public observation through deferred transmission to the public by video recording. Regarding the treatment of HSBI, the Division stated that it would focus on HSBI in dedicated segments to the extent possible in order to avoid interrupting the regular flow of the hearing.

In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the Division also received a communication from the United States requesting that the Division take account of the absence of a key member of the US delegation on one of the hearing dates during the second session of the oral hearing. In light of this, the United States suggested that the Division not address questions relating to certain areas on the day when the member of the US delegation at issue is to be absent or alter the schedule so that the hearing does not take place on the day when the member of the US delegation at issue is to be absent. The Division invited the European Union and the third participants to provide any comments. The European Union responded that, among the proposals made by the United States, it preferred the option of rescheduling the hearing, because reserving questioning regarding certain areas on the proposed date would create a scheduling conflict for a member of the EU delegation. The Division decided to change the dates of the second session of the oral hearing.

In *Russia – Railway Equipment*, the Appellate Body received a communication from Ukraine requesting that the Division extend the time limits for opening statements at the oral hearing. On the same day, the Division hearing the appeal invited Russia and third participants to provide any comments on Ukraine's request. Russia expressed its support and requested that equal opportunity be provided to both Russia and Ukraine in the event that the Division decided to grant Ukraine's request. No comments were received from the third participants. Having considered Ukraine's request and comments by Russia, the Division decided to extend the time limits for both participants' opening statements.

In *US – Supercalendered Paper*, the Division hearing this appeal received a joint communication from Canada and the United States requesting that the public be allowed to observe the participants and third participants that agree to make public their statements and responses at the oral hearing. Canada and the United States made the request on the understanding that any information that had been designated as confidential in the documents filed by any participant in the Panel proceedings would be adequately protected in the course of the Appellate Body's oral hearing. The Division invited third participants to comment on this request. Mexico indicated that, without prejudice to its systemic position on the matter, it did not object to allowing public observation of the oral hearing in these proceedings. No other comments from third participants were received. The Division issued a Procedural Ruling regarding the joint request by Canada and the United States. The Division adopted additional procedures on the conduct of the oral hearing, including procedures pertaining to public observation of the opening statements of the Members' delegations that had agreed to have their statements made public. During the hearing, the participants and four of the third participants (Brazil, China, the European Union, and Japan) made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal. A simultaneous closed-circuit television broadcast of the hearing was shown in a separate viewing room. Oral statements and responses to questions by a third participant that had indicated its wish to maintain the confidentiality of its submissions were not subject to public observation.

In *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)*, owing to the number of issues raised in these appellate proceedings, the Division hearing these appeals held two hearings. At the request of Honduras, the Division allowed a member of Honduras' delegation to participate in the reading of the closing statements at the second hearing via video conference.

Additionally, in *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)*, Australia requested the Division to provide guidance on the presence and role of individuals that Australia referred to as "fact experts", at the second hearing of these appellate proceedings. Australia requested that the Division either: (i) exclude, from the second hearing, individuals who appeared as "fact experts" before the Panel; or (ii) issue clear guidance concerning the role of these individuals at

the second hearing. The Dominican Republic, Honduras, Canada, China, the European Union, and the United States submitted comments in reaction to Australia's request. The Division responded to Australia's request by letter. The Division reiterated the Presiding Member's clarification, provided at the first hearing, that each Member has the right to determine who will form part of its delegation and who speaks on its behalf. The Division added that, when responding to questions from the Division, every individual member of a delegation responds as an advocate representing that participant. Moreover, as all individuals included in participants' delegations at the second hearing would be present as representatives of their governments, they would be subject to the provisions of the DSU, including the scope of appellate review as delineated by Article 17.6 of the DSU. In this regard, the Members of the Division indicated that they would be proactive in disciplining participants' responses to questions and would intervene whenever they deemed it necessary. The Division provided further guidance as to the conduct of the second hearing at the start of that hearing.

5.6 Transition

In a number of appeals for which the Appellate Body reports were circulated during 2019 and the first half of 2020, 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 certain Appellate Body Members to complete the disposition of such appeal, even though their terms of office were due to expire before the completion of these appellate proceedings. Such communications were made in the following cases: *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* for Mr Peter Van den Bossche; *Korea – Radionuclides, US – Countervailing Measures (China) (Article 21.5 – China)*, *Korea – Pneumatic Valves*, and *Ukraine – Ammonium Nitrate* for Mr Shree Baboo Chekitan Servansing; *Russia – Railway Equipment for* Messrs Shree Baboo Chekitan Servansing and Thomas R. Graham; *US – Supercalendered Paper for* Messrs Ujal Singh Bhatia and Thomas R. Graham; and *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic) for* Messrs Ujal Singh Bhatia, Shree Baboo Chekitan Servansing, and Thomas R. Graham. *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)* became the first appeals with respect to which the transition notice was issued for all three members of the Division hearing the appeals.

5.7 Reasons for the extension of the time period for the circulation of Appellate Body reports

The 90day 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 during 2019 and the first half of 2020. 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 backlog and 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 size of the panel records, the number and complexity of the issues appealed, 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.

5.8 Withdrawal of an appeal

As elaborated in detail in , in *Morocco – Hot-Rolled Steel*, the appellant, Morocco, informed the Appellate Body of its decision to withdraw the appeal, and requested the Appellate Body to inform the DSB of this decision, pursuant to Rule 30(1) of the Working Procedures. On the same day, Turkey submitted a letter to the Appellate Body, in which it noted Morocco's decision to withdraw the appeal and joined Morocco in requesting the Appellate Body to notify the DSB of Morocco's decision. In addition, Turkey noted that, on the previous occasion in which an appeal was withdrawn, i.e. in *India – Autos (DS146 and DS175)*, the Appellate Body issued a short report noting the withdrawal of the appeal. In view of Morocco's and Turkey's requests, the Appellate Body issued a report noting the withdrawal of the appeal and completed its work in the appeal.

5.9 *Amici curiae* submissions

In *Australia – Tobacco Plain Packaging (Honduras)* and *Australia – Tobacco Plain Packaging (Dominican Republic)*, the Appellate Body received eight *amici curiae* submissions in connection with these appellate proceedings. The Appellate Body acknowledged receipt of these *amici curiae* submissions but did not rely on these submissions in making its findings.

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

No Article 21.3(c) arbitration proceedings were completed in 2019, but in 2020, one arbitral award was issued in *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* as described in further detail below.

6.1 *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WT/DS493/RPT

On 30 September 2019, the DSB adopted the Appellate Body Report and the Panel Report in *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*. This dispute concerned anti-dumping measures imposed by Ukraine on imports of ammonium nitrate from Russia. Following an anti-dumping investigation, duties were originally imposed by Ukraine's Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision). Russian producer JSC MCC EuroChem (EuroChem) successfully challenged the 2008 original decision before domestic courts in Ukraine, following which ICIT issued an amendment (2010 amendment) to the 2008 original decision. Following interim and expiry reviews, ICIT issued a decision (2014 extension decision) imposing anti-dumping duties at modified rates, including with respect to EuroChem.

As set out in greater detail in section of this Annual Report, the Panel found that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement by failing to exclude EuroChem from the scope of the original Anti-Dumping measures, imposing a 0% anti-dumping duty on EuroChem through the 2010 amendment, and including EuroChem within the scope of the interim and expiry review determinations, although it had been found to have a *de minimis* dumping margin in the original investigation. The Panel also found that Ukraine acted inconsistently with: (i) Articles 2.2, 2.2.1, 2.2.1.1, and 11.2-11.3 of the Anti-Dumping Agreement in making dumping and likelihood-of-dumping determinations in the interim and expiry reviews; and (ii) Article 6.9 of the Anti-Dumping Agreement by failing to comply with certain disclosure obligations in these reviews. In ruling on Ukraine's appeal, the Appellate Body upheld all the Panel's findings that had been challenged.

At the meeting of the DSB held on 28 October 2019, Ukraine indicated its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would need a reasonable period of time for implementation. Consultations on the reasonable period of time for implementation pursuant to Article 21.3(b) of the DSU did not result in an agreement. Russia therefore requested that the reasonable period of time be determined by binding arbitration pursuant to Article 21.3(c) of the DSU. On 2 December 2019, Russia requested the Director-General to appoint an arbitrator. On 11 December 2019, the Director-General appointed Mr Ricardo Ramírez-Hernández to act as an arbitrator under Article 21.3(c) of the DSU. Mr Ricardo Ramírez-Hernández accepted this appointment on 12 December 2019.

[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.

Ukraine submitted that 27 months would be a reasonable period of time to implement the recommendations and rulings of the DSB. Ukraine argued that implementation required Ukraine to: (i) adopt first a "general legislative framework" to allow Ukrainian investigating authorities to conduct review investigations for the purpose of complying with DSB recommendations and rulings; and (ii) subsequently conduct an administrative review to amend the anti-dumping measures at issue. Ukraine also referred to a "particular circumstance" warranting a longer reasonable period of time. In that respect, Ukraine argued that it had been in a situation of "emergency in international relations" since 2014.

Russia responded that no reasonable period of time was warranted to implement the DSB's recommendations and rulings pertaining to Article 5.8 of the Anti-Dumping Agreement, and that Ukraine should have implemented the remaining DSB's recommendations and rulings within two months. With respect to Ukraine's implementation obligations under Article 5.8, Russia argued that the second sentence of Article 5.8 requires the *immediate* termination of an investigation, and that immediate compliance in this respect was not "impracticable" within the meaning of Article 21.3 of the DSU. Russia also argued, with respect to all the DSB recommendations and rulings at issue, that neither legislative changes nor an administrative review was necessary for implementation. Instead, implementation only required an administrative decision by ICIT. In any event, Russia maintained that Ukraine had failed to meet its burden of proof in requesting a reasonable period of time of 27 months.

At the outset, the Arbitrator took note of Russia's distinction between (i) the recommendations and rulings of the DSB pertaining to Article 5.8; and (ii) the remaining recommendations and rulings of the DSB. The Arbitrator recalled that, pursuant to Article 21.3(c) of the DSU, his mandate was to determine the reasonable period of time for compliance with the recommendations and rulings of the DSB in this dispute, not whether it was "impracticable to comply immediately with the recommendations and rulings" under the second sentence of Article 21.3 of the DSU, as suggested by Russia. The Arbitrator also observed that all of Ukraine's implementation obligations pertained to a single set of measures forming part of the same anti-dumping proceeding and that the 2014 extension decision was at the heart of all the recommendations and rulings of the DSB. The Arbitrator had difficulty accepting that he should distinguish between the various recommendations and rulings of the DSB pertaining to the same measure, and thus considered it appropriate to determine one reasonable period of time with respect to all of Ukraine's implementation obligations.

Addressing the proposed means of implementation in this dispute, the Arbitrator recognized that a combination of legislative and administrative actions, as proposed by Ukraine, would inevitably require more time than implementation by administrative means. The Arbitrator thus decided to consider first the available administrative means for implementation under Ukraine's existing legislative framework. In that regard, Russia argued that Article 5.6 of Ukraine's anti-dumping law allows ICIT to take a summary decision on the application of anti-dumping measures and that neither an administrative review nor legislative changes were thus required for the purpose of implementation in this dispute. The Arbitrator observed that Article 5.6 lists, in general terms, the decisions that ICIT may take, without specifying the steps that need to be completed before ICIT can make such decisions. The Arbitrator therefore considered this provision of Ukraine's Anti-Dumping law, on its own, to be of limited guidance in determining whether the Anti-Dumping measures at issue could be amended simply through a decision by ICIT. While Russia relied on certain past decisions by ICIT that had not required an administrative review, the Arbitrator considered these decisions not to be relevant, mainly because they had been based on specific provisions of Ukrainian law that were not applicable in the present dispute. Overall, the Arbitrator was not convinced by Russia's argument that implementation in this dispute could have been achieved through a decision by ICIT under Ukraine's anti-dumping law, without Ukrainian investigating authorities conducting an interim review of the anti-dumping measures at issue. In reaching this conclusion, the Arbitrator stated that he was mindful of the fact that implementation required excluding EuroChem from the scope of the anti-dumping measures, calculating dumping margins, and complying with certain disclosure obligations.

Next, the Arbitrator addressed Ukraine's argument that there is no legal basis in Ukraine's legislative framework for Ukrainian investigating authorities to review the anti-dumping measures at issue and that implementation thus required legislative changes. According to Ukraine, under its anti-dumping law, an interim review cannot: (i) be initiated *ex officio* by Ukrainian investigating authorities; (ii) be initiated on the basis that anti-dumping measures were found to be WTO-inconsistent; and (iii) focus on examining compliance with the recommendations and rulings of the DSB.

The Arbitrator took the view that, in light of the parties' submission and responses to questioning at the hearing, Ukraine had not shown that its investigating authorities could not reasonably review the anti-dumping measures at issue to implement the recommendations and rulings of the DSB under its existing legislative framework. In that regard, the Arbitrator noted that, pursuant to Article 20.1 of Ukraine's anti-dumping law, an administrative review can be initiated at the request of "an executive authority in the country of import". The Arbitrator noted that Ukraine had not put forward a definition of the term "executive authority". Instead, Ukraine had merely stated, without providing any supporting evidence, that the past practice of Ukrainian investigating authorities had been to consider that they do not qualify as "an executive authority" for the purpose of this provision. As the Arbitrator emphasized, Ukraine had not explained why any such past practice, if established, would necessarily prevent the same entity conducting anti-dumping investigations and reviews from requesting the initiation of the administrative review necessary for implementation or, for that matter, prevent another executive authority of Ukraine from making such a request.

The Arbitrator also referred to: (i) Article 20.2 of Ukraine's anti-dumping law, directing investigating authorities to initiate an interim review where there is sufficient evidence that the continued imposition of the anti-dumping duties is no longer necessary to offset dumping; and (ii) Article 20.3 of that law, requiring that, once an interim review is initiated, Ukrainian investigating authorities shall "in particular" examine "whether the circumstances relating to dumping and injury have changed significantly". The Arbitrator noted Ukraine's argument that it was unclear whether the continued imposition of the anti-dumping duties was no longer necessary to offset dumping within the meaning of Article 20.2 and whether the circumstances relating to dumping changed significantly within the meaning of Article 20.3. The Arbitrator observed, however, that Ukraine was necessarily required to recalculate dumping margins for the purpose of implementation in this dispute. It was also required to exclude EuroChem from the scope of the anti-dumping measures at issue because EuroChem, one of the two main investigated Russian producers in the interim and expiry reviews, had been found to have a *de minimis* dumping margin. To the Arbitrator, the continuation of anti-dumping measures was thus at the heart of Ukraine's implementation obligations. Without any further explanation by Ukraine, the Arbitrator was not convinced that the circumstances of this dispute did not justify the initiation of an interim review. He was also not convinced that, once initiated, Ukrainian investigating authorities could not focus this interim review on implementing the recommendations and rulings of the DSB. In that regard, the Arbitrator observed that Ukraine had not explained why new dumping margin calculations and the exclusion of EuroChem did not qualify as a significant change in circumstances relating to dumping. In any event, Article 20.3 directs Ukrainian investigating authorities to examine "in particular" significant changes in circumstances relating to dumping, and the Arbitrator took this to mean that Ukrainian investigating authorities are free to examine other relevant aspects.

In light of the foregoing considerations, the Arbitrator concluded that Ukraine had not shown that, in the circumstances of this dispute, Ukraine could not reasonably initiate and conduct an administrative review for the purposes of implementation under its existing legislative framework.

By way of consequence, the Arbitrator considered the issue of the time needed for Ukraine's proposed legislative changes to be moot. Specifically, the Arbitrator stated that, while Ukraine enjoyed a certain discretion in choosing the means and method of implementation, that discretion was not unfettered, and the chosen method of implementation needed to be capable of bringing Ukraine into compliance with its WTO obligations within a "reasonable period of time". The Arbitrator emphasized in this context that the

reasonable period of time should be the shortest period possible within the legal system of the implementing Member, and that the implementing Member should utilize all flexibilities available within its legal system. While the Arbitrator recognized that the legislative and administrative means of implementation proposed by Ukraine fell within the range of permissible means of implementation, he considered, based on his earlier conclusion, that legislative action was not indispensably required to achieve compliance in this dispute. The Arbitrator clarified that it was not his task under Article 21.3(c) of the DSU to decide which method or type of measure should be chosen by an implementing Member. However, the Arbitrator considered it to be within his mandate to assess the shortest period possible within Ukraine's legal system for effective implementation. Since Ukraine had not shown that implementation could not be reasonably achieved through administrative means under its existing legislative framework, the Arbitrator did not believe that his determination of the reasonable period of time needed to account for additional legislative actions.

Turning to the period of time for Ukraine's administrative process, the Arbitrator recalled that Ukraine requested 12 months to complete a partial interim review focusing on dumping margin determinations and complying with certain disclosure requirements. The Arbitrator also recalled Ukraine's statement that its proposed timeframes were based on the fastest full administrative review Ukrainian investigating authorities ever conducted, which had taken 11.5 months to complete. The Arbitrator then observed that the maximum amount of time foreseen under Ukraine's domestic legislation for an interim review is 12 months. In addition, the Arbitrator observed that the interim and expiry reviews, in which WTO-inconsistent determinations were made, had taken 12 months to complete.

The Arbitrator could not accept the time period in which Ukrainian investigating authorities were able to conduct previous full-fleshed reviews to be an appropriate measure of the time needed for an administrative review in this case. As the Arbitrator stated, the 11.5-month review to which Ukraine referred was, by nature, distinct from a redetermination for the purpose of implementing recommendations and rulings of the DSB. Given the limited scope of the administrative review to be conducted, the Arbitrator also could not accept that the administrative review necessary for implementation required the same amount of time than as the interim and expiry reviews. In that regard, the Arbitrator emphasized that Ukraine's implementation obligations pertained only to the nontermination of the investigation against EuroChem, dumping and likelihood-of-dumping determinations, and the disclosure of essential facts. Crucially, the parties' responses to questioning at the hearing made clear that: (i) EuroChem, one of the two main investigated Russian producers in the interim and expiry reviews, was to be excluded from the scope of the Anti-Dumping measures at issue, requiring no new determination; (ii) new analysis was to be limited to recalculating normal value for the remaining investigated Russian producers, without considering afresh the export price or the injury analysis; and (iii) some data relevant to these normal value calculations were already on the record.

In considering the time reasonably necessary to conduct the requisite administrative review, the Arbitrator noted that Ukraine had not argued or provided evidence that, under Ukrainian law, all the steps and timeframes it had put forward are mandatory. Yet, the Arbitrator was not convinced by Russia's argument that Ukraine simply needed to reconsider existing evidence for the purpose of recalculating normal value. Given the Panel and Appellate Body findings at issue, the Arbitrator did not exclude that Ukrainian investigating authorities could collect additional information and data to construct normal value. The Arbitrator considered that his determination needed to account for some time for Ukrainian investigating authorities to issue questionnaires and to collect and consider additional information and data. Moreover, bearing in mind the nature of the implementation at issue, and mindful that investigated exporters and producers benefit from the opportunity to defend their interests in hearings and through the process of verification, the Arbitrator was reluctant to determine any period of time for implementation that would foreclose the possibility that such procedural steps could be taken if and when warranted. That being said, the Arbitrator highlighted that, given the limited scope of Ukraine's administrative review, the time allocated for these steps needed to be reasonably reduced as compared to Ukraine's proposed timeframes.

Moreover, the Arbitrator observed that, even if some steps and time periods are not required by law, they could nonetheless be useful in ensuring transparent and efficient implementation, fully respecting due process for all parties involved. The Arbitrator considered that due process concerns needed to be balanced with the principle of prompt compliance reflected in Article 21.1 of the DSU. To that end, all flexibilities within the legal system of an implementing Member must be employed in the implementation process. In this case, the Arbitrator considered that Ukraine had not explained how the timeframes associated with the various steps of its proposed administrative review reflected the use of flexibilities within its legal system. The Arbitrator took the view that, given the limited scope of the administrative review at issue, Ukraine had available to it a considerable degree of flexibility to conduct that administrative review in a shorter period of time than it proposed, as evidenced by the absence of mandatory timeframes in relation to the majority of the component steps of Ukraine's review.

Based on the foregoing, the Arbitrator concluded that Ukraine had not satisfied its burden of proving that 12 months was the shortest period of time possible within its legal system to complete the administrative review at issue. The Arbitrator took the view that Ukraine could complete this administrative review in reasonably less time. At the same time, given all the necessary steps for an administrative review, the Arbitrator did not agree with Russia that this review could be completed within two months.

Having reached this conclusion, the Arbitrator noted that, a few days before the initially scheduled date of issuance of his Award, Ukraine had requested that recent measures taken in response to the COVID19 virus be taken into consideration in the determination of the reasonable period of time. Ukraine had referred to the 30-day emergency situation regime introduced across Ukraine on 25 March 2020, specifically pointing to quarantine measures, the suspension of all commercial international passenger services to and from Ukraine, the closing of all non-essential services, and the ban on gatherings of more than 10 individuals. While expressing its solidarity with the countries affected by the COVID-19 virus, Russia responded that it was unclear how the COVID-19 virus measures adopted by Ukraine affected Ukraine's ability to conduct administrative reviews. Russia emphasized that, as per Ukrainian investigating authorities themselves, investigations were not terminated or suspended and that, aside from a few mitigating measures, investigations continued to be conducted "as usual".

The Arbitrator recognized that Ukraine had not explained in detail the extent to which its measures to address the COVID19 virus affected its investigating authorities' ability to review the anti-dumping measures at issue in this dispute. At the same time, the Arbitrator stated that he was aware of the seriousness of Ukraine's recent COVID-19 measures, which had been put in place as part of an emergency situation regime in response to a pandemic, and that the types of measures described by Ukraine may affect many aspects of a country's operation. The Arbitrator added that the documents put on the record by Russia confirmed that Ukraine's recent measures affected the conduct of trade-defence investigations and that certain necessary procedural modifications were being made by Ukrainian investigating authorities. For example, as a result of the COVID-19 virus, on-site verifications were cancelled, potentially leading to the extension of deadlines for interested parties to provide answers to questionnaires. While the Arbitrator saw merit in Russia's argument that the COVID-19 pandemic is not "an overwhelming excuse for failures to comply with the WTO obligations", he could not, in his determination of the reasonable period of time in this dispute, turn a blind eye to the developments in Ukraine, and the rest of the world, relating to the COVID19 pandemic affecting the work of Ukrainian investigating authorities. The Arbitrator concluded that his determination also needed to take into account the developments in Ukraine relating to the COVID19 pandemic.

Finally, the Arbitrator addressed the particular circumstance alleged by Ukraine to be relevant to the determination of the reasonable period of time in this dispute. Ukraine requested that an additional six months be granted because Ukraine had been, since 2014, in a situation of "emergency in international relations". Ukraine argued that it had, since then, been prioritizing urgent legislative and regulatory actions to protect its territory and population, and maintain its law and public order internally, resulting

in significant delays for other initiatives. The Arbitrator did not, in principle, rule out the possibility that a situation of "emergency in international relations" could qualify as a particular circumstance relevant to the determination of the reasonable period of time. In the Arbitrator's view, however, Ukraine had not sufficiently substantiated that there was a situation of "emergency in international relations" affecting the reasonable period of time for implementation in this dispute. The Arbitrator stressed that Ukraine had not clarified how or to what extent the period of time needed for implementation was affected by the alleged situation of "emergency in international relations". Nor had Ukraine explained how it had devised six months as the additional period of time needed in response to the impact entailed by the alleged situation. Crucially, Ukraine had not submitted any evidence in support of its allegation that the situation of "emergency in international relations" resulted in delays in the conduct of Anti-Dumping investigations.

In light of the foregoing considerations, the Arbitrator determined that the reasonable period of time for Ukraine to implement the recommendations and rulings of the DSB in this dispute was 11 months and 15 days from the date on which the DSB adopted the Panel and Appellate Body Reports, expiring on 15 September 2020. Given access restrictions to the WTO premises, in light of developments relating to the COVID-19 pandemic, the award was issued by electronic means only. The parties did not object to such an electronic issuance of the award.

7. OTHER ACTIVITIES

7.1 Digital Dispute Settlement Registry (DDSR) / Disputes Online Registry Application (DORA)

7.1.1 Digital Dispute Settlement Registry (DDSR)

The WTO DDSR was 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 featured: (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 provided 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 contained: (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 provided access to information about WTO disputes and served as an online repository of all panel and Appellate Body records.

In 2019 and early 2020, the Appellate Body Secretariat 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. Several improvements to the DDSR were finalized, tested, and deployed on the DDSR in 2019, and participants and third participants in certain appellate proceedings tested the efiling feature as part of an appeal pilot phase on a voluntary basis.

7.1.2 Working towards a more user-friendly and intuitive system: Disputes Online Registry Application (DORA)

The programming for the DDSR project began in 2013, with the first e-filings of submissions in the live application taking place in 2015. Since its inception, huge advancements in technology have taken place and, in order to enhance the user experience and further improve the application, the Secretariat concluded that the best approach was to transfer the DDSR functionalities to a new platform.

With this in mind, the Secretariat suggested an approach that would move the development of the WTO's e-filing application in-house and take advantage of more flexible, state-of-the-art software platforms. Indeed, using a different platform would enable the WTO to manage the application and any changes in-house without recourse to external contractors. The latest technological solutions, combined with the close proximity to WTO information technology (IT) colleagues, would enable the Secretariat to respond more quickly to developments in dispute settlement that would require modifying the e-filing platform.

After an analysis of the DDSR and Members' business needs, the Applications Solutions Branch of the WTO's IT Division proposed a new application – the Disputes Online Registry Application (DORA).

Delegates were introduced to the new platform at a DDSR Working Group meeting in November 2019. During the meeting, delegates were given a tour of the main features of the application, such as accessing dispute documents, uploading and downloading submissions and exhibits, sending and receiving messages, and using the timetable and the disputes calendar. The proposed new platform was welcomed by delegates and production continued apace thereafter.

DORA is being developed using the latest technologies available on the market today. It therefore has a modern design, is faster and easier to use than the DDSR, and streamlines the e-filing process. Most importantly, it is agile, and modifications can be easily programmed directly into the platform by the WTO IT Division, thereby allowing the WTO to almost immediately reflect Members' feedback and changing requirements. DORA retains the sturdy security features of the DDSR with access controls and two-factor authentication, while also utilizing updated encryption and eliminating synchronization problems. All data contained in the DDSR are being migrated to DORA.

Given the agility of the new platform, the Secretariat has been able to initiate the first phase of implementation during the first half of 2020. During this phase, parties and third parties in new disputes are invited to begin to use DORA to e-file their submissions as the official repository of the dispute settlement records for those proceedings. In addition, parties and third parties in current panel proceedings are also invited to begin using DORA's e-filing mechanism in parallel to making their submissions via e-mail and paper as provided for in their panels' working procedures. At the second phase of implementation, the Secretariat envisages transitioning toward using DORA as the official mechanism for filing documents in all dispute settlement proceedings. The timing for this transition will be subject of further consultation with Members.

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

2019 and 2020 marked the 17th and 18th edition respectively 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 a fictional dispute and prepares both written and oral submissions.

In 2019, the competition continued to grow, with more than 90 universities from all over the globe participating. The moot case for the 17th edition, authored by Maria Anna Corvaglia from the University of Birmingham and Rodrigo Polanco from the World Trade Institute at the University of Bern, concerned sustainable energy production and raised issues relating to government procurement, rules of origin, and prohibited subsidies.

The regional rounds of the 17th edition of the competition took place between February and April 2019 in Nairobi (Kenya), Vienna (Austria), Prague (Czech Republic), Singapore, and Washington DC (United States). In each of these rounds, WTO staff members, including staff of the Appellate Body Secretariat, served as panelists. In addition, staff from the Appellate Body Secretariat, together with staff of other WTO divisions, 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 top 22 teams from regional rounds qualified for the final round, hosted by the Graduate Institute of International and Development Studies and the WTO in Geneva.

The final round was held on 4-8 June 2019. 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. The team from the Strathmore University School of Law emerged as winners, making history as the first African team to win this prestigious competition. Harvard Law School faced Strathmore in the Grand Final and became the runner-up.

The 18th edition of the competition took place amid global pandemic caused by COVID-19. As a result, while two European rounds took place in person in February and early March in Kiev (Ukraine) and Brno (the Czech Republic), four regional rounds (American, African and South- and East-Asian) took place virtually to ensure safety of the participants and compliance with various travel restrictions. Despite these unprecedented challenges, unwavering enthusiasm and interest in the competition was shared among

the total of 76 participating universities from all corners of the world. The moot case for the 18th edition, authored by Geraldo Vidigal, Assistant Professor at the University of Amsterdam (UvA), raised issues such as recognition of equivalence and application of SPS measures in the context of a regional trade agreement, most favoured nation treatment, and exceptions under the GATT 1994.

During the regional rounds, WTO staff members, including staff of the Appellate Body Secretariat, served in person, as well as virtually, as panellists. In addition, staff from the Appellate Body Secretariat, together with staff of other WTO divisions, provided support to the competition through technical advice on the subject matter and assistance with organizational issues, including hosting, for the first time in the history of the competition, the virtual final round, in which 20 teams participated.

The final round was held on 22-28 June 2020. Students had the opportunity to plead their case before the WTO Secretariat, leading academics, and private practitioners, who served as panelists in the mock dispute. The team from the Government Law College, Mumbai, emerged as winners. Belgium's Katholieke Universiteit Leuven faced the Government Law College, Mumbai in the Grand Final and became the runner-up.

The winning teams in the regional and final rounds were offered prizes by the WTO and the competition's academic supporters, which were Georgetown University and the World Trade Institute during the 17th competition, and Georgetown University, World Trade Institute, IE University and European Public Law Organization during the 18th edition.

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 carried out by Appellate Body Secretariat staff during the course of 2019 can be found in the table below.

APPELLATE BODY SECRETARIAT PARTICIPATION IN TECHNICAL ASSISTANCE ACTIVITIES IN 2019

Course / Seminar	Location	Dates
Regional Trade Policy Course for French-speaking African Countries – Dispute Settlement Module	Abidjan, Côte d'Ivoire	1-3 April 2019
Regional Trade Policy Course for English-speaking African Countries – Dispute Settlement Module	Port Louis, Mauritius	10-13 June 2019
Regional Trade Policy Course for Caribbean Countries – Dispute Settlement Module	Port of Spain, Trinidad and Tobago	15-18 July 2019
Regional Trade Policy Course for Latin American Countries – Dispute Settlement Module	Mexico City, Mexico	9-12 September 2019
Regional Trade Policy Course for Central and Eastern Europe, Central Asia and the Caucasus (CEECAC) – Dispute Settlement Module	Almaty, Kazakhstan	21-23 October 2019
WTO Regional Workshop on Dispute Settlement for Central and Eastern Europe, Central Asia and the Caucasus	Vienna, Austria	22-25 October 2019
Short Trade Policy Course for Asociación Latinoamericana de Integración/Associação Latino-Americana de Integração (ALADI) Member Countries	Montevideo, Uruguay	14-15 November 2019

ANNEX 1

FAREWELL SPEECH

28 MAY 2019
APPELLATE BODY MEMBER PETER VAN DEN BOSSCHE

Ambassador Walker, Deputy Director-General Brauner, excellencies, colleagues, friends, ladies and gentlemen,

I stand here before you with a heavy heart but not because this is my farewell. I served on WTO dispute settlement appeals for nine years, three months, and three weeks, and that is long enough. Some of you may well say that my parting is much overdue and that I overstayed my welcome. I stand before you with a heavy heart because of the current crisis in the rules-based multilateral trading system. While it is a system that needs much improvement to be fair to all, as well as adapted to 21st-century realities, the rules-based multilateral trading system, as it progressively developed since the late 1940s, has served us well. It has allowed hundreds of millions of people to escape from poverty and has brought continued prosperity to many others. It has also been instrumental in keeping trade and broader economic disputes from boiling over and escalating beyond control.

At the core of a well-functioning multilateral trading system is an effective dispute resolution mechanism. The Uruguay Round negotiators understood this. They therefore agreed on the WTO Dispute Settlement Understanding, the DSU, to provide security and predictability to the multilateral trading system and to strengthen that system by prohibiting any WTO Member from determining unilaterally whether another Member violates its obligations under WTO law. As Professor Claus-Dieter Ehlermann, one of the original seven Appellate Body members, wrote in 2003, the successful conclusion of the DSU was an extraordinary achievement that comes close to a miracle. With its combination of compulsory jurisdiction, independent and impartial adjudicators, appellate review, and binding rulings, the WTO dispute settlement system is indeed unique among international mechanisms for the resolution of disputes between sovereign states. Not surprisingly, it quickly became the most used state-to-state dispute resolution mechanism, and was acclaimed the jewel in the crown of the WTO. Those working in other fields of international law looked on with envy.

While there was high degree of satisfaction among WTO Members with the functioning of their dispute settlement system, concerns regarding certain aspects of the system were raised almost from the beginning. Many proposals to address these concerns were made and discussed, first in the context of the DSU review in 1998 and 1999, and later in the Doha Round negotiations on DSU reform. These negotiations came to nothing, and this is unfortunate because while some proposals aimed at introducing more Member control over dispute settlement, most proposals focused on further strengthening the system. How different is the situation today!

In response to concerns raised by the United States, in particular regarding the functioning of the Appellate Body, and the United States' obstruction of the appointment of Appellate Body members, more than 20 WTO Members have made – individually or in groups – proposals for the reform of WTO appellate review. These proposals seek to address the United States' concerns relating to the alleged "overreach" by the Appellate Body, the precedential effect of case law, the 90-day timeframe for appellate review, the Appellate Body's review of factual findings, including findings on the meaning of domestic law and the transition rules for outgoing Appellate Body members. However, unlike most of the proposals for reform made in the context of the Doha Round negotiations, the proposals for reform currently discussed no longer have the ambition to strengthen the system but are merely aimed at ensuring its survival in some form or another. It is not my intention in this brief farewell speech to put up a strong defence of the Appellate Body and its functioning to date, or

to engage in a detailed discussion of the reform proposals. Both such defence and discussion deserve more attention than I can give to either of them here and now. For the same reason, I will also not attempt in this speech to put the crisis of WTO dispute settlement in the broader context of the crisis in global governance, a crisis that manifests itself in the re-emergence of unilateralism and the failure to address global issues through earnest dialogue and cooperation.

With regard to the proposals on the reform of WTO appellate review currently under discussion, I will, however, say the following. First, while Members have made, and now discuss, multiple proposals on the reform of WTO appellate review to address the concerns raised by the United States, very few, if any, of these Members consider that there is something so fundamentally amiss with the Appellate Body and its functioning that blocking the appointment of Appellate Body members – and thus endangering the very existence of the Appellate Body – is an appropriate and proportionate action. In this regard, I note that no less than 75 WTO Members have made, repeatedly, a joint proposal urging the DSB to fill the vacancies on the Appellate Body without delay. Second, to the extent that the concerns addressed in the reform proposals are legitimate, and some of them certainly are, these concerns can be addressed without undermining the essential features of the current system. The proposal made by Thailand on 25 April 2019 (WT/GC/W/769) shows the way forward in this regard. In an attempt to address the concerns raised by the United States, some other WTO Members have made proposals that would significantly change essential features of the current system. It is, however, not clear to me, as I am sure it is not clear to most of you, whether any reform of the current system, short of its virtual elimination, will satisfy the United States. The United States has stated – most recently at the General Council meeting of 7 May 2019 – that the Appellate Body should follow the rules set out in the DSU. Nobody would disagree with that, but the United States has largely remained silent on what this actually means and has not engaged in the discussions on any of the reform proposals currently on the table.

I am afraid that – in spite of the most determined efforts of Ambassador Walker, efforts for which I would like to commend him, as well as the efforts of many WTO Members – it is ever more likely that the current crisis will be not be resolved by 11 December 2019. If this is indeed the case, the Appellate Body will no longer be able to hear and decide new appeals from that day onwards. As set out in Article 16.4 of the DSU, a panel report cannot be adopted by the DSB and become legally binding until after completion of the appeal. One can predict with confidence that, once the Appellate Body is paralyzed, the losing party will in most cases appeal the panel report and thus prevent it from becoming legally binding. Why would WTO Members still engage in panel proceedings if panel reports are likely to remain unadopted and thus not legally binding? As from 11 December 2019, it is therefore not only appellate review, but also the entire WTO dispute settlement system that will no longer be fully operational and may progressively shut down.

While the United States may welcome such an outcome, most other WTO Members obviously would not. A return to some kind of pre-WTO dispute settlement system means a return to dispute settlement in which economic and other might trumps legal right. As Judge James Crawford of the International Court of Justice recently commented, for international trade dispute settlement, this would be "back to square one". Ambassador Julio Lacarte-Muró, the first Chair of the Appellate Body, wrote in 2000 that the WTO dispute settlement system gives security to those WTO Members that "have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests". Most WTO Members do not want international trade without rules, or to be more precise, international trade with rules that are whatever the strongest party to a dispute says the rules are. They have a strong interest in an effective rules-based dispute settlement system.

Perhaps WTO Members will be able to reach in 2021, or sometime soon thereafter, consensus on reforms to the WTO dispute settlement system, and in particular WTO appellate review, that would preserve and even strengthen the key features of the current system, namely compulsory jurisdiction, the independence and impartiality of the adjudicators, appellate review, and binding rulings. However, if consensus among all WTO Members on such reforms is not possible, a coalition of willing WTO Members should consider establishing

a new parallel dispute settlement system that would copy the existing, but dysfunctional, DSU, in order to settle WTO disputes between them in an orderly and rules-based manner. While recourse to Article 25 of the DSU for appellate review or agreements between parties not to appeal may, for some time and in some cases, allow Members to ensure the availability of WTO dispute settlement, these are not long-term solutions.

Between December 2009 and March 2019, I have served on 20 appeals and have participated in the exchange of views in another 18 appeals. I feel very privileged to have been given the opportunity to serve the international community in this way. My experience as a WTO appellate judge has taught me – most appropriately – intellectual humility, and it has given me tremendous respect for the knowledge, skills, and dedication of those involved in WTO dispute settlement. Few of the questions of interpretation or application that come to the Appellate Body have a simple answer. Giving them a simple answer would not do justice to the arguments advanced by at least one of the parties. I have often struggled with what was the correct interpretation and/or application of the relevant WTO provisions in a particular case. The most challenging cases for me were those regarding the balance struck in the relevant WTO agreement between free trade and conflicting societal values, as well as cases regarding the proper role under WTO law of governments in the economy. The Appellate Body rulings in these cases have not seldom been severely criticized by Members. I have always – as have my colleagues on the Appellate Body – taken such criticism to heart, even when it was often merely a repetition of the arguments that were already presented during the appellate proceedings, were extensively addressed, and were found wanting by the Appellate Body. Some of these much-criticized rulings may have been in error. To say it in Latin, *errare humanum est*, but I am confident that wiser women and men on panels and the Appellate Body can and will in the future correct such mistakes, if and when they get the chance to do so. The Ap pellate Body never proclaimed it is infallible, just as it never proclaimed that its reports constitute binding precedent.

I have very often been impressed by the knowledge and skills of the lawyers, whether government officials or private practitioners, pleading before the Appellate Body. In response to the Appellate Body's remorseless questioning at the oral hearing, I have seen a lot of impressive "thinking on your feet". I have also admired the lawyers' patience with our questioning, which may, at times, have revealed that, unlike them, we were still trying hard to come to grips with the complexity of the issues on appeal.

I have been equally impressed by many panels. I have never envied their difficult task to get the facts straight and to have a first shot at the correct interpretation and/or application of the relevant WTO provisions. With regard to the latter, I often found that the Appellate Body very much benefitted from the fact that the parties' argumentation on appeal was more sophisticated and better articulated than their argumentation at the panel stage.

Finally, allow me to pay tribute to my colleagues on the Appellate Body and the staff of the Appellate Body Secretariat. Over the past nine years, I had the privileged to serve with 12 fellow Appellate Body members. While the differences in our professional background and our approach to law were pronounced and our disagreement on important issues often profound, we worked well together. I learned from each of my fellow Appellate Body members, and I am indebted to them for that. I could not have wished for better colleagues, especially in times that were difficult for me on a personal level. As for the Appellate Body Secretariat, I can but say that its director, its senior and junior lawyers (past and present), and its support staff (past and present) are the most accomplished and dedicated professionals that I have ever worked with. It was a privilege for me to work with them on a daily basis for the past nine years. I will miss them dearly and wish them the professional recognition and success they so clearly deserve.

I cannot but conclude this farewell speech on a sombre note. There are very difficult times ahead for the WTO dispute settlement system. This system was – and currently still is – a glorious experiment with the rule of law in international relations. In six months and two weeks from now, this unique experiment may start to unravel and gradually come to an end. History will not judge kindly those responsible for the collapse of the WTO dispute settlement system.

ANNEX 2

LAUNCH OF THE WTO APPELLATE BODY'S ANNUAL REPORT FOR 2018

28 MAY 2019
ADDRESS OF MR UJAL SINGH BHATIA, 2018 CHAIR OF THE APPELLATE BODY

Excellencies, Ladies and Gentlemen,

This is possibly the last time I speak in public as a member of the AB. it is also, possibly one of the last times the AB speaks *tout court*. Unless something extraordinary happens, in December 2019, the AB will fall below the three-member quorum necessary to compose Divisions and hear appeals.

I have had the privilege of serving two consecutive terms as the Chair of the Appellate Body. From the perspective of the Appellate Body, it is no overstatement to say that we are living in extraordinary times.

In 2018, the Appellate Body's docket continued to grow with increasingly complex appeals. In the same year, the membership of the Appellate Body was reduced from the already diminished number of four to three.

Despite these challenges, in 2018, the Appellate Body circulated nine Appellate Body reports concerning six matters, including the Appellate Body Report in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*. The covered agreements addressed by the 2018 Appellate Body reports included the Anti-Dumping Agreement, the SCM Agreement, the GATT 1994, the TRIMs Agreement, the TBT Agreement, and the DSU. These Appellate Body Reports dealt with sensitive issues spanning prohibited and actionable subsidies, animal welfare, domestic tax regimes, and unfair trade. The 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. Moreover, starting in 2017, and concluding in 2018, the Appellate Body Secretariat 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))*.

This is not the end of the story. In addition to the circulated Appellate Body reports and arbitration award, 12 panel reports concerning 11 matters were appealed in 2018. In sum, the heavy workload of the Appellate Body continues unabated.

These indicators would appear to suggest that WTO Members consider the appellate system to be a key pillar of a robust and effective dispute settlement mechanism. However, the transformation of the AB from "crown jewel" to a problem child in urgent need of reform in the space of a few months has been as dramatic as it is mystifying. My job today is not to explore the reasons for this mood swing, which are self-evident to those who have followed the debate. Nor do I intend to deny that the dispute settlement system, including the AB, needs reform.

Rather, I wish to extend an invitation to all WTO Members as they debate the future of the DSS: if good solutions are to be found, the right questions must be asked. Members should think carefully about what kind of system they want, what its role and reach should be, and what core principles should govern its operation. Only then will Members be able to engage in long-lasting reform projects.

As I see it, the ongoing debates should aim at answering two core questions:

i. What does it mean for WTO dispute settlement bodies to provide positive solutions to trade disputes?

ii. What does it take for the DSS to do justice to the needs of all Members, weak and strong, and to maintain legitimacy among its stakeholders?

1. What does it mean for WTO dispute settlement bodies to provide positive solutions to trade disputes?

- The DSU indicates that the DS process "serves to preserve the rights and obligations of Members under the covered agreements" and "to clarify the existing provisions of those agreements" (Art. 3.2).

- In my view, these two functions are inextricably intertwined, and both serve the overarching goal of providing long-lasting and positive solutions to trade disputes. What makes the DSS unique in the field of international adjudication is precisely its multilateral nature, coupled with extensive third party rights, and the transparency with which rulings are disseminated across the WTO Membership.

- Obviously, under the DSU, rulings adopted by the DSB are binding only upon the parties to the dispute. But by progressively clarifying the content of WTO provisions, panels and the AB have offered guidance to Members on how to comply with their WTO obligations, thereby promoting WTO-consistent practice and preventing the initiation of countless disputes. The importance of such clarifications for the smaller and poorer WTO Members, who often lack the resources to examine their trade policies in the context of their WTO commitments, must not be disregarded.

- There is no denying that, on occasion, both panels and the AB could have exercised greater economy in their legal reasoning. However, one of the core conditions for the legitimacy of international dispute settlement is that the adjudicators provide adequate reasons, including an interpretation of the relevant rules, to support their conclusions. If adjudicators were to limit their decisions to laconic "consistency/inconsistency" statements, the parties in dispute would be stripped of their right to have fully reasoned rulings. This would hardly foster compliance. How helpful would it be for governments to overcome domestic resistance against compliance, and to implement DSB recommendations consistently with WTO law, if they were not clearly told why their measures were violative?

- Against this backdrop, it is incumbent upon Members to decide where the appropriate boundaries of legal reasoning lie, and what role legal reasoning should play in securing positive outcomes to disputes.

- As the debates continue, Members may also want to reflect on the following points:

  - Panels are triers of facts and the AB is a forum to decide on legal interpretations developed by panels. But what happens when the factual analysis by panels is flawed, contaminating their legal analysis?

  - Is the "completion of analysis" a valid procedural tool for the AB to employ in view of its mandate, given the absence of a proper remand system?

2. What does it take for the DSS to do justice to the needs of all Members, weak and strong, and to maintain legitimacy among its stakeholders?

- As we all know, the legitimacy of any multilateral DSS can only be sustained if it is seen by Member governments and other stakeholders as operating in a fair, impartial, and independent manner. While normative legitimacy is important, at the end of the day, legitimacy is about perception and is based on empirical performance. This implicates not only the quality of the adjudicators and their decisions, but also their timeliness.

- In recent months, several delegations have lamented the delays incurred by appellate proceedings beyond the 90 days set out in the DSU. Sadly, these critiques are accurate: the average duration of appeals completed in 2018 was 395 days. These slippages – which worry us as much as they worry Members – were often due to the AB's inability to staff cases with the reduced number of Appellate Body members and supporting lawyers, as well as the complex nature of the issues raised.

- However, focusing exclusively on delays in appellate proceedings risks obscuring the broader issue of duration of WTO disputes. In fact, appellate review is but a fraction of the total timelength of proceedings, which has been steadily increasing in recent years. Suffice it to say that the panel reports the AB reviewed in 2018 took, on average, 859 days to complete against the stipulated 6 months as of panel composition, or, at most, 9 months as of panel establishment.

- Moreover, one must consider the steps that often follow the adoption of panel and AB reports, such as the reasonable period of time for implementation, compliance proceedings, and retaliation. When one takes these factors into account, the picture becomes quite dramatic. Consider, again, the appeals the AB completed in 2018. The original panel requests in those disputes were filed, on average, 2,227 days prior to the circulation of the latest AB reports. These include the original panel requests in Airbus, filed on 3 June 2005, and in Tuna, filed on 9 March 2009. Even discounting these extraordinarily lengthy cases, however, the figure remains strikingly high: on average, 1,267 days have elapsed since the filing of the panel requests and the circulation of the AB reports. What is more, some of these disputes are still ongoing as I speak.

- All this, put together, means that "prompt settlement" of disputes (Art. 3.3), which earlier was the "unique selling point" of the WTO, is firmly a thing of the past. It is this larger context of the total life-cycle of WTO disputes which should be the focus of the debate as well as of reform initiatives.

- But if we are to address the 90-day issue frontally, it is important to address the problem in all its dimensions. In the last 3 years, 29 panel reports have been appealed, meaning an average of almost 10 per year. The requirement to complete this number of appeals within a 90-day timeframe has obvious implications for the number of ABMs required and staff resources. This would also require a discussion among Members about the size of appeals, procedures for extensions of the 90-day rule, the nature and depth of consideration by the AB, and so on. It would also require discussions about how to sequence and structure the queue of unstaffed appeals. Given that AB reports are adopted by the DSB by negative consensus, the AB effectively functions as a last instance forum. Therefore, the AB must ensure that its interpretations and reasoning are of the highest quality and should not be rushed to come to conclusions. In fact, any rushed conclusions cannot be corrected (save perhaps, for authoritative interpretations by Members).

- This has obvious implications for the rigour and attention to detail that must inform deliberations in the AB. These considerations are also pertinent for Members' discussions of the 90-day rule.

One thing should be abundantly clear: ultimately, the performance and legitimacy of the DSS will not rest on some abstract principles of international law, but on its ability to address the pressing needs of real-life trade. Every minute we spend without a properly functioning DSS is a minute where WTO-inconsistent measures remain in place, trade flows are hindered, and companies across the globe lose precious business opportunities. This accentuates, as nothing else can, the real value of an independent and effective dispute settlement system in a multilateral setting.

In the next few weeks and months, WTO Members face critical choices regarding the future of the multilateral trading system. Let us be clear – the crisis of the AB is the crisis of trade multilateralism. Binding commitments of WTO Members must necessarily rest on the bedrock of impartial and effective dispute resolution. It is difficult to imagine how this can be achieved without a wellfunctioning appellate process.

The choices that are made will define the prospects for international cooperation in trade for the next decades. In appointing Ambassador David Walker as Facilitator for this important debate, WTO Members have chosen wisely. I have no doubt they will exhibit similar wisdom in the choices they eventually make.

Finally, I would like to express my deep appreciation for the always competent members of the ABS staff who have collaborated to produce the comprehensive Annual Report. My special thanks, in no particular order, to Chibole Wakoli, Leslie Stephenson, Alexandra Baumgart, Stephanie Carmel, Hugh Lee, and Rhian Wood, as well as others who have contributed case summaries for the Report.

I cannot conclude without performing a delicate but pleasant task – of paying tribute to my friend Peter without embarrassing him inordinately. I have had the privilege of knowing Peter and being his friend for several years now. For much of this time he has been for me a valued guide through the maze of legal complexity. He has also been an unerring beacon for all of us in the AB for his deep commitment to the rule of law and to justice. He has always combined academic rigour with a deep commitment to justice and equity. But more than anything else, he has been for me the human being I would have liked to be. I'm sure Patricia is smiling today. God bless you, Peter, for what you are.

ANNEX 3

APPELLATE BODY DEVELOPMENTS AND CHALLENGES IN 2018

12TH ANNUAL UPDATE ON WTO DISPUTE SETTLEMENT AT THE
GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

10 APRIL 2019
ADDRESS BY DR HONG ZHAO, CHAIR OF THE APPELLATE BODY

Good afternoon. To begin with, I would like to thank the Graduate Institute, in collaboration with the WTO Secretariat, for organizing this annual convention on WTO dispute settlement. I appreciate your invitation to me, in my capacity as current Chair of the Appellate Body, to speak about developments and challenges of the Appellate Body.

By all means, the last couple of years has been remarkable and challenging for the Appellate Body and the WTO dispute settlement system as a whole. The hardship stems not only from the protracted backlog of appeals confronting the Appellate Body but also from the reduction in the number of sitting Appellate Body Members to review such cases. At the same time, complicated disputes on contentious and sensitive issues, involving multiple complaints, continue to flood in, the institution is under unprecedented pressure and being strained to its limit. This situation has never been experienced in the history of the dispute settlement system.

Looking back, with the unabated support from the Members of the WTO and the diligent work of the Appellate Body Members and the Secretariat staff, the Appellate Body has delivered its rulings without compromising on quality. Throughout 2018, the Appellate Body has been engaged in appeals and has circulated nine Appellate Body reports concerning six matters, including the Appellate Body report in the massive appeal in *EC and certain Member States – Large Civil Aircraft (Article 21.5 – US)*. The matters addressed by these reports involved the GATT 1994, the TRIMs Agreement, the TBT Agreement, the Anti-Dumping Agreement, the SCM Agreement, and the DSU. These disputes dealt with sensitive issues ranging from prohibited and actionable subsidies, safeguards, animal welfare, and domestic tax regimes to trade remedies. 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 throughout the last year. The Secretariat also assisted an Arbitrator in 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))*. In addition, 12 panel reports concerning 11 matters were appealed in 2018. Furthermore, two additional appeals have been filed in the first quarter of 2019. Therefore, currently there are 13 appeals pending before the Appellate Body. These figures indicate Members' unwavering confidence in the dispute settlement system, including its appellate process.

In a nutshell, despite the current crisis, the heavy workload of the Appellate Body will continue for the days ahead. Needless to say, and it is known to many, the tenure of two of the three current Appellate Body Members will expire on 10 December 2019. The Appellate Body will not be able to review any new appeals after that date without replacement of these vacancies. This could paralyze the whole dispute settlement system, or as some may argue, lead it back to the old GATT era, when panel reports could be adopted only when both parties endorsed them. Under the current DSU, if any Member chooses to appeal a panel report after the above-mentioned date, that dispute settlement process could be suspended indefinitely, if no break-through could be achieved on the current impasse by December of this year.

This is more than simply alarming.

Fortunately, Members of the WTO are actively and earnestly seeking to resolve this impasse. A number of proposals were put forward by Members and Groups of Members to the DSB and the General Council throughout last year. WTO Members discussed a number of substantive and procedural concerns regarding the functioning of the Appellate Body, at both formal and informal sessions of the DSB and the General Council in 2018.[1] Moreover, starting in January 2019, under the auspices of the General Council, Ambassador David Walker of New Zealand has been assisting the Chair of the General Council, as a facilitator, to lead an informal process of focused discussions on Appellate Body matters. Needless to say, the resolution of the concerns pertaining to Appellate Body requires the political commitment of all WTO Members. The famous saying in multilateral negotiations is "wherever there is a will, there is a way". I believe that the technical issues concerning the Appellate Body can be resolved. In fact, I am confident that the current process will benefit from Members understanding each other, narrowing differences and eventually striking a deal to break the deadlock.

Given the early stage of discussions among Members, and being the Chair of the Appellate Body, I won't elaborate on the issues under discussion today. The Appellate Body believes that it is the WTO Members' right and obligation to take their decisions about the future of the WTO dispute settlement system. The Appellate Body remains ready to assist the entire Membership in settling their disputes under the covered agreements. We are well aware of our duties and responsibilities, and we will impartially and faithfully fulfil them within our mandate according to the rules set forth in the DSU.

Having discussed the developments pertaining to Appellate Body in 2018, I will now take this opportunity to speak about some broader perspectives of the history of international adjudication as a background for delegations, academia and the public to consider how to unlock the current crisis of the dispute settlement system at the WTO.

First, from War to Peaceful Settlement of Disputes: A Milestone in the History of Human Civilization

The English philosopher Sir Francis Bacon said "Histories make men wise".[2]

History seems to show that it was not unusual that war and armed conflict had been used to settle disputes among nations for a long time. Thus, some international law scholars of the 19th and the early 20th centuries were of the view that international law "exists solely or mainly in order to make war a human and gentlemanly occupation".[3] The early influential work on public international law, *De Jure Belli ac Pacis (On the Law of War and Peace)*, written by Hugo Grotius in 1625, included a few chapters on the issues of war. At the same time, dispute settlement in a peaceful and civilized manner such as through third-party mediation, conciliation, and arbitration has been tried and practiced for many centuries. In Europe, arbitration, as practiced by the Greek city-states and the communities within the Roman Empire was advocated for by Professors Hugo Grotius and Emmerich De Vattel as an effective peaceful means of dispute settlement among nation-states. As one of the famous international law theorists of his time, Prof. De Vattel regarded arbitration as "a practical, rational and ethical means of resolving interstate disputes."[4]

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1 The concerns discussed are contained in the following WTO documents: 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.

2 Francis Bacon: "Histories make men wise; poets, witty; the mathematics, subtle; natural philosophy, deep; moral, grave; logic and rhetoric, able to contend." (*The Collected Works of Sir Francis Bacon*)

3 Prof. Brierly disagreed with those who held this view by regarding it as one of the "possible two popular misconceptions about its character of (the law of nations)". See *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, the preface to the first edition, published in its seventh edition, Oxford University Press, 2012.

4 J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, The Hague, Netherlands: TMC. Asser Press 2000, p. 14.

Throughout human history, in the east and in the west, it took long time for nations to commit to subjecting themselves to a set of rules aimed at ending wars and maintaining peace. The solemn treaty between the rulers of Lagash and Umma in Ancient Mesopotamia around 2100 BCE was the earliest document evidencing such efforts.[5] In 1648, following three years of negotiations, the parties to the Peace Treaty of Westphalia committed to a set of rules and principles recognizing the sovereignty of co-equal states, non-intervention, religious tolerance, and the peaceful settlement of disputes through "amicable settlement or legal discussions", thereby putting an end to the devastating 30 Years' War in Europe. This marked not only the birth of modern international law, but also of the peaceful settlement of international disputes entering a new era, premised upon the widely accepted common values and the founding principles of public international law.

From today's global point of view, these were only regional peace frameworks. Seven decades ago, after the Second World War, a multilateral framework aiming at maintaining peace and security was created after the sacrifice of tens of millions of lives. Today, based on that framework, we witness the proliferation of hundreds of treaties and countless international legal documents in various fields. International law has become an essential pillar of the present international order. Maintaining peace and prosperity has become the ultimate goal and objective of international law in all domains.

While material achievements of human civilization are physically visible, invisible institutional achievement, though more precious, is easily ignored.

After seven decades, it seems that international dispute resolution has come to a crossroad, and it is high time to decide whither the next step?

Second, from Arbitration to International Courts: An Orientation Toward an International Judiciary Institution (an Evolution of International Adjudication)

As civilization progresses, the ways and methods of peaceful settlement of disputes among nations proliferate. Except for bilateral consultation, good offices, third-party mediation and conciliation, and arbitration are all viable means of peaceful settlement of disputes among States. Remarkably, the rise of the international court as a prominent means of conflict resolution has become a monumental achievement in the peaceful settlement of disputes in human history.

Academic studies show that the rise of international adjudication was closely connected with the peace movements in the late 19th century to the first half of 20th century.[6]

The establishment of the Permanent International Court of Justice (PICJ) in 1922, which was transformed into the International Court of Justice (ICJ) in 1946, represented the voluntary acceptance of jurisdiction of International Courts. After the Cold War, six permanent international courts[7] existed, along with the non-compulsory dispute settlement system of the GATT 1947 and the European Court of Justice, which operates effectively on a regional basis. According to the *Oxford Handbook on International Adjudication* of 2014, currently there are at least two dozen permanent internationals courts (ICs) that have collectively issued more than tens of thousands legal judgements. More than 90% of these rulings have been issued after the fall of Berlin Wall.[8] The greater influence of international adjudication today is not simply a matter of numbers. While the early international adjudication bodies were primarily invoked on a voluntary basis, there has been a marked shift to compulsory jurisdiction, often with non-state actors also having access to international adjudication.

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5 Malcolm N. Shaw, *International Law*, eighth edition, Cambridge University Press, 2017, p. 10.

6 The 1889 Universal Peace Congress, the peace-through-law movement, etc. all helped the shift from arbitration to international courts.

7 The European Court of Justice (ECJ) represents an active and effective international court.

8 The *Oxford Handbook of International Adjudication*, Oxford University Press, 2014, p. 54.

In general, the rise of the international court with compulsory jurisdiction elevates the institutionalization of the peaceful settlement of disputes among States to a new level.

Third, Reassess the Appellate Proceedings at the WTO: Its Unique Value

Among the two dozen international adjudicatory bodies, the WTO Appellate Body is one of the very few that actively operates as an appeal mechanism on a multilateral basis.[9]

The Appellate Body was established when the GATT multilateral dispute settlement was vested with compulsory jurisdiction and the negative consensus rule in the DSU. The right to appeal was a compromise ensuring institutional balance for WTO Members to accept such changed rules. It provides for a standing body comprising seven Members with recognized authority in international trade, elected by all Members to serve on a fixed-term basis with representation from different world regions. The selection process has designed to ensure democracy and legitimacy to the composition of the Appellate Body. The seven Members have equal opportunities to form, by random rotation, a three-Member division to conduct a final review of the legal issues Members appealed in panel reports.

By analogy, if multi-level court systems within the domestic judicial regime foster the advancement of justice to citizens of a country, the appellate stage represents a higher level of justice and fairness within the WTO dispute settlement for its Members. The right to appeal a panel report is an entitlement of Members that is enshrined in the multilateral trade system since the Uruguay Round. The number of cases resolved by the system and the remarkably high rate of implementation are indicators of the effectiveness of the institution.

Having made those remarks, it should be emphasized that the Appellate Body never claims to be perfect. On the contrary, the Appellate Body Members constantly recognize the need to actively engage in improving their practices, both in adjudication and internal management. The Appellate Body Members are willing to listen to the concerns of WTO Members and are ready to respond constructively to Members' reform proposals once the DSB reaches consensus. The Appellate Body appreciates Members' understanding of the chronic backlog of cases, on the one hand, and the limited resources of Appellate Body, on the other hand. In response to concerns over lengthy and complex reports, the Appellate Body has introduced a brief summary of its findings at the end of each of its reports for the last three years, and has significantly reduced the length of its reports when compared with previous years. The Appellate Body is open to further improvements and is always determined, to the best of its capacities, to provide an adjudicatory service of high quality to WTO Members. This commitment has never changed and will never change.

Let me conclude by emphasizing that the WTO dispute settlement system is at a historical juncture.

While the international adjudication system has been created and serves the purposes of maintaining world peace, the weakening of such institution enlarges the risks and threatens the interests of all.

Therefore, this is high time for the Members of the WTO to take decisive action and to guide the future of its dispute settlement system.

Thank you for your attention.

[9] See the studies of the *Oxford Handbook on International Adjudication*, Oxford University Press, 2014.

ANNEX 4

MEMBERS OF THE APPELLATE BODY WHO SERVED ON APPEALS FOR WHICH REPORTS WERE CIRCULATED IN 2019-2020

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)

Thomas R. Graham 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 nonlawyer professionals into the international trade practices of private law firms.

Prior to entering private practice, Mr Graham served as Deputy General Counsel in the Office of the US Trade Representative. Earlier in his career, he was a Legal Officer of the United Nations, in Geneva, and a visiting professor of law and assistant to the president of Ford Motor Company, in Caracas, Venezuela.

Mr Graham was the founding Chair 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 Georgetown Law School, and a Guest Scholar at the Brookings Institution. He has edited books on international trade policy, and on international trade and environment, and has authored articles and monographs on international trade law and policy. He also is the co-author, with his daughter, of *Getting Open: The Unknown Story of Bill Garrett and the Integration of College Basketball* (Simon & Schuster, Atria Books, 2006; Indiana University, paperback, 2008).

Mr Graham 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)

Peter Van den Bossche is Director of Studies of the World Trade Institute and Professor of International Economic Law at the Faculty of Law of the University of Bern, Switzerland. Since 2018, he serves as President of the Society of International Economic Law. From 2009 to 2019, he was a member of the Appellate Body of the WTO and served as Chair of the Appellate Body in 2015. He is an honorary professor at Maastricht University, the Netherlands, and a visiting professor at the College of Europe, Bruges, Belgium, the Universidad San Francisco de Quito, Ecuador, and the LUISS Guido Carli University, Rome, Italy. He is a member of the Advisory Board of the *Journal of International Economic Law, the Journal of World Investment and Trade, the Revista Latinoamericana de Derecho Comercial Internacional*, and the Chairs Programme of the WTO.

Dr Van den Bossche holds an LL.M. from the University of Michigan, Ann Arbor (1986) and a Ph.D. in law from the European University Institute, Florence (1990). He graduated magna cum laude from the Faculty of Law of the University of Antwerp (1982). Dr Van den Bossche worked at the Court of Justice of the European Communities, Luxembourg, as référendaire of Advocate-General W. Van Gerven (1990-92), after which he joined the Faculty of Law of Maastricht University. From 1997 to 2001, Dr Van den Bossche was Counsellor to the Appellate Body. In 2001, he served as Acting Director of the Appellate Body Secretariat, after which he returned to Maastricht University as Professor of International Economic Law. From 2005 to 2009, Dr Van den Bossche was Head of the Department of International and European Law of Maastricht University.

Dr Van den Bossche frequently acted as a consultant on issues of international economic law to numerous national administrations, international organizations, NGOs, and law firms. He also conducted capacity building and consultancy activities and/or lectured on international economic law in over 35 countries and held visiting professorships at over 10 universities. In 2010, Dr Van den Bossche was a Fernand Braudel Senior Research Fellow at the European University Institute, Florence, and in 2014 Senior Fellow at the Melbourne Law School, University of Melbourne.

Dr Van den Bossche is the author of *The Law and Policy of the World Trade Organization* (with Werner Zdouc from the 3rd edition onwards) and Essentials of WTO Law (with Denise Prévost).

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 the Shenzhen International Arbitration Court. Previously she provided legal services at the Treaty and Law Department of the Ministry of Foreign Trade and Economic Cooperation (which was later transformed into the Ministry of Commerce) of China. Later she served as Assistant Representative for Trade Negotiation at the Office of Representative for International Trade Negotiation of the Ministry of Commerce and as Deputy Director-General of the Anti-Monopoly Bureau of the Ministry of Commerce of China. Subsequently, 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, Berne, Barcelona, Seoul, and Fudan; 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 5

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

Name	Nationality	Term(s) of office
Seung Wha Chang	Korea, Republic of	2012-2016
Hyun Chong Kim	Korea, Republic of	2016-2017
Ricardo Ramírez-Hernández	Mexico	2009-2013 2013-2017
Peter Van den Bossche	Belgium	2009-2013 2013-2017
Shree Baboo Chekitan Servansing	Mauritius	2014-2018
Ujal Singh Bhatia	India	2011-2015 2015-2019
Thomas Graham	United States	2011-2015 2015-2019

II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

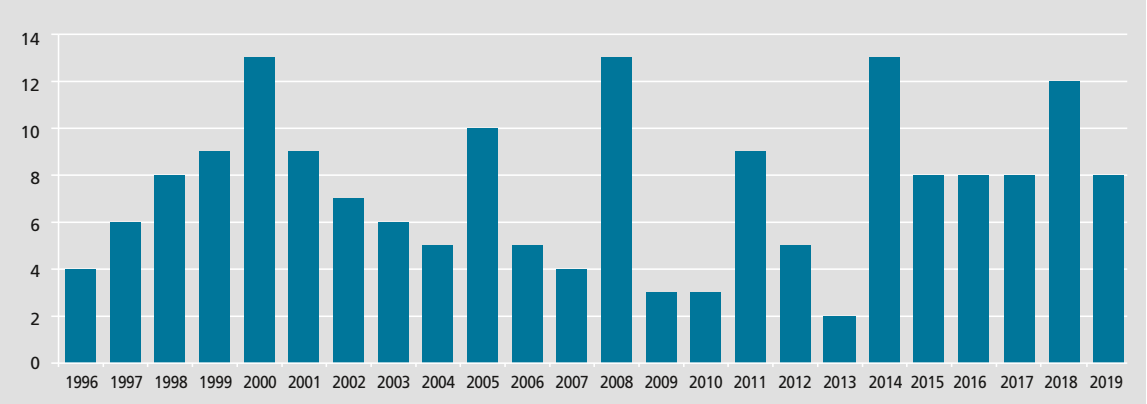
Name	Nationality	Term(s) as Chairperson
Julio Lacarte-Muró	Uruguay	7 February 1996-6 February 1997 7 February 1997-6 February 1998
Christopher Beeby	New Zealand	7 February 1998-6 February 1999
Said El-Naggar	Egypt	7 February 1999-6 February 2000
Florentino Feliciano	Philippines	7 February 2000–6 February 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

Name	Nationality	Term(s) as Chairperson
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 1 July 2019-30 November 2019
Ujal Singh Bhatia	India	1 January 2017-31 December 2017 1 January 2018-31 December 2018
Hong Zhao	China	1 January 2019-30 June 2019 1 December 2019-30 November 2020*

* Madame Zhao Hong has been elected to serve as Chair of the Appellate Body as of 1 December 2019 until 30 November 2020 pursuant to Rule 5.1 of the Working Procedures for Appellate Review (WT/DSB/78).

ANNEX 6

APPEALS FILED: FROM 1995 TO THE FIRST HALF OF 2020[a]



[a] No appeals were filed and no Appellate Body reports were circulated during 1995, the year the Appellate Body was established. No appeals were filed during the first half of 2020.

APPEALS FILED: FROM 1995 TO THE FIRST HALF OF 2020

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
1995	0	0	0
1996	4	4	0
1997	6[a]	6	0
1998	8	8	0
1999	9[b]	9	0
2000	13[c]	11	2
2001	9[d]	5	4
2002	7[e]	6	1
2003	6f	5	1
2004	5	5	0
2005	13	11	2
2006	5	3	2
2007	4	2	2

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
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
2015	8h	6	2
2016	8	7	1
2017	8	6	2
2018	12	10	2
2019	8i	4	4
2020 first half	0	0	0
Total	**178**	**147**	**32**

[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 – Measures Imposing Anti-Dumping Duties on HighPerformance Stainless Steel Seamless Tubes ("HP-SSST")* from the European Union.

[i] This number includes the Panel Report in *US – Carbon Steel (India) (Article 21.5 – India)*, for which the United States notified of its decision to appeal, but did not file a notice of appeal or an appellant submission because no Division of the Appellate Body could be established to hear this appeal (WT/DS436/22).

ANNEX 7

PERCENTAGE OF PANEL REPORTS[a] APPEALED BY YEAR OF CIRCULATION[b]: 1996–2019[c]

	All panel reports			Panel reports other than Article 21.5 reports			Article 21.5 panel reports[d]		
Year	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%
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%
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%

	All panel reports			Panel reports other than Article 21.5 reports			Article 21.5 panel reports[d]		
Year	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] %
2017	13	11	85%	11	9	82%	2	2	100%
2018	18	12	67%	14	10	71%	4	2	50%
2019	14	8g	57%	11	4	36%	3	4	100%e
Total	**306**	**203**	**66%**	**262**	**171**	**65%**	**44**	**32**	**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 and no appeals were filed during the first half of 2020. As such, these two periods have been excluded for the purpose of this statistics.

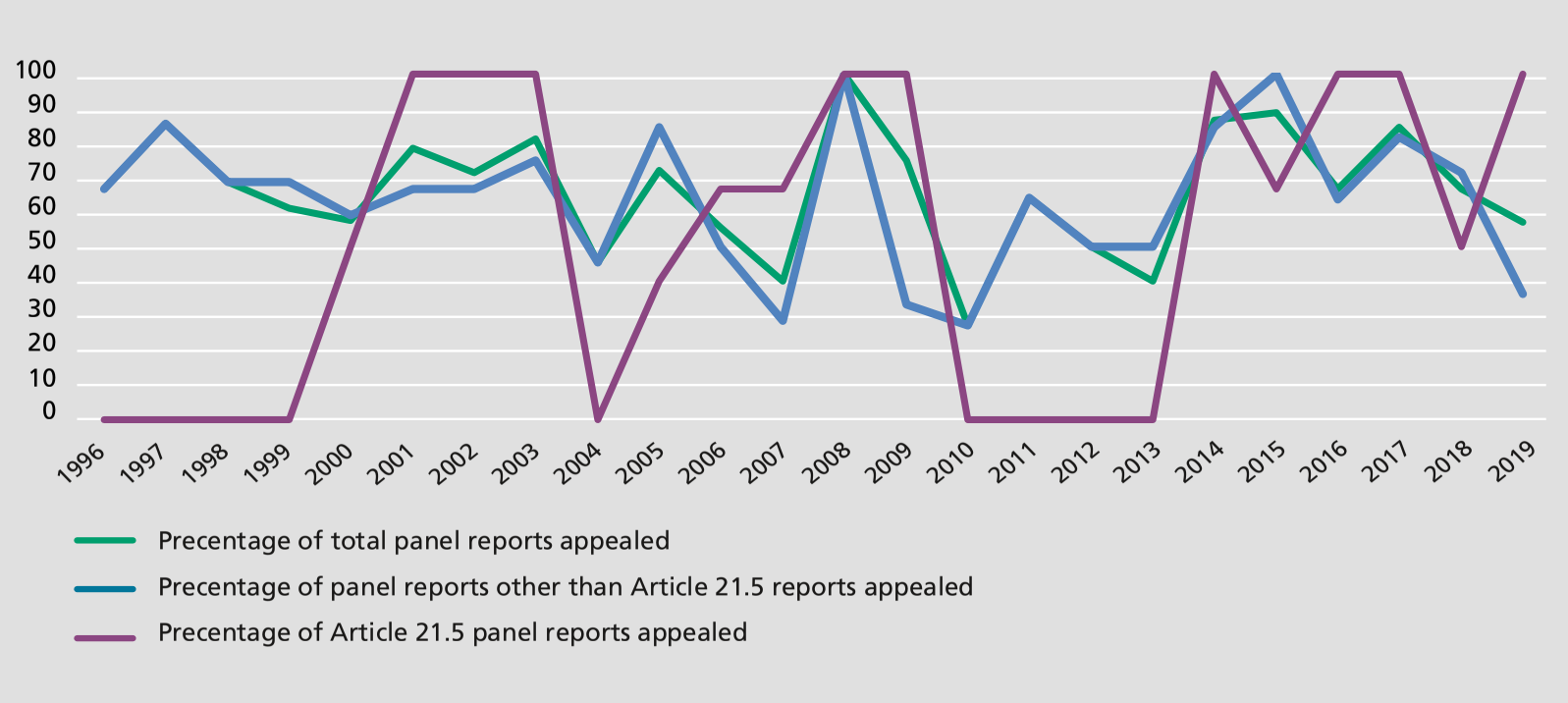
[d] Under Article 21.5 of the DSU, a panel may be established to hear a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB upon the adoption of a previous panel or Appellate Body report.

[e] The panel report in *EC – Bed Linen (Article 21.5 – India)*, which was circulated in 2002, was appealed in 2003. The panel report in *US – Zeroing (EC) (Article 21.5 – EC)*, which was circulated in 2008, was appealed in 2009. The panel report in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, which was circulated in 2018, was appealed in 2019.

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

[g] This number includes the Panel Report in *US – Carbon Steel (India) (Article 21.5 – India)*, for which the United States notified of its decision to appeal, but did not file a notice of appeal or an appellant submission because no Division of the Appellate Body could be established to hear this appeal (WT/DS436/22).

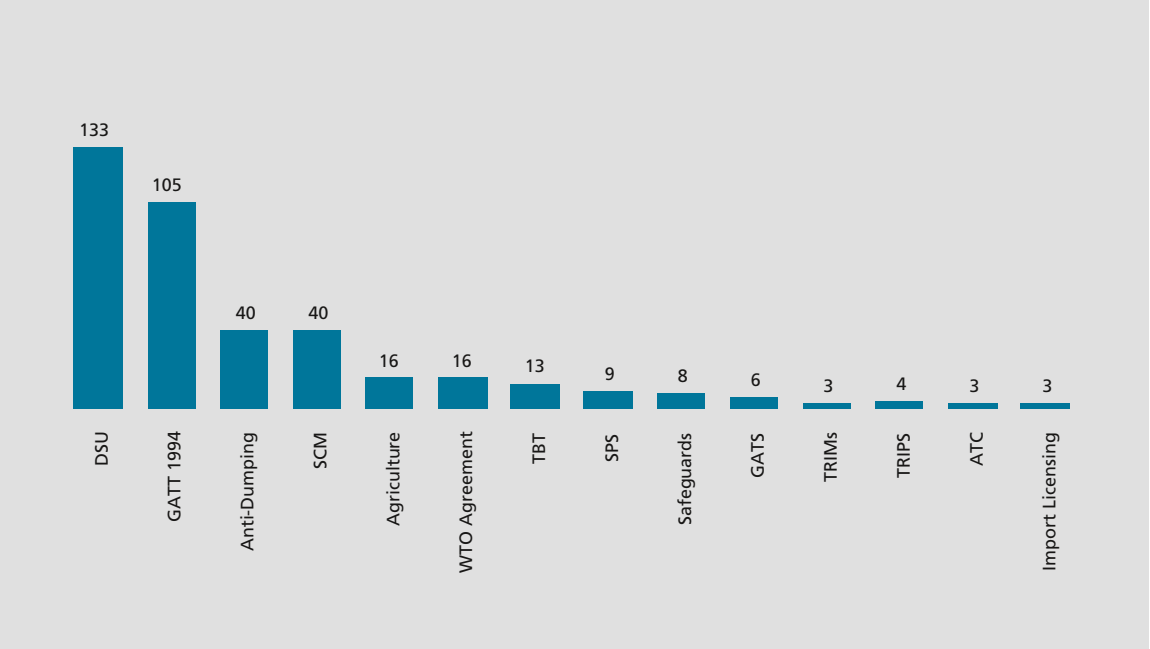
PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF CIRCULATION: 1996–2019



ANNEX 8

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: FROM 1996 TO THE FIRST HALF OF 2020[a]

The chart below shows the number of times specific WTO agreements have been addressed in the 168 Appellate Body reports circulated from 1996 to the first half of 2020.



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

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: FROM 1996 TO THE FIRST HALF OF 2020

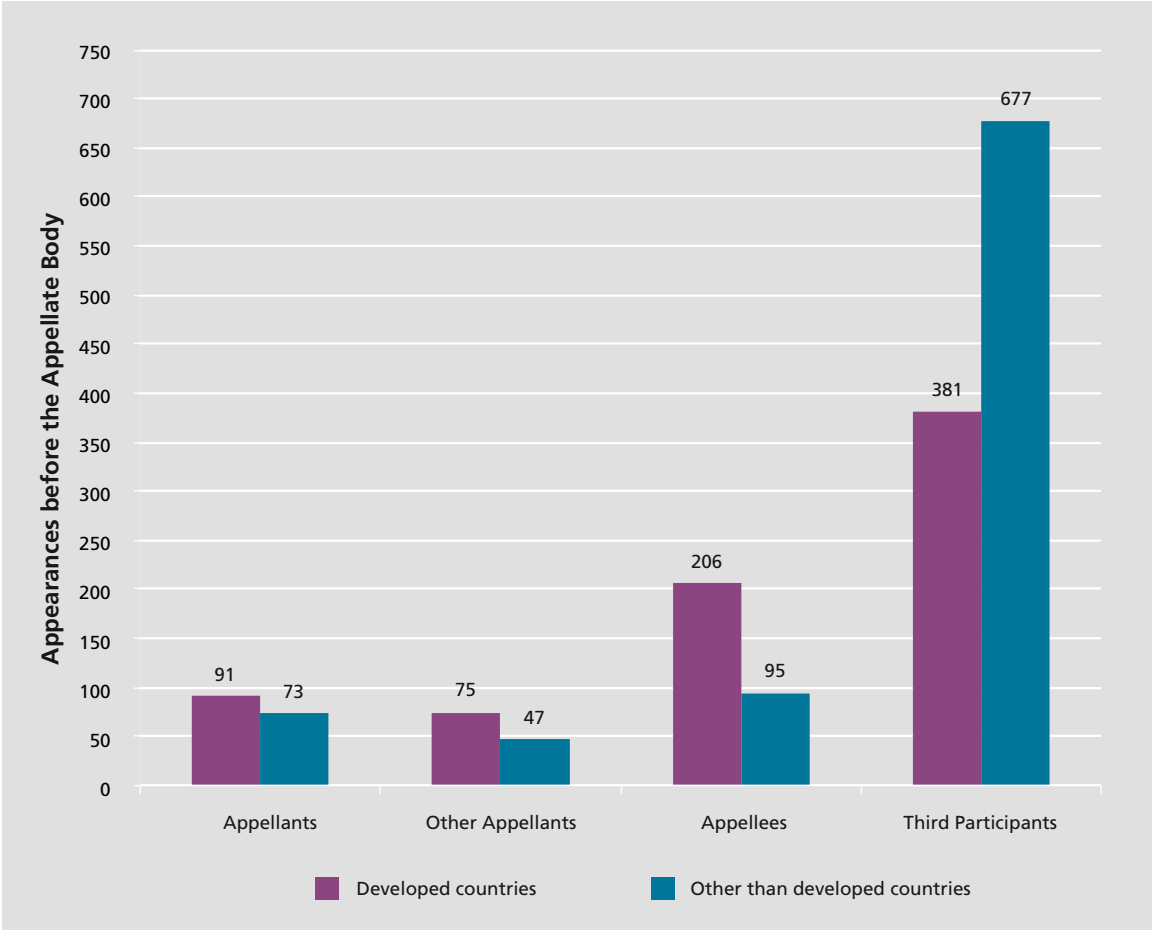
Year of circulation	DSU	WTO Agmt	GATT 1994	Agri-culture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	Safe-guards	GATS	TRIPS
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	0	1	1
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	1	0	0
2000	8	1	7	2	0	0	0	0	2	0	5	2	1	1
2001	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
2019	6	0	0	0	1	0	0	0	2	0	2	0	0	0
2020	3	0	0	0	0	0	2	0	0	0	1	0	0	1
Total	**133**	**16**	**105**	**16**	**9**	**3**	**13**	**3**	**39**	**3**	**41**	**8**	**6**	**4**

ANNEX 9

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: FROM 1996 TO THE FIRST HALF OF 2020[a]

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 the first half of 2020.

WTO MEMBER PARTICIPATION IN APPEALS FROM 1996 TO THE FIRST HALF OF 2020



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

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua and Barbuda	0	1	1	0	2
Argentina	3	5	8	25	41
Australia	2	2	7	56	67
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	52	77
Cameroon	0	0	0	3	3
Canada	14	10	24	46	94
Chad	0	0	0	2	2
Chile	3	0	2	14	19
China	16	6	12	68	102
Colombia	1	0	0	25	26
Costa Rica	1	0	0	3	4
Côte d'Ivoire	0	0	0	4	4
Cuba	0	0	0	5	5
Dominica	0	0	0	4	4
Dominican Republic	2	0	1	4	7
Ecuador	0	2	2	22	26
Egypt	0	0	0	3	3
El Salvador	0	0	0	6	6
Eswatini (Swaziland)	0	0	0	1	1
European Union	25	24	56	85	190
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	2	2	16	21
Guyana	0	0	0	1	1
Honduras	1	2	2	6	11
Hong Kong, China	0	0	0	8	8
Iceland	0	0	0	2	2
India	9	2	8	56	75
Indonesia	4	1	2	7	14
Israel	0	0	0	2	2

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Jamaica	0	0	0	5	5
Japan	8	8	18	82	116
Kenya	0	0	0	1	1
Korea, Republic of	4	6	9	51	70
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1
Malawi	0	0	0	2	2
Malaysia	1	0	1	2	4
Mauritius	0	0	0	2	2
Mexico	6	6	9	39	60
Morocco	1	0	0	0	1
Namibia	0	0	0	1	1
New Zealand	0	3	8	17	28
Nicaragua	0	0	0	5	5
Nigeria	0	0	0	2	2
Norway	2	1	3	40	46
Oman	0	0	0	5	5
Pakistan	0	1	3	3	7
Panama	1	0	2	4	7
Paraguay	0	0	0	7	7
Peru	1	1	1	8	11
Philippines	3	0	3	3	9
Poland	0	0	1	0	1
Russian Federation	2	1	4	19	26
Saint Kitts and Nevis	0	0	0	1	1
Saint Lucia	0	0	0	4	4
Saint Vincent and the Grenadines	0	0	0	3	3
Saudi Arabia, Kingdom of	0	0	0	19	19
Senegal	0	0	0	1	1
Singapore	0	0	0	7	7
South Africa	0	0	0	3	3
Suriname	0	0	0	3	3
Switzerland	0	1	1	1	3
Chinese Taipei	0	1	1	47	49
Tanzania	0	0	0	1	1
Thailand	3	2	5	24	34
Trinidad and Tobago	0	0	0	2	2

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Turkey	1	0	1	25	27
Ukraine	2	0	1	5	8
United States	40	26	89	54	209
Uruguay	0	0	0	1	1
Venezuela, Bolivarian Republic of	0	0	1	6	7
Viet Nam	1	1	1	11	14
Zambia	0	0	0	1	1
Zimbabwe	0	0	0	1	1
Total	**164**	**122**	**301**	**1058**	**1645**

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 Bolivarian Republic of 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 WT/DS33/AB/R/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 Saint Lucia Saint Vincent and the Grenadines Senegal Suriname Bolivarian Republic of 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 WT/DS56/AB/R/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, Republic of	---	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 WT/DS113/AB/R/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, Republic of	European Communities	Korea, Republic of 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, WT/DS142/AB/R	Canada	European Communities Japan	Canada European Communities Japan	Korea, Republic of 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, Republic of	---	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 Saint 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, Republic of
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, Republic of	Korea, Republic of United States	Australia Canada European Communities Japan Mexico
India – Autos[a] WT/DS146/AB/R, WT/DS175/AB/R	India	---	European Communities United States	Korea, Republic of
Chile – Price Band System WT/DS207/AB/R and WT/DS207/AB/R/Corr.1	Chile	---	Argentina	Australia Brazil Colombia Ecuador European Communities Paraguay United States Bolivarian Republic of Venezuela
EC – Sardines WT/DS231/AB/R	European Communities	---	Peru	Canada Chile Ecuador United States Bolivarian Republic of Venezuela
US – Carbon Steel WT/DS213/AB/R and WT/DS213/AB/R/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

a 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, Republic of 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, Republic of 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, Republic of New Zealand Norway Switzerland	Brazil China European Communities Japan Korea, Republic of New Zealand Norway Switzerland United States	Canada Cuba Mexico Chinese Taipei Thailand Turkey Bolivarian Republic of 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, Republic of 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	Plurinational State of Bolivia Brazil Colombia Costa Rica Cuba Ecuador El Salvador Guatemala Honduras Mauritius Nicaragua Pakistan Panama Paraguay Peru United States Bolivarian Republic of 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, Republic of 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 WT/DS285/AB/R/Corr.1	United States	Antigua and Barbuda	Antigua and 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 Saint Kitts and Nevis Swaziland Tanzania Trinidad and 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, Republic of	Korea, Republic of United States	China European Communities Japan Chinese Taipei
EC – Chicken Cuts WT/DS269/AB/R, WT/DS286/AB/R and WT/DS286/AB/R/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 Turkey
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	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 WT/DS277/AB/RW/Corr.1	Canada	---	United States	China European Communities
US – Zeroing (EC) WT/DS294/AB/R and WT/DS294/AB/R/Corr.1	European Communities	United States	United States European Communities	Argentina Brazil China Hong Kong, China India Japan Korea, Republic of 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, Republic of 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, Republic of 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, Republic of 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 WT/DS336/AB/R/Corr.1	Japan	Korea, Republic of	Korea, Republic of Japan	European Communities United States
Brazil – Retreaded Tyres WT/DS332/AB/R	European Communities	---	Brazil	Argentina Australia China Cuba Guatemala Japan Korea, Republic of 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, Republic of 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 – II) WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW2/ECU/Corr.1	European Communities	Ecuador	Ecuador European Communities	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ghana Jamaica Japan Nicaragua Panama Saint Lucia Saint Vincent and the Grenadines Suriname United States
EC – Bananas III (Article 21.5 – US) WT/DS27/AB/RW/USA and WT/DS27/AB/RW/USA/Corr.1	European Communities	---	United States	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ecuador Jamaica Japan Mexico Nicaragua Panama Saint Lucia Saint Vincent and 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, Republic of Mexico Norway Chinese Taipei Thailand
US – Zeroing (EC) (Article 21.5 – EC) WT/DS294/AB/RW and WT/DS294/AB/RW/Corr.1	European Communities	United States	European Communities United States	India Japan Korea, Republic of 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, Republic of 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, Republic of 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, Kingdom of Brazil Canada European Union India Japan Kuwait, the State of Mexico Norway Saudi Arabia, Kingdom of 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, Republic of
Thailand – Cigarettes (Philippines) WT/DS371/AB/R	Thailand	---	Philippines	Australia China European Union India Chinese Taipei United States
EC – Fasteners (China) WT/DS397/AB/R	European Union	China	China European Union	Brazil Canada Chile Colombia India Japan Norway Chinese Taipei Thailand Turkey United States
US – Tyres (China) WT/DS399/AB/R	China	---	United States	European Union Japan Chinese Taipei Turkey Viet Nam

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Philippines – Distilled Spirits (European Union) WT/DS396/AB/R	Philippines	European Union	European Union Philippines	Australia China Colombia 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, Republic of Norway Saudi Arabia, Kingdom of 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, Republic of Norway Saudi Arabia, Kingdom of Chinese Taipei Turkey
China – Raw Materials (Mexico) WT/DS398/AB/R	China	Mexico	China Mexico	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea, Republic of Norway Saudi Arabia, Kingdom of 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, Republic of
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 European Union Guatemala Japan Korea, Republic of New Zealand Chinese Taipei Thailand Turkey Bolivarian Republic of 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, Republic of 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, Republic of New Zealand Peru Chinese Taipei
China – GOES WT/DS414/AB/R	China	---	United States	Argentina European Union Honduras India Japan Korea, Republic of Saudi Arabia, Kingdom of 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, Republic of Mexico Norway Saudi Arabia, Kingdom of 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, Republic of Mexico Norway Saudi Arabia, Kingdom of 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 Russian Federation United States
EC – Seal Products (Norway) WT/DS401/AB/R	Norway	European Union	Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Namibia Russian Federation United States
US – Countervailing and Anti-Dumping Measures (China) WT/DS449/AB/R and WT/DS449/AB/R/Corr.1	China	United States	United States China	Australia Canada European Union India Japan Russian Federation 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, Republic of Japan Norway Oman Peru Russian Federation Saudi Arabia, Kingdom of 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, Republic of Norway Oman Peru Russian Federation Saudi Arabia, Kingdom of 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, Republic of Norway Oman Peru Russian Federation Saudi Arabia, Kingdom of Turkey United States Viet Nam
US – Carbon Steel (India) WT/DS436/AB/R	India	United States	India United States	Australia Canada China European Union Saudi Arabia, Kingdom of 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, Republic of Norway Russian Federation Saudi Arabia, Kingdom of 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, Republic of Norway Saudi Arabia, Kingdom of 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, Republic of Norway Saudi Arabia, Kingdom of Chinese Taipei Thailand Turkey Switzerland

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Argentina – Import Measures (Japan) WT/DS445/AB/R	Argentina	Japan	Argentina Japan	Australia Canada China Ecuador European Union Guatemala India Israel Korea, Republic of Norway Saudi Arabia, Kingdom of Chinese Taipei Thailand Turkey Switzerland United States
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, Republic of 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, Republic of New Zealand
US – Shrimp II (Viet Nam) WT/DS429/AB/R	Viet Nam	---	United States	China Ecuador European Union Japan Norway Thailand

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
India – Agricultural Products WT/DS430/AB/R	India	---	United States	Argentina Australia 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, Republic of United States
China – HP-SSST (Japan) WT/DS454/AB/R	Japan	China	China Japan	European Union India Korea, Republic of Russian Federation Saudi Arabia, Kingdom of Turkey United States
China – HP-SSST (EU) WT/DS460/AB/R	China	European Union	China European Union	India Japan Korea, Republic of Russian Federation Saudi Arabia, Kingdom of 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, Republic of 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, Kingdom of 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, Republic of	Korea, Republic of United States	Brazil Canada China European Union India Japan Norway Saudi Arabia, Kingdom of 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, Republic of Malaysia Norway Russian Federation Saudi Arabia, Kingdom of Chinese Taipei Turkey
EU – Biodiesel (Argentina) WT/DS473/AB/R	European Union	Argentina	Argentina European Union	Australia China Colombia Indonesia Mexico Norway Russian Federation Saudi Arabia, Kingdom of Turkey United States

2017

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Pigs (EU) WT/DS475/AB/R	Russian Federation	European Union	European Union Russian Federation	Australia Brazil China India Japan Korea, Republic of 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, Republic of Norway Russian Federation Saudi Arabia, Kingdom of Chinese Taipei Turkey Ukraine Viet Nam
US – Tax Incentives WT/DS487/AB/R	United States	European Union	European Union United States	Australia Brazil Canada China Japan Korea, Republic of Russian Federation
EU – Fatty Alcohols (Indonesia) WT/DS442/AB/R	Indonesia	European Union	European Union Indonesia	Korea, Republic of United States
Indonesia – Import Licensing Regimes WT/DS477/AB/R	Indonesia	---	New Zealand United States	Argentina Australia Brazil Canada China European Union Japan Korea, Republic of 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, Republic of Norway Paraguay Singapore Chinese Taipei

2018

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Commercial Vehicles WT/DS479/AB/R	Russian Federation	European Union	European Union Russian Federation	Brazil China Japan Korea, Republic of Turkey Ukraine United States
EC and certain member States – Large Civil Aircraft (Article 21.5 – US) WT/DS316/AB/R/RW	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea, Republic of
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 WT/DS496/AB/R	Indonesia	Chinese Taipei Viet Nam	Chinese Taipei Viet Nam Indonesia	Australia Chile China European Union India Japan Korea, Republic of Russia Ukraine United States

2018 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Brazil – Taxation WT/DS472/AB/R WT/DS497/AB/R	Brazil	European Union[a] Japan[b]	European Union[c] Japan[d] Brazil	Argentina Australia Canada China Colombia European Union[e] India Japan[f] Korea, Republic of Russian Federation Singapore South Africa Chinese Taipei 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 WT/DS381/AB/RW2	Mexico	---	United States	Australia Brazil Canada China Ecuador European Union Guatemala India Japan Korea, Republic of New Zealand Norway

[a] In DS472 only.
[b] In DS497 only.
[c] In DS472 only.
[d] In DS497 only.
[e] In DS497 only.
[f] In DS472 only.

2019

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU) WT/DS353/AB/RW	European Union	United States	European Union United States	Australia Brazil Canada China Japan Korea, Republic of Russian Federation
Korea – Radionuclides WT/DS495/AB/R	Korea, Republic of	Japan	Korea, Republic of Japan	Brazil Canada China European Union Guatemala India New Zealand Norway Russian Federation Chinese Taipei United States
US – Countervailing Measures (China) (Article 21.5 – China) WT/DS437/AB/RW	United States	China	United States China	Australia Canada European Union Japan Korea, Republic of India Russian Federation Viet Nam
Korea – Pneumatic Valves WT/DS504/AB/R	Japan	Korea, Republic of	Japan Korea, Republic of	Brazil Canada China Ecuador European Union Norway Singapore Turkey United States Viet Nam
Ukraine – Ammonium Nitrate WT/DS493/AB/R	Ukraine	---	Russian Federation	Argentina Australia Brazil Canada China Colombia European Union Japan Mexico Norway United States

2019 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Morocco – Hot-Rolled Steel WT/DS513/AB/R	Morocco	---	Turkey	China Egypt European Union India Japan Korea, Republic of Russian Federation Singapore United States

2020

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Railway Equipment WT/DS499/AB/R	Ukraine	Russian Federation	Russian Federation Ukraine	Canada China European Union India Indonesia Japan Singapore United States
US – Supercalendered Paper WT/DS505/AB/R	United States	---	Canada	Brazil China European Union India Japan Korea, Republic of Mexico Turkey

2020 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Australia – Tobacco Plain Packaging (Honduras) / Australia – Tobacco Plain Packaging (Dominican Republic) WT/DS435/AB/R WT/DS441/AB/R	Honduras Dominican Republic	---	Australia	Argentina Brazil Canada Chile China Cuba Dominican Republic[a] Ecuador European Union Guatemala Honduras[b] India Indonesia Japan Korea, Republic of Malawi Malaysia Mexico New Zealand Nicaragua Nigeria Norway Oman Panama Peru Philippines Russian Federation Saudi Arabia, Kingdom of Singapore South Africa Chinese Taipei Thailand Trinidad and Tobago Turkey Ukraine United States Uruguay Zambia Zimbabwe

[a] In DS435 only.
[b] In DS441 only.

WORLD TRADE ORGANIZATION

2019-2020