WORLD TRADE ORGANIZATION

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Page: 1/153

APPELLATE BODY

ANNUAL REPORT FOR 2014

JULY 2015

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CONTENTS

WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
ATC	**Agreement on Textiles and Clothing**
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CAFC	United States Court of Appeals for the Federal Circuit
China's Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO
CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
GOC	Government of China
GOI	Government of India
NMDC	National Mineral Development Corporation
NME	non-market economy
OCTG	Oil Country Tubular Goods
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the DSB on 3 December 1996, WT/DSB/RC/1
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDF	Steel Development Fund
SOEs	state-owned enterprises
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

FOREWORD

In January 2014, the Appellate Body welcomed a new cycle in the Mayan Calendar, fully aware of the challenges ahead. David Unterhalter completed his second term in December 2013, and the Appellate Body was left to function with only six Members for most of 2014. It was not until September that the Appellate Body reverted to normality with the appointment of Mr Shree Baboo Chekitan Servansing. Shree has already made his presence felt in the Appellate Body, and his skills and knowledge continue to make our institution stronger and wiser.

By the end of 2014, the Dispute Settlement Body had received nearly 500 requests for consultations. In its first 16 years, the DSB has handled disputes spanning over US$1 trillion in trade flows. Two thirds of WTO Members have participated in dispute settlement in one way or another. These numbers are quite telling. Despite the attention given to emerging regional trade initiatives, our dispute settlement system remains to be the preferred and perhaps the only forum where international trade disputes are adjudicated effectively and efficiently.

2014 saw the highest number of total active disputes at the panel and appeal stages. Thirteen panel reports were appealed in 2014, and the Appellate Body issued eight reports concerning five matters in: *EC – Seal Products*; *US – Countervailing and Anti-Dumping Measures (China)*; *China – Rare Earths*; *US – Carbon Steel (India)*; and *US – Countervailing Measures (China)*. A ninth Appellate Body report, in *Argentina – Import Measures*, was circulated in January 2015.

The robust level of appeal activity in 2014 confirms the conclusions reached in the Appellate Body's 2013 Workload Paper (see Annex 1 to the Annual Report for 2013). As indicated in the 2013 Workload Paper, appeals have increased not only in rate, but also in complexity, to what was witnessed in the first decade of the WTO dispute settlement mechanism. Disputes now commonly involve multiple parties advancing a variety of claims, increased third-party participation, and greater procedural complexity. Looking at it from a broader context, 2014 has been a "trend-setting year" in terms of complexity of appeals and the number of panel reports appealed. On average, 68% of circulated panel reports are appealed. In 2014, that figure rose to 87%.

Be that as it may, 2014 is just the tip of the iceberg. As the 2013 Workload Paper projected, the upward trend of dispute settlement activity will continue for the next several years. On top of the current heavy workload, we anticipate appeals in the aircraft and tobacco cases, which are on the horizon.

All these facts have increased the burden that is placed on the dispute settlement system, and on the Appellate Body in particular, to produce high-quality reports. This significant strain on the system and its limited resources require effective and innovative solutions. The Appellate Body, together with the WTO Administration, continue to address budgetary and human resource issues to meet the challenges posed by the current workload. Nonetheless, there are structural aspects to these concerns that only the WTO Membership can address.

We interpret the upsurge in the use of dispute settlement, and in appeals specifically, as a sign of confidence by the WTO Membership in the dispute settlement system. We thus consider it our mission to continue delivering high-quality Appellate Body reports swiftly, regardless of the number and complexity of appeals filed.

For the past 20 years, the Appellate Body has served as a model for treaty interpretation and adjudication. Regardless of one's agreement with our findings, it is uncontested that we adjudicate disputes on their merits and in a methodical manner. The WTO dispute settlement system is among the most active, complex, efficient, and sophisticated international dispute settlement systems. The quality of our reports is our trademark, and it is non-negotiable. We stand ready with the WTO Membership and the WTO Administration to address coming challenges and make the system work better than ever.

Ricardo Ramírez-Hernández
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

ANNUAL REPORT FOR 2014

1 INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2014.

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

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

Proceedings under the DSU take place in stages. In the first stage, Members are required to hold consultations with a view to reaching a mutually agreed solution to the matter in dispute.[7] If these consultations fail to produce a mutually agreed solution, the dispute may advance to the adjudicative stage in which the complaining Member requests the DSB to establish a panel to examine the matter.[8] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[9] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[10] Panels shall be composed of well-qualified governmental and/or non-governmental individuals with expertise in international trade law or policy.[11] In discharging its adjudicative function, a panel is required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings

[1] Article 3.3 of the DSU.
[2] Annex 1A to the WTO Agreement.
[3] Annex 1B to the WTO Agreement.
[4] Annex 1C to the WTO Agreement.
[5] Annex 4 to the WTO Agreement.
[6] Appendix 1 to the DSU.
[7] Article 4 of the DSU.
[8] Article 6 of the DSU.
[9] Article 8.6 of the DSU.
[10] Article 8.7 of the DSU.
[11] Article 8.1 of the DSU.

provided for in the covered agreements."[12] The panel process includes written submissions by the main parties and also by third parties that have notified their interest in the dispute to the DSB. Panels usually hold two meetings with the parties, one of which also includes a session with third parties. Panels set out their factual and legal findings in an interim report that is subject to comments by the parties. The final report is first issued to the parties, and is subsequently circulated to all WTO Members in the three official languages of the WTO (English, French, and Spanish), at which time it is also posted on the WTO website.

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

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

Panel and Appellate Body reports must be adopted by WTO Members acting collectively through the DSB. Under the reverse consensus rule, a report is adopted by the DSB unless all WTO Members present at the meeting formally object to its adoption.[16] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding upon the parties.

Following the adoption by the DSB of a panel or Appellate Body report that includes a finding of inconsistency of a measure of the responding Member with its WTO obligations, Article 21.3 of the DSU provides that the responding Member should, in principle, comply immediately. However, where immediate compliance is "impracticable", the responding Member shall have

[12] Article 11 of the DSU.

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

[14] Former Appellate Body Members, Secretariat staff and interns are also subject to Post Employment Guidelines, which facilitate compliance with relevant obligations of conduct following a term of service (WT/AB/22). The communication from the Appellate Body regarding post-employment guidelines is attached as Annex 1 to this Annual Report.

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

[16] Articles 16.4 and 17.14 of the DSU.

a "reasonable period of time" to implement the DSB's recommendations and rulings. The "reasonable period of time" may be determined by the DSB, by agreement between the parties, or through binding arbitration pursuant to Article 21.3(c) of the DSU. In such arbitration, a guideline for the arbitrator is that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of the panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. Arbitrators have indicated that the reasonable period of time shall be the shortest time possible in the implementing Member's legal system. To date, arbitrations pursuant to Article 21.3(c) of the DSU have been conducted by current or former Appellate Body Members acting in an individual capacity.

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

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

2 COMPOSITION OF THE APPELLATE BODY

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

The second term of office of Mr David Unterhalter expired on 17 December 2013. In order to fill the vacancy arising from the expiration of Mr Unterhalter's term, the DSB, at its meeting on

[17] Article 22.1 of the DSU.
[18] Article 5 of the DSU.
[19] There has been only one recourse to Article 25 of the DSU and it was not in lieu of panel or Appellate Body proceedings. Rather, the purpose of that arbitration was to set an amount of compensation pending full compliance by the responding Member. (See Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*)
[20] Articles 21 and 22 of the DSU apply *mutatis mutandis* to decisions by arbitrators.

24 May 2013, launched a selection process for the appointment of a new Appellate Body Member.[21] Based on the procedures set forth in document WT/DSB/1, the DSB established a Selection Committee consisting of the Director-General and the 2013 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council, and the DSB.[22]

Four candidates were nominated by four WTO Members, namely, Australia, Cameroon, Egypt, and Kenya. These four candidates were interviewed by the Selection Committee on 21 October 2013. At the DSB meeting held on 22 October, Members wishing to express their views on any of the candidates were invited to meet with the Selection Committee. As previously agreed, the Selection Committee was to make its recommendation to the DSB no later than 7 November 2013, in order to enable the DSB to consider the recommendation at its regularly scheduled meeting on 25 November 2013.[23] However, on 14 November 2013, the Chair of the DSB informed Members that, due to the intensive consultation process in preparation for the 9th Ministerial Conference in Bali in December 2013, the Selection Committee had not been able to complete its deliberations on a recommendation regarding a new Member of the Appellate Body. The Selection Committee proposed to resume its deliberations in 2014 with a view to making its recommendation as soon as practicable.

At its meeting on 23 May 2014, the DSB decided to launch a new selection process for the appointment of an Appellate Body Member.[24] The DSB also decided that the candidates nominated for the 2013 process would remain under consideration and that it would not be necessary for Members to re-nominate them. Based on the procedures set forth in document WT/DSB/1, the DSB established a Selection Committee consisting of the Director-General and the 2014 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council, and the DSB.[25] The 2014 Selection Committee considered seven candidates nominated by seven WTO Members, namely, Cameroon, Egypt, Ghana, Kenya, Mauritius, Uganda, and Zimbabwe.[26] These seven candidates were interview by the Selection Committee on 22 and 23 July 2014. Members wishing to express their views on any of the candidates were invited to meet with the Selection Committee or send written comments to the DSB Chair.

At its meeting on 26 September 2014, on the basis of the Selection Committee's recommendation and following consultations with WTO Members, the DSB appointed Mr Shree Baboo Chekitan Servansing as a member of the Appellate Body for a four-year term starting on 1 October 2014.[27] The new member of the Appellate Body was sworn in at a ceremony on 20 October 2014.[28]

The composition of the Appellate Body in 2014 and the respective terms of office of its Members are set out in Table 1. Before Mr Servansing's appointment the Appellate Body was composed of only six members between 12 December 2013 and 30 September 2014.

[21] WT/DSB/60.
[22] WT/DSB/M/332.
[23] WT/DSB/338.
[24] WT/DSB/63.
[25] WT/DSB/M/343.
[26] The candidates from Cameroon and Egypt, nominated in 2013, remained under consideration in the 2014 process.
[27] WT/DSB/M/350.
[28] The Director-General Azevêdo, and the then Chair of the Appellate Body, Mr Ricardo Ramírez-Hernández, welcomed Mr Servansing at the DSB meeting held on 20 October 2014. Their remarks are attached as Annex 4 to this Annual Report.

Table 1: Composition of the Appellate Body in 2014

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

Pursuant to Rule 5.1 of the Working Procedures, the Members of the Appellate Body re-elected Mr Ricardo Ramírez-Hernández to serve a second term as Chairperson of the Appellate Body from 1 January to 31 December 2014.[29] In December 2014, Mr Peter Van den Bossche was elected to serve as Chairperson as of 1 January 2015 until 31 December 2015.

Biographical information about the Members of the Appellate Body is provided in Annex 3. A list of former Appellate Body Members and Chairpersons is provided in Annex 5.

The Appellate Body receives legal and administrative support from the Appellate Body Secretariat, in accordance with Article 17.7 of the DSU. As at 31 December 2014, the Secretariat comprised a Director, fourteen lawyers, one administrative assistant, and three support staff. Werner Zdouc has been Director of the Appellate Body Secretariat since 2006.

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 5 days of the filing of the Notice of Appeal.

Thirteen panel reports concerning seven matters were appealed in 2014. One dispute related to compliance proceedings, while all remaining disputes related to original proceedings. "Other appeals" were filed pursuant to Rule 23(1) of the Working Procedures in nine out of the thirteen disputes. Table 2 sets out further information regarding appeals filed in 2014.

[29] WT/DSB/62.

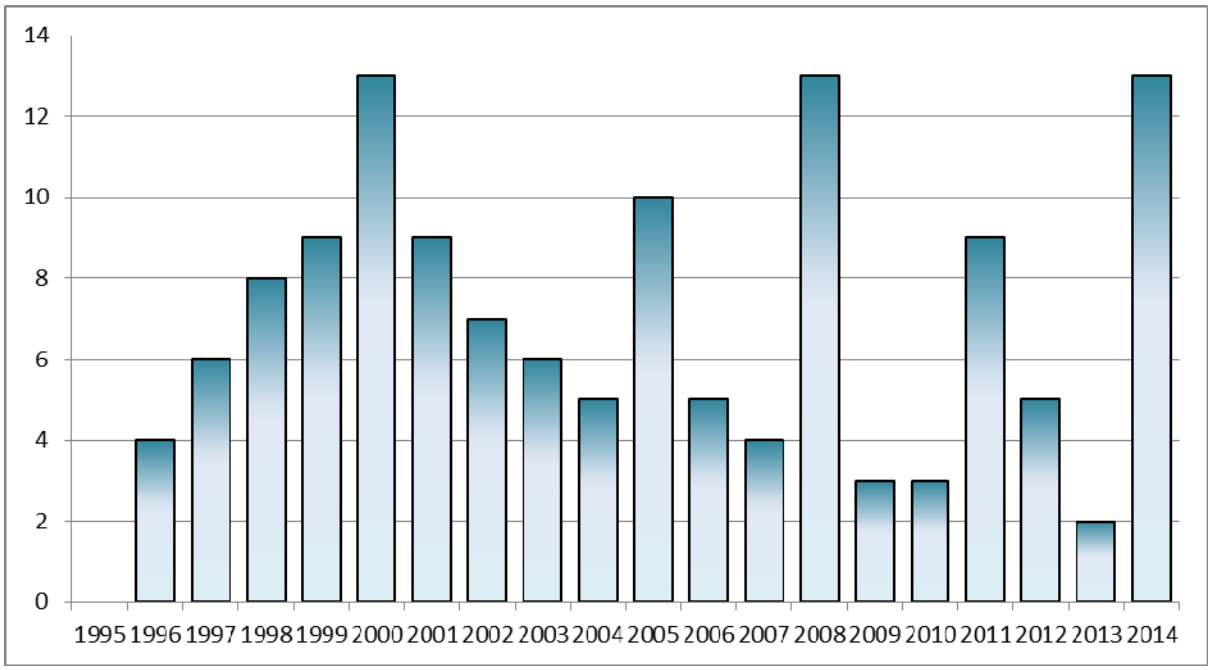
Table 2: Panel reports appealed in 2014

Panel report appealed	Date of appeal	Appellant [a]	Document symbol	Other appellant [b]	Document symbol
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	24 January 2014	Canada	WT/DS400/8	European Union	WT/DS400/9
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	24 January 2014	Norway	WT/DS401/9	European Union	WT/DS401/10
United States — Countervailing and Anti-Dumping Measures on Certain Products from China	8 April 2014	China	WT/DS449/6	United States	WT/DS449/7
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	8 April 2014	United States	WT/DS/431/9	China	WT/DS/431/10
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	25 April 2014	China	WT/DS/432/9	-	-
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	25 April 2014	China	WT/DS/433/9	-	-
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	8 August 2014	India	WT/DS436/6	United States	WT/DS436/7
United States — Countervailing Duty Measures on Certain Products from China	22 August 2014	China	WT/DS437/7	United States	WT/DS437/8
*Argentina — Measures Affecting the Importation of Goods**	26 September 2014	Argentina	WT/DS438/15	European Union	WT/DS438/16
*Argentina — Measures Affecting the Importation of Goods**	26 September 2014	Argentina	WT/DS444/14	-	-
*Argentina — Measures Affecting the Importation of Goods**	26 September 2014	Argentina	WT/DS445/14	Japan	WT/DS445/15
United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada	28 November 2014	United States	WT/DS384/29	Canada	WT/DS384/30
United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Mexico	28 November 2014	United States	WT/DS386/28	-	-

[a] Pursuant to Rule 20(1) of the Working Procedures.
[b] Pursuant to Rule 23(1) of the Working Procedures.
* Appellate Body reports concerning disputes with the same title were circulated as a single document.

Information on the number of appeals filed each year since 1995 is provided in Annex 6. Chart 1 shows the number of appeals filed each year between 1995 and 2014.

Chart 1: Total number of appeals 1995–2014



The overall average of panel reports that have been appealed from 1995 to 2014 is 68%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 7.

4 APPELLATE BODY REPORTS

Eight Appellate Body reports concerning five matters were circulated in 2014, the details of which are summarized in Table 3. As of the end of 2014, the Appellate Body has circulated a total of 127 reports.

Table 3: Appellate Body reports circulated in 2014

Case	Document symbol	Date circulated	Date adopted by the DSB
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	WT/DS400/AB/R	22 May 2014	18 June 2014
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	WT/DS401/AB/R	22 May 2014	18 June 2014
United States — Countervailing and Anti-Dumping Measures on Certain Products from China	WT/DS449/AB/R	7 July 2014	22 July 2014
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS431/AB/R	7 August 2014	29 August 2014
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS432/AB/R	7 August 2014	29 August 2014

Case	Document symbol	Date circulated	Date adopted by the DSB
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS433/AB/R	7 August 2014	29 August 2014
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	WT/DS436/AB/R	8 December 2014	19 December 2014
United States — Countervailing Duty Measures on Certain Products from China	WT/DS437/AB/R	18 December 2014	16 January 2015

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

The following table shows which WTO agreements were addressed in the Appellate Body reports circulated in 2014.

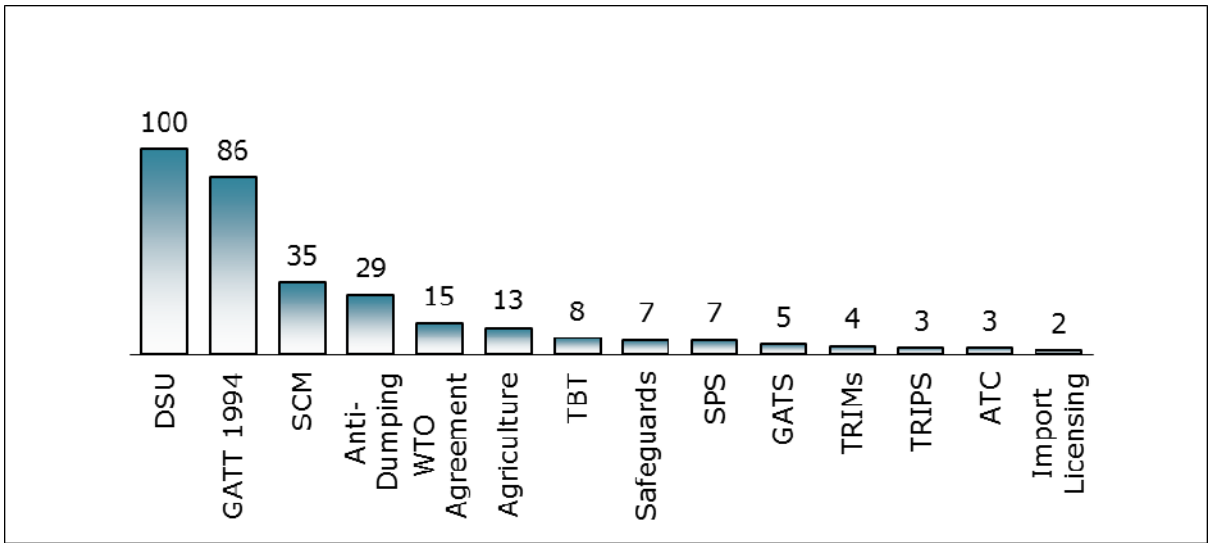
Table 4: WTO Agreements addressed in Appellate Body reports circulated in 2014

Case	Document symbol	WTO agreements addressed
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	WT/DS400/AB/R	GATT 1994 TBT Agreement
*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products**	WT/DS401/AB/R	GATT 1994 TBT Agreement
United States — Countervailing and Anti-Dumping Measures on Certain Products from China	WT/DS449/AB/R	GATT 1994 SCM Agreement DSU
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS431/AB/R	GATT 1994 China's Accession Protocol WTO Agreement DSU
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS432/AB/R	GATT 1994 China's Accession Protocol WTO Agreement DSU
*China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum**	WT/DS433/AB/R	GATT 1994 China's Accession Protocol WTO Agreement DSU
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	WT/DS436/AB/R	GATT 1994 SCM Agreement WTO Agreement DSU
United States — Countervailing Duty Measures on Certain Products from China	WT/DS437/AB/R	SCM Agreement DSU

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

Chart 2 below shows the number of times specific WTO agreements have been addressed in the 127 Appellate Body reports circulated from 1996 through 2014.

Chart 2: WTO agreements addressed in appeals 1996–2014



Annex 8 contains a breakdown by year of the frequency with which the specific WTO agreements have been addressed in appeals from 1996 through 2014.

The findings and conclusions contained in the Appellate Body reports circulated in 2014 are summarized below.

4.1 Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R

These disputes arose from challenges by Canada and Norway (complainants) to certain measures enacted by the European Union affecting the importation and placing on the EU market of products derived from seals. Specifically, the complainants challenged EU Regulation (EC) No. 1007/2009 on trade in seal products (Basic Regulation) and Commission Regulation (EU) No. 737/2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 (Implementing Regulation). Together, these measures prohibit the importation and placing on the market of seal products other than seal products derived from hunts conducted by Inuit or other indigenous communities (IC exception), conducted for marine resource management purposes (MRM exception), or seal products imported for the personal use of travellers (Travellers exception). The panel and the Appellate Body referred to these measures collectively as the "EU Seal Regime".

Before the panel, Canada and Norway claimed that the EU Seal Regime is inconsistent with Articles I:1, III:4 and XI:1 of the GATT 1994, and Articles 2.2, 5.1.2, and 5.2.1 of the TBT Agreement. In addition, Canada also claimed that the EU Seal Regime is inconsistent with Article 2.1 of the TBT Agreement, and Norway claimed that the regime at issue is inconsistent with Article 4.2 of the Agreement on Agriculture.

The panel found that the EU Seal Regime is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. The panel also found that the EU Seal Regime has a detrimental impact on the competitive opportunities of Canadian imported seal products compared to like products from Greenland and certain EU member States. The panel concluded that the IC exception and the MRM exception under the EU Seal Regime are inconsistent with Article 2.1 of the TBT Agreement because the detrimental impact caused by these exceptions does not stem exclusively from legitimate regulatory distinctions and consequently the exceptions accord imported seal products treatment less favourable than that accorded to like domestic and other foreign seal products. The panel further found that the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement, because it fulfils the objective of addressing EU public moral

concerns on seal welfare to a certain extent, and no alternative measure had been demonstrated to make an equivalent or greater contribution to the fulfilment of the objective as the EU Seal Regime. The panel also determined that the EU Seal Regime is inconsistent with Article 5.1.2 of the TBT Agreement because the conformity assessment procedures under the EU Seal Regime were incapable of enabling trade in qualifying products to take place as from the date of entry into force of the EU Seal Regime. The panel, however, rejected the claims under Article 5.2.1 of the TBT Agreement.

Regarding the remaining claims, the panel found that (i) IC exception under the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994 because an advantage granted by the European Union to seal products originating in Greenland is not accorded immediately and unconditionally to the like products originating in Canada and Norway; and (ii) the MRM exception under the EU Seal Regime is inconsistent with Article III:4 of the GATT 1994 because it accords imported seal products treatment less favourable than that accorded to like domestic seal products. The panel, however, rejected the claims under Article XI:1 of the GATT 1994, and Article 4.2 of the Agreement on Agriculture. In addition, the panel found that (i) the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(a) of the GATT 1994 because they fail to meet the requirements under the chapeau; and (ii) the IC exception and the MRM exception under the EU Seal Regime are not justified under Article XX(b) of the GATT 1994 because the European Union has failed to make a *prima facie* case for its claim.

On appeal, Canada challenged the panel's intermediate finding under Article 2.1 of the TBT Agreement that the distinction between commercial and IC hunts is justifiable. Canada also claimed that the panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts in the context of its findings under Article 2.1 of the TBT Agreement. In addition, Canada and Norway appealed the panel's findings that (i) the EU Seal Regime is not inconsistent with Article 2.2 of the TBT Agreement, and (ii) the EU Seal Regime is provisionally justified under Article XX(a) of the GATT 1994 and the panel's reasoning with respect to the chapeau of Article XX. Canada and Norway also alleged that the panel acted inconsistently with Article 11 of the DSU in relation to its findings under Article 2.1 of the TBT Agreement. Finally, Canada alleged that the panel acted inconsistently with Article 11 of the DSU in making certain factual findings in relation to its finding under Article XX(a) of the GATT 1994.

In its other appeal, the European Union challenged the panel's finding that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. The European Union also appealed the panel's interpretation of Articles I:1 and III:4 of the GATT 1994, as well as the panel's conclusion under Article I:1.

4.1.1 Annex 1.1 to the TBT Agreement

In its cross-appeal, the European Union challenged the panel's finding that the EU Seal Regime lays down product characteristics, including the applicable administrative provisions, and requested the Appellate Body to reverse the panel's conclusion that the EU Seal Regime is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement.

The Appellate Body explained that, since Annex 1.1 describes a technical regulation by reference to a "document" and makes clear that it is "compliance" with the content of the document laying down product characteristics or their related processes and production methods (PPMs) that must be found to be "mandatory", the scope of Annex 1.1 is limited to those documents that establish or prescribe something and thus have a certain normative content. With respect to the meaning of the term "product characteristics", the Appellate Body recalled its observations in *EC – Asbestos* that the "characteristics" of a product include "objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product" that might relate, *inter alia*, to "a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity". Further, the Appellate Body noted that, in *EC – Asbestos*, the Appellate Body had described these characteristics as "features and qualities intrinsic to the product itself" and had added that "product characteristics" within the meaning of Annex 1.1 may also include "related 'characteristics'". In addition, the Appellate Body explained that the reference to "or their related processes and production methods" in the first sentence of Annex 1.1 indicates that the subject matter of a technical regulation may also consist of the laying down of PPMs that are

related to product characteristics. According to the Appellate Body, in order to determine whether a measure lays down related PPMs, a panel should examine whether the PPMs prescribed by the measure have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics.

Turning to the term "applicable administrative provisions" in the first sentence of Annex 1.1 to the TBT Agreement, the Appellate Body noted that this term is linked to the words "product characteristics or their related processes and production methods" by the conjunctive "including". Recalling the ordinary meaning of the words "provision" and "administrative", the Appellate Body noted that the word "applicable" in this context indicates that the relevant "administrative provisions" must "refer" to or be "relevant" to the product characteristics or their related PPMs as prescribed in the relevant document. The Appellate Body further explained that the second sentence of Annex 1.1 enumerates specific elements that technical regulations "may also include or deal exclusively with", namely, "terminology, symbols, packaging, marking or labelling requirements" as they apply to a product, process or production method. The use of the words "also include" and "deal exclusively with" at the beginning of the second sentence indicates that the second sentence includes elements that are additional to, and may be distinct from, those covered by the first sentence of Annex 1.1.

With regard to the panel's analysis of the EU Seal Regime, the Appellate Body found that the panel's conclusion that the measure lays down product characteristics appeared to be based on a single component of the measure, namely the prohibition on seal-containing products. Referring to its report in *EC – Asbestos*, the Appellate Body explained that the panel should have examined the design and operation of the measure while seeking to identify its "integral and essential" aspects before reaching a final conclusion as to legal characterization of the measure as a whole. The Appellate Body considered that the panel therefore erred to the extent it reached a final conclusion as to the legal character of the measure on the basis of an examination of the aspect of the EU Seal Regime that sets out a "prohibition on seal-containing products" taken alone. The Appellate Body further noted that a prohibition of pure seal products also found in the EU Seal Regime does not prescribe or impose any "characteristics" on such products and considered that the panel should have assessed the relevance of this aspect of the measure in order to determine whether it was an integral and essential aspect of the measure, and, if so, the weight that should be ascribed to it in characterizing the EU Seal Regime as a whole.

The Appellate Body then turned to examine the EU Seal Regime as it applies to products containing seal as an input ("mixed" products). The Appellate Body noted that the prohibition on "mixed" products could be seen as imposing certain objective features or characteristics on all products by providing that they may not contain seal. However, this was but one of the components of the EU Seal Regime and had to be analysed together with the other components of the measure. Referring to its report in *EC – Asbestos*, the Appellate Body noted that, in that case, the measure at issue regulated asbestos-containing products due to the carcinogenicity or toxicity of the *physical properties of the products at issue*, i.e. *the fact that those products contained asbestos fibres*. By contrast, the Appellate Body pointed out that the EU Seal Regime does not prohibit seal-containing products merely because they *contain seal as an input*; instead, *the prohibition is imposed based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived*.

The Appellate Body next addressed the European Union's argument that the panel erred in considering that the word "applicable" pertains to products rather than "product characteristics or their related processes and production methods". The Appellate Body explained that the clause "including applicable administrative provisions" in Annex 1.1 refers to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related PPMs. Insofar as the essential and integral aspects of the EU Seal Regime do not set out product characteristics, the Appellate Body found that the relevant administrative provisions cannot be characterized as being applicable to product characteristics. Although the administrative provisions under the EU Seal Regime "apply" to products containing seal, this did not, in the Appellate Body's view, mean that the measure at issue amounts to a technical regulation for that reason alone, since these administrative provisions only serve to identify the exempted products, and are an ancillary aspect of the measure.

Having reviewed the relevant aspects of the EU Seal Regime, the Appellate Body explained that, to the extent that the measure regulates the placing on the EU market of *pure* seal products,

it does not prescribe or impose any "characteristics" on the products themselves. To the extent the measure prohibits the placing on the EU market of seal-containing products, it could be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal. However, the Appellate Body was not persuaded that this constitutes the main feature of the measure at issue. The Appellate Body added that the EU Seal Regime's prohibition of "mixed" products differs, to a considerable extent, from the prohibitive aspects of the French Decree under *EC – Asbestos*. The Appellate Body further noted that, when the prohibitive aspects of the EU Seal Regime are considered together with the IC and MRM exceptions, it becomes clear that the EU Seal Regime is not concerned with the banning of the placing of seal products on the EU market as such; instead, the measure establishes the conditions for placing on the market based on criteria relating to the identity of the hunter and/or the type or purpose of the hunt from which the product is derived. That being the main feature of the EU Seal Regime, the Appellate Body did not consider that the measure as a whole lays down product characteristics. For these reasons, the Appellate Body reversed the panel's findings in that respect. Since the panel's conclusion that the EU Seal Regime constitutes a technical regulation was based on its intermediate finding that the EU Seal Regime lays down product characteristics, the Appellate Body also reversed the panel's finding that the EU Seal Regime constitutes a technical regulation within the meaning of Annex 1.1.

In the event the Appellate Body were to reverse the panel's finding that the EU Seal Regime lays down "product characteristics" and/or "applicable administrative provisions" within the meaning of Annex 1.1 of the TBT Agreement, Canada and Norway had requested that the Appellate Body complete the analysis and find that the EU Seal Regime constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. Thus, the Appellate Body turned to Norway's and Canada's requests. The Appellate Body noted that in order to complete the analysis it would have to determine whether the EU Seal Regime lays down "related processes and production methods" and therefore qualifies as a technical regulation even though it does not lay down product characteristics. The Appellate Body recalled that Norway and Canada presented arguments on PPMs to the panel in the alternative; however, the panel did not consider it necessary to examine whether the EU Seal Regime lays down PPMs since it had already found the EU Seal Regime to lay down product characteristics. The Appellate Body noted that, during the hearing, Canada confirmed that it had not argued that the IC and MRM exceptions are "related PPMs", and Norway indicated that it did not consider that the conditions under the exceptions, by themselves, constitute "related PPMs". The Appellate Body recalled that it had on previous occasions refused to complete the analysis in the absence of a full exploration of the issues before the panel that could give rise to concerns about due process. Since neither the panel, nor the complainants, addressed in detail whether the EU Seal Regime lays down "related process and production methods" within the meaning of Annex 1.1, the Appellate Body considered it inappropriate to complete the legal analysis in this respect.

Having reversed the panel's finding that the EU Seal Regime constitutes a technical regulation, and having found that it was unable to complete the legal analysis, the Appellate Body declared moot and of no legal effect the panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.

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

The European Union appealed the panel's interpretation of Articles I:1 and III:4 of the GATT 1994, claiming that the panel erred in finding that the legal standard of the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. The European Union also appealed the panel's conclusion under Article I:1 but not under Article III:4.

The Appellate Body began by making some general observations about the similarities and differences between Articles I:1 and III:4 of the GATT 1994. First, although the MFN and national treatment obligations under the GATT 1994 are both fundamental non-discrimination obligations under the GATT 1994, their points of comparison for determining whether a measure discriminates between like products are not the same. Second, the Appellate Body highlighted the textual differences between the two provisions, noting that the national treatment obligation under Article III:4 is expressed through a "treatment no less favourable" standard, whereas the legal standard under Article I:1 is expressed through an obligation to extend any "advantage" granted by a Member to any product originating in or destined for any other country

"immediately and unconditionally" to the "like product" originating in or destined for any other Members. Third, notwithstanding the textual differences between the two provisions, each provision is concerned with prohibiting discriminatory measures by requiring the equality of competitive opportunities for like products. Against this background, the Appellate Body examined, separately, the panel's interpretation of Articles I:1 and III:4.

Turning to address the European Union's appeal as it related to Article I:1 of the GATT 1994, the Appellate Body considered that an interpretation of the proper legal standard under Article I:1 must take into account the fundamental purpose of Article I:1, namely, to preserve the equality of competitive opportunities for like imported products from all Members. The Appellate Body noted that Article I:1 requires that any advantage granted by a Member to imported products must be made available "unconditionally" to like imported products from any other Members. However, insofar as Article I:1 is concerned with protecting expectations of equal competitive opportunities for like imported products from all Members, the Appellate Body explained that Article I:1 does not prohibit a Member from attaching any conditions to the grant of an "advantage" within the meaning of Article I:1. Instead, the Appellate Body explained that Article I:1 prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member. Conversely, the Appellate Body noted that Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member. Thus, the Appellate Body rejected the European Union's argument that, for the purposes of establishing an inconsistency with Article I:1, it must be demonstrated that the detrimental impact of a measure on competitive opportunities for like imported products does not stem exclusively from a legitimate regulatory distinction. Instead, the Appellate Body considered that where a measure modifies the conditions of competition between like imported products to the detriment of the imported products at issue, it is inconsistent with Article I:1.

Turning to address the European Union's appeal of the panel's interpretation of the legal standard under Article III:4 of the GATT 1994, the Appellate Body noted the European Union's argument that WTO jurisprudence under Article III:4 establishes that the analysis of whether imported products are accorded treatment less favourable than that accorded to like domestic products, "goes beyond" a consideration of the detrimental effect of a measure on the competitive opportunities for like imported products. The Appellate Body recalled that, in *US – Clove Cigarettes*, it had clarified that a violation of Article III:4 had not been established in *Dominican Republic – Import and Sale of Cigarettes*, since, in that dispute, the detrimental impact on competitive opportunities for like imported products was not attributable to the specific measure at issue. Thus, the Appellate Body had clarified that the detrimental impact on competitive opportunities for like imported products must be attributable to, or have a genuine relationship with, the measure at issue. The Appellate Body therefore rejected the European Union's argument that its report in *Dominican Republic – Import and Sale of Cigarettes* stands for the proposition that, under Article III:4, a panel must examine whether the detrimental impact that a measure has on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.

The European Union also relied on the Appellate Body's statement in *EC – Asbestos* that "a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products". In the European Union's view, this statement supports its contention that, for the purposes of establishing a violation of Article III:4, a finding that a measure has a detrimental impact on competitive opportunities for like imported products is not dispositive.

The Appellate Body considered that the statement of the Appellate Body in *EC – Asbestos*, on which the European Union relied, merely highlighted that Article III:4 does not require the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products. However, in the Appellate Body's view, regulatory distinctions between imported and like domestic products constitute less favourable treatment of imported products, under Article III:4, where such distinctions modify the conditions of competition in the relevant market to the detriment of like imported products.

The European Union further asserted that the panel's interpretation of the legal standard under Article III:4 failed to take account of the general principle, expressed in Article III:1 of the GATT 1994, that internal regulations should not be applied "so as to afford protection" to domestic production. The Appellate Body considered that although the general principle expressed in Article III:1 informs the rest of Article III, including Article III:4, the extent to which this general principle informs the other paragraphs of Article III depends on the textual connection between Article III:1 and the other paragraphs of Article III. Noting that Article III:4 does not explicitly refer to Article III:1, the Appellate Body considered that Article III:4 is, itself, an expression of the principle set forth in Article III:1, such that if there is "less favourable treatment" of the group of "like" imported products, "protection" is afforded to the group of "like" domestic products.

The European Union also suggested that, since the list of possible legitimate objectives that may factor into an analysis under Article 2.1 of the TBT Agreement is open, a divergent approach to *de facto* discrimination under the GATT 1994 could lead to a situation where, under Article 2.1, a technical regulation that has a detrimental impact on imports would be permitted if such detrimental impact stems from a legitimate regulatory distinction, while, under Articles I:1 and III:4 of the GATT 1994, the same technical regulation would be prohibited if the objective that it pursues does not fall within the closed list of the subparagraphs of Article XX of the GATT 1994. In the Appellate Body's view, this argument was predicated on a perceived imbalance between, on the one hand, the scope of a Member's right to regulate under Article XX of the GATT 1994, and, on the other hand, the scope of that right under Article 2.1 of the TBT Agreement. The Appellate Body dismissed this argument, noting that under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.

For these reasons, the Appellate Body upheld the panel's finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. As a result, the Appellate Body also upheld the panel's conclusion that the measure at issue is inconsistent with Article I:1 because it does not "immediately and unconditionally" extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.

4.1.3 Article XX of the GATT 1994

The Appellate Body recalled that it had declared moot and of no legal effect the panel's conclusions under Articles 2.1 and 2.2 of the TBT Agreement. However, to the extent that the panel had relied on certain of its findings and reasoning in the context of its analysis under the TBT Agreement when addressing claims and arguments under Article XX of the GATT 1994, the Appellate Body explained that it would refer to those findings and reasoning in considering the participants' claims and arguments on appeal under Article XX.

4.1.3.1 The Objective of the EU Seal Regime

The Appellate Body noted that the panel sought first to identify the "objective" of the EU Seal Regime in the context of its analysis under Article 2.2 of the TBT Agreement, and relied on that assessment in its analysis under Article XX of the GATT 1994. In the context of Article XX, the Appellate Body explained that the panel's characterization of the objective of the measure has implications both in respect of the analysis under subparagraph (a), as well as under the chapeau. Accordingly, before addressing the claims on appeal directed at the panel's analysis under Article XX, the Appellate Body addressed the panel's characterization of the objective of the EU Seal Regime and the parties' arguments relating thereto. Norway challenged the panel's finding that the "sole objective" of the EU Seal Regime is to address EU public moral concerns regarding seal welfare. In Norway's view, the panel committed a number of legal and factual errors in reaching the conclusion that the EU Seal Regime does not pursue objectives relating to the protection of IC interests and the promotion of MRM interests. The European Union maintained that the panel correctly found that the "principal" or "main" objective of the EU Seal Regime is to address public moral concerns with regard to the welfare of seals.

The Appellate Body began by noting that, in order to identify a measure's objective, a panel must take account of all evidence put before it in this regard, including the texts of statutes, the legislative history, and other evidence regarding the structure and operation of the measure at issue. The Appellate Body also noted that, a panel's identification of the objective of a measure is a matter of legal characterization subject to appellate review under Article 17.6 of the DSU. Contrary to what Norway argued, the Appellate Body considered that the panel did not find that addressing EU public moral concerns regarding seal welfare was the "sole objective" of the EU Seal Regime. Instead, while the panel identified the "principal objective" of the EU Seal Regime as being "to address public concerns on seal welfare", the panel found that the interests, *inter alia*, of indigenous communities and those for marine management purposes had been "accommodated" in the measure as well. Thus, when the panel stated that the other interests must be distinguished from the "main objective" of the measure "as a whole", according to the Appellate Body, it was commenting on how the relative significance of the policy interests played out in the measure, suggesting that such other interests were not manifest in the objective of the measure in the same manner as concerns regarding seal welfare. Finally, the Appellate Body noted that although the panel did not determine the moral content of such other interests, either alone or as part of a single moral standard for seal welfare, the panel also did not accept the European Union's contention that the benefits to Inuit communities "outweighed" concerns in respect of seal welfare in indigenous community hunts. The Appellate Body also recalled that the panel did not consider that the evidence before it supported the European Union's position that the EU public attributes a higher moral value to the protection of Inuit interests as compared to seal welfare.

For these reasons, the Appellate Body rejected Norway's claim that the panel erred in its characterization of the objective of the EU Seal Regime. Having reviewed the panel's findings and the participants' arguments on appeal, the Appellate Body considered that the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating other interests so as to mitigate the impact of the measure on those interests.

4.1.3.2 Article XX(a) of the GATT 1994

Norway submitted that the panel erred by seeking to justify under Article XX(a) of the GATT 1994 the EU Seal Regime as a whole, instead of the aspects of the measure – namely, the IC and MRM exceptions – giving rise to WTO-inconsistency under Articles I:1 and III:4 of the GATT 1994. The Appellate Body noted that the general exceptions of Article XX apply to "measures" that are to be analysed under the subparagraphs and chapeau, and not to any inconsistency with the GATT 1994 that might arise from such measures. With respect to the claims under Article I:1 of the GATT 1994, the Appellate Body considered that the existence of the permissive component in the form of the IC exception alone cannot be considered to confer an advantage to seal products of Greenlandic origin, unless it is compared to the treatment of seal products of Canadian and Norwegian origin. The Appellate Body thus noted that it is only the combined operation of the permissive aspect of the EU Seal Regime (i.e. the IC exception which grants market access to seal products of Greenlandic origin), together with its prohibitive aspect (i.e. the "ban" which restricts market access for Canadian and Norwegian seal products), that leads to a finding of *de facto* discrimination under Article I:1. The Appellate Body noted that, in the present case, the panel's analysis correctly focused on determining whether these WTO-inconsistent aspects of the measure are justified under Article XX(a). The Appellate Body therefore rejected Norway's claim, and found that the panel did not err in concluding that the analysis under Article XX(a) of the GATT 1994 should examine both the prohibitive and permissive aspects of the EU Seal Regime.

Canada maintained that the panel erred in finding that the EU Seal Regime is a measure taken "to protect public morals" within the meaning of Article XX(a). Relying on the panel report in *EC – Asbestos*, Canada argued that the use of the phrase "to protect" in Article XX(a) requires the identification of a risk to public morals against which the EU Seal Regime seeks to protect. In Canada's view, the evidence it submitted established that the welfare risks associated with commercial seal hunts are "commonplace" in situations that involve the killing of animals, especially in the context of wildlife hunts, regardless of whether they take place inside or outside the European Union. On this basis, Canada argued that the panel failed to consider whether the risks associated with commercial seal hunts "exceeded the accepted level of risk of compromised animal welfare".

The Appellate Body noted that the statement of the panel in *EC – Asbestos* – that "the notion of 'protection' … impl[ies] the existence of a health risk" – was made in the context of Article XX(b) which focuses on the protection of "human, animal or plant life or health". Referring to the concepts of "risk" and "protection" embodied in the SPS Agreement, the Appellate Body noted that the protection of human, animal, or plant life or health may suggest a particular focus on the protection from or against certain dangers or risks. However, the notion of risk in the context of Article XX(b) is difficult to reconcile with the subject-matter of protection under Article XX(a), namely, public morals. The Appellate Body explained that while the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) may lend itself to scientific or other methods of inquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals. The Appellate Body therefore did not consider that the term "to protect", when used in relation to "public morals" under Article XX(a), required the panel to identify the existence of a risk to EU public moral concerns regarding seal welfare. For these reasons, the Appellate Body also rejected Canada's argument that, for the purposes of an analysis under Article XX(a), a panel is required to determine the exact content of the public moral standard at issue. The Appellate Body noted that Canada did not challenge the panel's reliance on statements by the panel in *US – Gambling*, including that "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation'", and that Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values. The Appellate Body further noted that Canada did not directly challenge the panel's finding that public moral concerns exist in relation to seal welfare in the European Union.

The Appellate Body noted that, by arguing that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appeared to suggest that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement "to protect" public morals under Article XX(a). The Appellate Body recalled that the panel in *US – Gambling* underscored that Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, the Appellate Body did not consider that the European Union was required by Article XX(a) to address such public moral concerns in the same way. For these reasons, the Appellate Body found that the panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a).

Canada and Norway both contended that the panel erred in concluding that the EU Seal Regime is "necessary" to protect public morals and by finding that the EU Seal Regime made a "material" contribution to its objective, since the degree of contribution of the EU Seal Regime did not rise to the level of being "material". In addition, because the panel's analysis under Article XX(a) relied on findings it made in the context of Article 2.2 of the TBT Agreement, the Appellate Body also considered the arguments made by Canada and Norway in that context to the extent they were relevant to Article XX(a) of the GATT 1994.

The Appellate Body first noted the panel's reliance on *Brazil – Retreaded Tyres* to state that "the contribution made by the 'ban' to the identified objective must be shown to be at least material given the extent of its trade-restrictiveness". In that dispute, the Appellate Body was confronted with the particular challenge of assessing the contribution of a measure that formed part of a broader policy scheme, and that was not yet having an immediately discernible impact on its objective. Accordingly, the Appellate Body sought in that dispute to determine whether the measure was "apt to make a material contribution" to its objective. The Appellate Body explained that its approach in *Brazil – Retreaded Tyres* was tailored to the peculiar features of the measure at issue in that case and did not set out a generally applicable standard requiring the use of a pre-determined threshold of "material" contribution in analysing the necessity of a measure under Article XX of the GATT 1994. The Appellate Body considered that this was supported by the notion of an overall necessity analysis, which involves a holistic process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure, following which a comparison with less trade restrictive alternatives should in most cases be undertaken. In the Appellate Body's view, whether a measure is "necessary" cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis. For these reasons, the

Appellate Body rejected Canada's and Norway's argument that the panel was required to apply a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis, and considered that the panel erred to the extent that it relied on such a standard in its analysis. However, because it considered that the panel went on to examine the contribution of both the prohibitive and permissive aspects of the EU Seal Regime, the Appellate Body proceeded to address Canada's and Norway's appeals of the panel's conclusions under Article XX(a) on the basis of their contentions that the panel erred in the contribution analysis it conducted in the context of Article 2.2 of the TBT Agreement to the extent these arguments were relevant to the analysis under Article XX(a).

The Appellate Body then turned to address Canada's and Norway's claims that the panel failed to articulate the "degree" or "extent" of the contribution made by the prohibitive and permissive components of the EU Seal Regime. The Appellate Body observed that the panel opted for a qualitative analysis that focused mainly on the design and expected operation of the measure, and the panel had only limited information on how certain aspects of the measure would operate in practice. Furthermore, the permissive aspects were still in a relatively nascent stage of implementation at the time of the proceedings before the panel. Moreover, although the parties submitted considerable evidence regarding the EU market, the Appellate Body noted that, as acknowledged by the panel, that information was incomplete and subject to a number of limitations. The Appellate Body therefore did not consider that the panel's decision to adopt a qualitative approach in assessing the contribution of the measure was improper. With respect to the contribution made by the EU Seal Regime to the first aspect of the objective – i.e. addressing public moral concerns relating to the EU public's participation as consumers in the market for products derived from inhumanely killed seals – the complainants argued that, by concluding that the ban was "capable of making a contribution", the panel identified a possible, instead of an actual, contribution. The Appellate Body noted that, because the panel made clear that it was focusing on the design and expected operation of the measure, the panel could be seen as projecting what the impact of the prohibitive aspect of the measure would be. In the Appellate Body's view, such an approach was similar to the analysis in *Brazil – Retreaded Tyres*, where the panel concluded that the measure at issue was "capable of making a contribution to the objective". With regard to the second aspect of the objective – i.e. addressing public moral concerns relating to the number of inhumanely killed seals – the Appellate Body considered that the panel's articulation of the degree of contribution was influenced by the limitations in the data about which the panel had signalled its prior reservations. With respect to the complainants' contention that the panel failed to identify how the positive and negative contributions of the different elements of the measure resulted in a net overall contribution to the identified objective, the Appellate Body noted that, although the panel's conclusion that the EU Seal Regime is "capable of making and does make some contribution" does not provide much information as to the precise degree or extent of the contribution, it was not clear what greater clarity or precision the panel could have achieved.

Next, the Appellate Body addressed the complainants' distinct claims that various aspects of the panel's findings with respect to the contribution of the EU Seal Regime to its objective were unsubstantiated. The Appellate Body first assessed Canada's and Norway's contention that the EU Seal Regime fails to contribute to the objective in various respects because it leads to worse seal welfare outcomes, given: (i) that the EU Seal Regime will have the effect of replacing imports from commercial hunts with those from IC and MRM hunts; and (ii) that IC and MRM hunts lead to higher rates of inhumanely killed seals as compared to commercial hunts. In the Appellate Body's view, the record before the panel provided the panel with reasonable grounds for not concluding that IC and MRM hunts lead to poorer seal welfare outcomes than commercial hunts, or that the EU Seal Regime resulted in the replacement of seal product imports from commercial hunts with such products from IC and MRM hunts. Accordingly, the Appellate Body rejected the claims of Canada and Norway as they relate to this aspect of the panel's contribution analysis.

The Appellate Body then addressed the complainants' claims in respect of the panel's finding that the EU Seal Regime contributes to reducing EU and global demand for seal products and the incidence of inhumanely killed seals. The Appellate Body noted that the European Union had argued that the ban makes a partial contribution to addressing public concerns regarding seal welfare "by reducing global demand for seal products resulting from commercial hunts, with the consequence that less seals are killed in an inhumane way". By focusing on whether the ban reduces demand for seal products, the panel appeared to have accepted the proposition that reducing such demand would lead to fewer inhumanely killed seals. The Appellate Body did not

consider it unreasonable for the panel to have assumed that a decrease in demand, and hence a contraction of the seal product market, would have the effect of reducing the number of seals killed, and thus the number of inhumanely killed seals. With regard to the complainants' argument that seal products derived from Greenlandic hunts could fully satisfy EU demand, and that the ban could or does lead to an increase in the number of seals killed inhumanely, the Appellate Body recalled that this argument rested on a factual premise that was highly contested by the parties, was not uniformly supported by the panel record, and, in any event, the panel did not make a finding in this respect. In the light of this uncertainty, the Appellate Body rejected Canada's and Norway's claims in this regard.

The Appellate Body next turned to the remaining questions of whether the panel's finding that the EU Seal Regime led to a reduction in demand for seal products was properly substantiated. Canada and Norway contended that the evidence relied on by the panel suggesting that the market uncertainty created by the EU Seal Regime led to a decline in demand is unavailing because the prohibitive aspect of the EU Seal Regime affects the supply, not the demand, for seal products. The Appellate Body noted that the evidence cited by the panel did not refer to demand per se but rather to observations about trade impacts experienced by the EU seal product market as a whole. Such observations, in the Appellate Body's view, were descriptive of a market dynamic that necessarily reflects both supply-side and demand-side considerations. The Appellate Body therefore considered that the references to market uncertainty and decreases in trade volume and market prices were all elements of a market dynamic that is at least partly informed by demand-side considerations, and that the panel therefore had a reasonable basis to conclude that the evidence that it cited provided some support for the view that the measure reduced EU demand for seal products. In respect of the panel's conclusion that the EU Seal Regime contributes "to a certain extent, to reducing a global demand", the Appellate Body considered that the panel based its conclusions largely on its conclusions regarding the effect of the EU Seal Regime on EU demand. Although it considered that the basis for this finding was somewhat tenuous, the Appellate Body recalled the difficulties faced by the panel in conducting any sort of quantitative analysis on the basis of the panel record, which rendered the panel's analysis necessarily qualitative in nature. For these reasons, the Appellate Body rejected the claims of Canada and Norway with respect to the panel's assessment of the EU Seal Regime's impact on EU and global demand for seal products.

The Appellate Body next addressed claims by Norway alleging that the panel undervalued two additional aspects in assessing the contribution of the EU Seal Regime. First, Norway argued that the panel failed to take full account of the negative contribution made by the implicit exceptions in its contribution analysis. The Appellate Body disagreed with Norway's claim, highlighting that the panel explicitly discussed the impact of inward processing on the EU market in the context of its contribution analysis. Norway further argued that the panel wrongly concluded that indigenous communities have not been able to benefit from the IC exception, a factor that the panel considered to limit the negative impact of the exceptions. The Appellate Body considered that the panel was not, as Norway suggested, referring exclusively to the difficulties faced by Greenlandic Inuit as the basis for its statement, and it therefore rejected Norway's claim.

The Appellate Body then turned to assess Canada's and Norway's claims relating to the panel's finding that the alternative measure was not reasonably available. The Appellate Body noted that the alternative measure proposed in these disputes consisted of market access for seal products that would be conditioned on compliance with animal welfare standards, and certification and labelling requirements. Canada and Norway requested the Appellate Body to reverse the panel's finding that the proposed alternative measure is not reasonably available, arguing, principally, that the panel failed to assess the alternative measure against the actual contribution of the EU Seal Regime, but rather did so against a standard of complete fulfilment of the objective. The Appellate Body took note of the panel's explanation that it was undertaking an analytical exercise in which the contours of the animal welfare standards required as part of the alternative measure were not clearly defined. The Appellate Body further noted that, based on the differing views on what would constitute adequate welfare standards, and absent a clearly articulated standard from the complainants, the panel examined a range of hypothetical versions of the alternative measure spanning a range of different levels of stringency or leniency. In the Appellate Body's view, the fact that the panel entertained, and compared, the possibility of stringent versus lenient versions of a certification system, in order to consider how a loosely defined alternative measure might contribute to the identified objective, confirmed that the panel

was undertaking considerable efforts to understand how such variations of the alternative measure might operate.

Canada and Norway further contended that the panel erred in considering the costs and logistical demands on hunters and marketers of seal products if a strict certification scheme were to be adopted by the European Union. According to the complainants, the Appellate Body report in *Brazil – Retreaded Tyres* stands for the proposition that it is the burdens and costs imposed on the responding WTO Member, not on the industry, that are relevant for a finding on whether the alternative measure is reasonably available. The Appellate Body explained, however, that its observations in *Brazil – Retreaded Tyres* did not exclude a priori the possibility that an alternative measure may be deemed not to be reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure.

Ultimately, having reviewed the panel's reasoning and findings in respect of the alternative measure, the Appellate Body did not consider that the panel erred in concluding that the alternative measure is not reasonably available. The panel considered that even the most stringent certification system would be difficult to implement and enforce, and would lead to an increase in the number of inhumanely killed seals. The panel further considered that making the welfare standards or the certification and labelling requirements more lenient would make the alternative measure more reasonably available but would not meaningfully contribute to addressing EU public moral concerns regarding seal welfare. The Appellate Body therefore understood the panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare.

Finally, the Appellate Body considered two claims brought respectively by Canada and Norway under Article 11 of the DSU relating to the reasonable availability of the alternative measure. First, the Appellate Body responded to Canada's assertion that the panel had no basis to conclude that the alternative measure could result in an increase in the number of seals killed inhumanely. The Appellate Body considered that the panel had relied on more information than alleged by Canada. The Appellate Body noted that a panel does not fail to make an objective assessment as required under Article 11 of the DSU by failing to cite all of the arguments and evidence supporting a particular proposition, and therefore rejected Canada's claim.

Second, the Appellate Body addressed Norway's contention that the panel acted in violation of Article 11 of the DSU by ignoring two further alternative measures it had proposed during the course of the panel proceedings. The Appellate Body explained that the first alternative to which Norway referred amounted to the removal of the EU Seal Regime. The Appellate Body noted that this alternative rested on the factual premise that it had previously examined and which the panel did not find to exist, namely, that the EU Seal Regime could or does lead to worse seal welfare outcomes than those existing prior to the adoption of the measure. Norway's second alternative proposed the removal of three of the restrictive conditions of the MRM exception – that is, the not-for-profit, non-systematic, and sole purpose conditions – to be replaced by certain animal welfare, certification, and labelling requirements. The Appellate Body noted that Norway's second alternative consisted in part of a set of requirements similar to what the panel actually analysed in its Reports, and, therefore, any conclusions the panel reached regarding the likely limitations of the certification system it analysed equally applied to a version of that system that would apply only in respect of seal products from MRM hunts. In sum, the Appellate Body dismissed Norway's Article 11 claims as it considered that the additional alternatives to which Norway referred were in fact implicitly addressed by the panel.

For the above reasons, having rejected the claims on appeal by Canada and Norway as they related to Article XX(a), the Appellate Body upheld the panel's finding that the EU Seal Regime is provisionally deemed necessary within the meaning of Article XX(a) of the GATT 1994. Since it upheld the panel's finding that the EU Seal Regime is provisionally justified under Article XX(a), the Appellate Body was not called upon to address the European Union's conditional other appeal with respect to Article XX(b).

4.1.3.3 The chapeau of Article XX of the GATT 1994

While Canada and Norway agreed with the panel's ultimate conclusion that the EU Seal Regime does not meet the requirements of the chapeau, they took issue with the panel's reasoning, and in particular its reliance on findings under Article 2.1 of the TBT Agreement, in reaching this conclusion. The European Union, in turn, requested the Appellate Body to reverse the panel's conclusion under the chapeau with respect to the IC exception, to complete the analysis, and to find instead that the IC exception meets the requirements of Article XX(a), including the chapeau.

The Appellate Body began its analysis by setting out an interpretation of the chapeau of Article XX of the GATT 1994. The Appellate Body noted that the chapeau imposes additional disciplines on measures that have been found to violate an obligation under the GATT 1994, but that have also been found to be provisionally justified under one of the exceptions set forth in the subparagraphs of Article XX. The Appellate Body recalled that the function of the chapeau is to prevent the abuse or misuse of a Member's right to invoke those exceptions. The Appellate Body noted that the examination of whether a measure is applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" necessitates an assessment of whether the "conditions" prevailing in the countries between which the measure allegedly discriminates are "the same". The Appellate Body considered that, in determining which "conditions" prevailing in different countries are relevant in the context of the chapeau, the subparagraphs of Article XX, and in particular the subparagraph under which a measure has been provisionally justified, provide pertinent context. The Appellate Body recalled that the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau "should focus on the cause of the discrimination, or the rationale put forward to explain its existence". Drawing on previous jurisprudence, the Appellate Body further noted that a key factor in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.

With regard to Canada's and Norway's claims, the Appellate Body recognized that there are important parallels between the analyses under Article 2.1 of the TBT Agreement and the chapeau of Article XX. However, the Appellate Body also saw significant differences with respect to the applicable legal standard, and the function and scope of these provisions. The Appellate Body therefore found that the panel erred in applying the same legal test under the chapeau of Article XX of the GATT 1994 as it applied under Article 2.1 of the TBT Agreement, instead of conducting an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau. The Appellate Body therefore reversed the panel's findings under the chapeau of Article XX, and consequently found that it did not need to address the participants' appeals as far as they related to those findings.

The Appellate Body then went on to complete the analysis on the basis of factual findings by the panel and uncontested facts on the panel record. The Appellate Body recalled that the circumstances that bring about the discrimination within the meaning of the chapeau may include, but are not limited to, the circumstances that led to the finding of a violation of a substantive provision of the GATT 1994. The Appellate Body stated that it would therefore examine whether the different regulatory treatment that the EU Seal Regime accords to seal products derived from IC hunts as compared to "commercial" hunts constitutes "arbitrary or unjustifiable discrimination", as well as whether the measure has any discriminatory effects on different indigenous communities that would amount to arbitrary or unjustifiable discrimination.

Turning to the question of whether the "conditions" prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, are relevantly different, the Appellate Body considered that the European Union had not shown this to be the case. In particular, the Appellate Body noted that the European Union did not appear to contest that "the same animal welfare conditions prevail in all countries where seals are hunted". The Appellate Body also did not understand the European Union to have argued that the differences in the identity of the hunter or in the purpose of seal hunts that the panel found to exist between "commercial" and IC hunts would render the conditions in Canada and Norway, on the one hand, and Greenland, on the other hand, relevantly different. The Appellate Body therefore proceeded on the basis that the conditions prevailing in these countries are "the same" for the purposes of the chapeau.

The Appellate Body next turned to Canada's and Norway's claim that the EU Seal Regime results in arbitrary or unjustifiable discrimination because it discriminates on a basis that does not have a "rational relationship" with the objective of the measure or goes against that objective. The Appellate Body recalled that the objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, and that in pursuit of this objective, the EU Seal Regime bans the importation and placing on the market of seal products derived from "commercial" hunts, while it allows the importation of seal products derived from IC hunts that satisfy certain criteria relating to the identity of the hunter, the purpose of the hunt, and the use of by-products from the hunt. The Appellate Body noted the European Union's explanation that it exempts seal products derived from hunts conducted by Inuit and other indigenous peoples from the ban on the importation and placing on the market of seal products in order to mitigate the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals. Yet, the Appellate Body considered that the European Union had failed to demonstrate how the discrimination resulting from the EU Seal Regime can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. In this connection, the Appellate Body noted that the European Union had not established why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union could not do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that IC hunts can cause the very pain and suffering for seals that the EU public is concerned about.

The Appellate Body noted that, while the relationship of the discrimination to the objective of a measure is one of the most important factors, it is not the sole factor that is relevant to the assessment of arbitrary or unjustifiable discrimination, and there could be additional factors that may also be relevant to that overall assessment. The Appellate Body therefore proceeded to examine whether the specific criteria of the IC exception are designed and applied in a manner that would constitute arbitrary or unjustifiable discrimination.

The Appellate Body identified ambiguities with respect to two of these criteria, namely, the requirements that the seal products are derived from "seal hunts which contribute to the subsistence of the community" ("subsistence") and from "seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions" ("partial use"). With respect to the "subsistence" criterion, the Appellate Body recalled the panel's finding that the subsistence purpose of IC hunts encompasses a commercial component "to the extent that Inuit or indigenous communities also exchange some by-products of the hunted seals for economic gain." With respect to the "partial use" criterion, the Appellate Body considered that the ambiguity in the notion of "partial use" arises when it is applied on an aggregate basis together with the ambiguity arising from the subsistence criterion. The Appellate Body was concerned that, where conformity with the "partial use" criterion is not assessed with respect to individual seals but rather with respect to individual hunters over an extended period of time (e.g. through licensing conditions), or with respect to all hunters active in a particular area or even all members of an Inuit community, a proportion of seal products that, when considered individually, might not conform to the "partial use" criterion (either because the hunter has commercialized the entire seal or because the non-commercialized parts of the seal have been disposed of rather than used) could potentially qualify for the IC exception. Given the ambiguities that could arise with respect to at least these two elements of the IC exception requirements, the Appellate Body considered that the "recognized bodies" applying these requirements appeared to enjoy broad discretion, which could allow for instances of abuse of the IC exception, even where the recognized body was acting in good faith. The Appellate Body was concerned that, depending on how strictly the IC requirements are applied, seal products derived from what should in fact be properly characterized as "commercial" hunts could thus enter the EU market under the IC exception in some instances. For the Appellate Body, the European Union had not sufficiently explained how such instances could be prevented in the application of the IC exception. The Appellate Body noted that differently from the other exceptions under the EU Seal Regime, the IC exception did not contain any anti-circumvention clause which would allow the denial of entry of seal products that, while formally compliant with the exception appear to be outside the scope of the exception.

Finally, the Appellate Body turned to the question of whether the manner in which the IC exception affects Inuit communities in different countries amounts to "arbitrary or unjustifiable discrimination". The Appellate Body considered that, to the extent that the IC exception is

designed or applied so as to be *de facto* only available to Greenland, the EU Seal Regime would treat seal products derived from IC hunts in Greenland and Canada differently and, in this respect, result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail. While it was undisputed that the Inuit in Greenland are currently the only beneficiaries of the IC exception, the European Union contested that this outcome can be attributed to the EU Seal Regime, which would imply that there is no "genuine relationship" between the current *de facto* exclusivity of the IC exception and the design and application of the exception, such that this outcome would not be "attributable" to the EU Seal Regime.

The Appellate Body noted that the panel did not point to any aspect of the IC exception itself that prevents indigenous communities in Canada from taking advantage of it, and that the panel also did not explain how it accounted for the failure of the Canadian authorities to apply for recognized body status in reaching its conclusion. The Appellate Body further noted that, according to Canada's own explanation, the reason why Inuit communities in Canada did not have an incentive to take advantage of the IC exception was related to the incidental effects of the ban on seal products derived from *commercial* hunts, rather than any aspect of the "text" of the measure, as the panel was suggesting.

The Appellate Body was, however, not persuaded that the European Union had made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. The Appellate Body observed, for example, that the Danish customs authorities processed imports based on certificates by the Greenlandic authorities prior to a Greenlandic entity obtaining recognized body status within the meaning of the Implementing Regulation. The Appellate Body acknowledged the European Union's argument that it "engaged in 'multiple efforts' to assist the Inuit in Canada to benefit from the IC exception", but also noted the European Union's recognition that "the relevant Canadian Inuit authorities wrongly interpret the EU Seal Regime as requiring the Inuit communities to process their own sealskin products to fall under the IC exception". The Appellate Body also observed that the European Union did not appear to have pursued cooperative arrangements to facilitate the access of Canadian Inuit to the IC exception. The Appellate Body recalled, in this regard, that a measure may result in arbitrary or unjustifiable discrimination "when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries", adding that setting up a "recognized body" that fulfils all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.

In sum, the Appellate Body identified several features of the EU Seal Regime that indicated that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception. First, the Appellate Body found that the European Union had not shown that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, the Appellate Body found considerable ambiguity in the "subsistence" and "partial use" criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, the Appellate Body considered that seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception.

For these reasons, the Appellate Body found that the European Union had not demonstrated that the EU Seal Regime, in particular with respect to the IC exception, is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994. Thus, the Appellate Body found that the European Union had not justified the EU Seal Regime under Article XX.

4.2 Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R

This dispute concerned China's challenge to measures taken by the United States regarding the application of countervailing duties to imports from non-market economy (NME) countries, and the United States' failure to investigate and avoid double remedies[30] in certain countervailing and anti-dumping duty investigations. On 13 March 2012, the US Congress enacted Public Law (PL) 112-99, which in Section 1 adds a new paragraph (f) to Section 701 of the United States Tariff Act of 1930, expressly providing for the application of countervailing duties to NME countries. Section 1 of PL 112-99 further specifies that it applies to all countervailing duty proceedings initiated by the United States authorities on or after 20 November 2006, as well as to all pending court proceedings relating to such countervailing duty proceedings.

Before the panel, China claimed that: (i) Section 1 of PL 112-99, and the new Section 701(f) of the US Tariff Act it establishes, are inconsistent with Articles X:1, X:2, and X:3(b) of the GATT 1994; and (ii) the United States acted inconsistently with Articles 10, 19, and 32 of the SCM Agreement by failing to investigate and avoid double remedies in certain investigations and reviews initiated between 20 November 2006 and 13 March 2012.

The panel found that Section 1 of PL 112-99 was not inconsistent with Article X:1, X:2, or X:3(b) of the GATT 1994. The panel also found that, in 25 of the 26 sets of proceedings included in China's claim, the United States acted inconsistently with Article 19.3, and Articles 10 and 32.1 of the SCM Agreement because it imposed concurrently anti-dumping and countervailing duties on the same products, without investigating whether double remedies arose in each case.

On appeal, China claimed that the panel erred in its interpretation and application of Article X:2 of the GATT 1994, insofar as the panel found that PL 112-99 is consistent with Article X:2 because it does not effect an "advance in a rate of duty or other charge on imports under an established and uniform practice" or impose "a new or more burdensome requirement, restriction or prohibition on imports" within the meaning of that provision. China also claimed that the panel applied an incorrect standard of review and failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, in making factual findings with respect to the rates, requirements, or restrictions applicable under US municipal law prior to the enforcement or enactment of Section 1 of PL 112-99. In its other appeal, the United States challenged the panel's findings that China's claims under Articles 10, 19.3, and 32.1 of the SCM Agreement were within the panel's terms of reference. The panel's findings under the SCM Agreement were not challenged on appeal.

4.2.1 Article 6.2 of the DSU

In its other appeal, the United States challenged the panel's finding in its Preliminary Ruling of 7 May 2013 that the claims listed in Part D of China's panel request were identified consistently with Article 6.2 of the DSU. First, the United States argued that the panel imposed a new and incorrect legal standard when the panel determined whether China's panel request permitted "sufficiently clear inferences as to the WTO obligations at issue in its Part D". Second, the United States contended that the panel failed to examine China's panel request on its face when the panel treated the findings in *US – Anti-Dumping and Countervailing Duties (China)* (DS379), as referenced in footnote 6 of the panel request, as an integral part thereof. Third, the United States pointed out that the panel's finding that China's panel request was limited to Article 19.3 of the SCM Agreement contradicted China's own indication of its intent to bring claims under Article 19 as an "integrated whole". Finally, the United States maintained that the panel sought to "cure" China's panel request by allowing China, by its letter dated 25 March 2013, to limit its claims under Part D of its panel request to Articles 10, 19, and 32 of the SCM Agreement, despite having earlier identified several other general claims under that Agreement, the Anti-Dumping Agreement and the GATT 1994.

[30] The term "double remedies" refers to the imposition of anti-dumping and a countervailing duties on the same product, as well as to "double counting", i.e. circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported product results, at least to some extent, in the offsetting of the same subsidization twice.

The Appellate Body examined the text and narrative of China's panel request, which made a general reference to Articles 10, 19, and 32 of the SCM Agreement without specifying the particular paragraphs on which its claims were based. The Appellate Body observed that both Articles 10 and 32 are consequential claims, in that a violation of these provisions depends on whether there is a finding of violation of Article 19. While Article 10 contains only one paragraph, Article 32.1 appears to be the only paragraph in Article 32 that imposes an obligation on the imposition of countervailing duties.

As for Article 19 of the SCM Agreement, the Appellate Body found that neither Article 19.1 nor Article 19.2 was relevant to China's complaint. Article 19.1 establishes when a countervailing duty may be imposed, and Article 19.2 grants Members the discretion for such imposition. The Appellate Body noted that this dispute concerned investigations and reviews already initiated and countervailing duties already imposed. With respect to Articles 19.3 and 19.4, the Appellate Body agreed with the panel that Articles 19.3 and 19.4 are "the potentially relevant obligations", as they impose substantive obligations on the permissible amounts of countervailing duties. Since both Article 19.3 and Article 19.4 address the quantitative limits on the imposition of countervailing duties, they are "closely related" articles that share an "interlinked nature". However, the Appellate Body underscored that Article 19.3 pertains to the amount of the duty to be levied ("in the appropriate amounts"), as well as to the manner in which it is imposed ("on a non-discriminatory basis"), and Article 19.4 limits the maximum amount of the countervailing duty. Thus, the fact that these obligations under Articles 19.3 and 19.4 may be interlinked does not necessarily, in itself, provide a summary of the legal basis of the complaint sufficient to present the problem clearly.

The Appellate Body then turned to the narrative of the panel request, and noted that its explicit reference to "double remedies" is supplemented by an elaboration of what this concept means in the context of the present dispute, i.e. "the double remedies that are likely to result when the USDOC [United States Department of Commerce] applies countervailing duties in conjunction with anti-dumping duties determined in accordance with the US non-market economy methodology" in respect of the investigations or reviews initiated between 20 November 2006 and 13 March 2012. According to the Appellate Body, the panel request narrative sufficiently explained that, in these investigations and reviews, the US authorities failed to investigate and avoid double remedies that may have resulted therefrom, thus amounting to an alleged violation of Article 19 of the SCM Agreement. The Appellate Body found that the word "double" gives an indication that the problem with "double remedies" is that they result in the levying of countervailing duties exceeding the "appropriate amounts in each case" in the sense of Article 19.3 of the SCM Agreement. Therefore, the Appellate Body held that the narrative's reference to "double remedies" assisted in presenting the problem clearly by providing a connection between the measure at issue (the failure of the US authorities to investigate and avoid double remedies) and the legal claims (Articles 10, 19, and 32 of the SCM Agreement). In this way, the term "double remedies" "plainly connects" and assists in clarifying how the measure at issue is inconsistent with the relevant legal provision in Article 19, i.e. Article 19.3.

The Appellate Body emphasized that, ideally, the panel request in this dispute would have referred not only to the specific measure at issue (the failure of the US authorities to investigate and avoid double remedies), but also to the specific provision concerned, namely, Article 19.3 of the SCM Agreement. However, the Appellate Body clarified that simply specifying Article 19.3, or adopting its exact language, without referring to "double remedies", would not necessarily have presented the problem more clearly. The Appellate Body noted that the obligations under Article 19.3 to impose countervailing duties "in the appropriate amounts" and "on a non-discriminatory basis" are broader in scope than the specific concept of "double remedies". When a Member imposes concurring countervailing and anti-dumping duties on the same imports, strictly speaking, the amount of countervailing duty may still be levied "in the appropriate amounts" or not in excess of the amount of the subsidy found to exist. Neither does the concurrent imposition necessarily mean that the anti-dumping duty exceeds the margin of dumping found to exist. The problem arises when, as a result of the parallel imposition of countervailing and anti-dumping duties, the same subsidization is offset twice in calculating the amount of subsidy and the dumping margin. Under these circumstances, countervailing duties may not be levied "in the appropriate amounts in each case", contrary to Article 19.3.

Further, the Appellate Body agreed with the panel that using "sufficiently clear inferences" is merely a way of explaining how "the WTO obligations at issue in a panel request, while not

explicitly identified by paragraph number, are nonetheless identifiable from the panel request considered as a whole." Inferential reasoning may be inevitable in ascertaining compliance with Article 6.2, as in situations where a panel request makes a general reference to a set of measures or WTO provisions containing multiple obligations, and the specific measure and/or legal claim must be discerned from the panel request as a whole, including its narrative and any annexes.

Turning to the panel's reliance on footnote 6 of the panel request, the Appellate Body emphasized that footnotes are part of the text of a panel request, and may be relevant to the identification of the measure at issue or to the presentation of the legal basis of the complaint. In this dispute, however, the Appellate Body disagreed with the manner in which the panel interpreted footnote 6 as excluding China's claim under Article 19.4. The Appellate Body explained that footnote 6 refers to Appendices A and B to the panel request, which list the parallel countervailing duty and anti-dumping investigations and reviews initiated between 20 November 2006 and 13 March 2012. Footnote 6 also states that China excluded from this list of investigations and reviews those that resulted in a negative injury determination, and those that were already the subject of the dispute in *US – Anti-Dumping and Countervailing Duties (China)* (DS379). According to the Appellate Body, references to these Appendices and to DS379 merely indicate which investigations and reviews were the subject of, and which were excluded from, Part D of China's panel request. Nevertheless, the Appellate Body noted that the panel's exclusion of Article 19.4 from its terms of reference was not challenged on appeal.

Finally, the Appellate Body did not agree with the United States that China's abandonment of its claims under Part C, as well as some of its claims under Part D, of the panel request "cured" its alleged inconsistency with Article 6.2 of the DSU. The Appellate Body stated that even assuming that the initial listing of the abandoned claims in China's panel request failed to fulfil the requirements of Article 6.2 of the DSU, this did not affect the analysis of whether the remaining claims under Articles 10, 19, and 32 of the SCM Agreement were identified with sufficient clarity, which must be addressed in its own right. The Appellate Body also did not agree that the mere fact that the United States had to prepare for claims that were later on dropped could be considered as affecting its due process rights in respect of the remaining claims.

Based on the analysis of the panel request as a whole, the Appellate Body considered that China's panel request, given its references to Articles 10, 19, and 32 of the SCM Agreement, and coupled with the identification of the specific measure at issue and a reference to and explanation of "double remedies", provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Therefore, the Appellate Body upheld the panel's finding that the claims under Articles 10, 19.3, and 32.1 of the SCM Agreement were within its terms of reference, and found that China's panel request was not inconsistent with Article 6.2 of the DSU.

4.2.2 Article X:2 of the GATT 1994

Article X:2 of the GATT 1994 stipulates that no measure of general application that (i) increases a rate of duty or (ii) imposes a new or more burdensome requirement shall be enforced before such measure has been officially published.[31] Whether the measure at issue increases the duty or imposes a new or more burdensome requirement within the meaning of Article X:2 requires a comparison between the new measure of general application in municipal law and the prior published measure that it replaced or modified. Thus Article X:2 requires the identification of a "baseline" of comparison in municipal law applicable prior to the new measure, which was the focus of China's appeal.

On appeal, China challenged the panel's interpretation of Article X:2 of the GATT 1994 in respect of the baseline of comparison to determine whether a measure effects an advance in a rate of duty or imposes a new or more burdensome requirement. China also challenged the panel's application of its interpretation of Article X:2 to the measure at issue, Section 1 of PL 112-99. In particular, China challenged the panel's findings that "China ha[d] not established that Section 1 is a provision 'effecting an advance in a rate of duty or other charge on imports under an established

[31] The Panel concluded that Article X:2 prohibits an administrative agency or court not only from enforcing a measure prior to its official publication, but also from enforcing or applying such measure in respect of *events or circumstances that occurred before it has been officially published*. This finding was not appealed.

and uniform practice'" and that "China ha[d] not established that Section 1 is a provision 'imposing a new or more burdensome requirement, restriction or prohibition on imports'".

The Appellate Body reversed the panel's interpretation in respect of the relevant baseline of comparison under Article X:2 of the GATT 1994 to determine whether a measure effects an advance in a rate of duty or imposes a new or more burdensome requirement.

First, the Appellate Body considered that the panel erred in finding that the phrase "under an established and uniform practice" "serves to define the relevant prior rate … to establish whether or not an advance in a rate [of duty] has been effected", and that the relevant comparison contemplated by Article X:2 of the GATT 1994 is "between the new rate effected by the measure at issue and the rate that was previously applicable under an established and uniform practice". The Appellate Body noted that, within the context of Article X:2, the preposition "under" may be interpreted as introducing the manner in which the measure of general application should advance the rate of duty or other charge. Definitions of the preposition "under", as "in the form of" and "in the guise of", suggest that the phrase "under an established and uniform practice" refers to certain characteristics of the application of the measure, and not to the baseline of comparison. Relying on Article 33 of the Vienna Convention, the Appellate Body further considered that the definition of the preposition "under" as "in the form of" and "in the guise of" was reconcilable with the French and Spanish versions of the provisions which read "*en vertu de*" and "*en virtud del*". The context found in Article X:1 of the GATT 1994, which requires that measures be published promptly, further supports the view that the identification of the baseline of comparison under Article X:2 should start with the measure that Article X:1 requires to be published promptly. The Appellate Body concluded that the ordinary meaning of the phrase "under an established and uniform practice", its position in Article X:2, its relevant context, and the function that Article X:2 performs relating to transparency and due process, suggest that this phrase refers to the measure of general application, rather than serving as the baseline of comparison.

Second, the Appellate Body considered that the panel committed an error in finding that, in order to determine whether a measure of general application imposes a new or more burdensome requirement or restriction, a comparison should be made with a requirement or restriction that results from an *interpretation* of a measure adopted and publicly communicated *by an administering agency*. The Appellate Body considered that a textual and contextual analysis of Article X:2 of the GATT 1994 does not suggest that the baseline of comparison for the second type of measure in this provision, i.e. a measure "imposing a new or more burdensome requirement, restriction or prohibition", should be the uniform or established practice of the administering agency. Unlike in the case of measures "effecting an advance in a rate of duty or other charge on imports", the reference to "a uniform and established practice" is of no assistance because this phrase precedes the reference to measures "imposing a new or more burdensome requirement, restriction or prohibition on imports", and thus it has no connection to it. Moreover, the Appellate Body remarked that, like for measures "effecting an advance in a rate of duty or other charge on imports", the context of Article X:1 of the GATT 1994 suggests that the starting point of the analysis of municipal law should, normally, be the published measure of general application, rather than an administrative practice.

Having disagreed with the panel's interpretation of Article X:2 of the GATT 1994 as requiring a comparison with the practice of the administrative agency, the Appellate Body found that, to determine whether a measure of general application increases a rate of duty or imposes a new or more burdensome requirement, the comparison should be conducted with the *prior published measure of general application*. In this regard, the Appellate Body clarified that Article X:2 requires panels and the Appellate Body to ascertain the meaning of municipal law. The Appellate Body recalled its ruling in *US – Carbon Steel* that, in ascertaining the meaning of municipal law, a panel should undertake a holistic assessment and consider the text of the law on its face and, when this is not clear, it could rely on other legal instruments such as evidence of the consistent application of such law, the pronouncements of domestic courts on the meaning of such law, the opinions of legal experts and the writings of recognized scholars. The Appellate Body also clarified that an examination of whether these elements are legal characterizations depends on the circumstances of each case. Although factual aspects may be involved in the individuation of the text[32],

[32] For example, whether the text is official in more than one language, its date of enactment, publication and enforcement, the issuing authority, etc.

an assessment of the meaning of a legal text for determining whether it complies with the covered agreements is a legal characterization. Similarly, whether or when a domestic court ruling has been rendered, or what a writing by a recognized scholar contains, may involve factual aspects. However, the examination of legal interpretations given by domestic courts or administering agencies as to the meaning of municipal law with respect to the challenged measure may be a legal characterization. These assessments are subject to the circumstances of each case, including the national legal system in which the municipal law operates.

In the present case, the Appellate Body considered that the panel erred in identifying the USDOC's practice of applying countervailing duties to imports from China as an NME country between 2006 and 2012 as the relevant baseline of comparison to determine whether Section 1 increased the rate of duty or imposed a new or more burdensome requirement. Instead of proceeding from the agency practice and then addressing the issue of whether that practice was lawful or not, the panel should have focused on ascertaining the meaning of the prior published measure of general application, that is, Section 701(a) of the US Tariff Act, in order to determine whether Section 1 (through the new Section 701(f) of the US Tariff Act) increased duties or imposed new or more burdensome requirements as compared to Section 701(a). In ascertaining the meaning of Section 701(a), the panel should have taken into account all other relevant elements besides its text, including the practice of the USDOC, as well as the relevant judicial decisions on the meaning of Section 701(a), in order to determine the meaning of the US countervailing duty law applicable to NME countries prior to Section 1 of PL 112-99.

The Appellate Body thus reversed the panel's interpretation and application of Article X:2 of the GATT 1994 to the measure at issue as well as the panel's final conclusion under Article X:2. The Appellate Body also declared moot and of no legal effect the panel's findings that: (i) the USDOC's practice of applying countervailing duties to China as an NME country between 2006 and 2012 was "presumptively lawful" under US law, as the USDOC's interpretation of US countervailing duty law governs in the absence of a binding judicial determination indicating otherwise; and (ii) it was potentially relevant to address the issue of whether the USDOC's practice prior to enactment of Section 1 of PL 112 99 was lawful under US law, for purposes of an analysis under Article X:2. The Appellate Body considered that an unlawful practice by an administering agency, which may be overturned by a domestic court decision, could not create expectation among traders over and above the published measure of general application with which it failed to comply.

4.2.3 Article 11 of the DSU

China argued that the panel failed to conduct an objective assessment of the matter as required by Article 11 of the DSU in concluding, in paragraphs 7.158-7.186 of the panel report, that the USDOC's practice should be regarded as "presumptively lawful" and, thus, requested the Appellate Body to reverse these findings.

The Appellate Body understood China's claims under Article 11 as being linked to the panel's approach in the *application* of Article X:2 of the GATT 1994 to the measure at issue. As the Appellate Body had reversed the panel's findings regarding its interpretation and application of Article X:2, and had declared moot and of no legal effect the panel's findings regarding the lawfulness of the USDOC's practice in the context of the analysis under Article X:2, it did not consider it necessary to examine further China's claims under Article 11 of the DSU.

4.2.4 Completion of the analysis

Having found that the panel erred in its interpretation and application of Article X:2 of the GATT 1994, the Appellate Body turned to consider whether it was in a position to complete the analysis and to determine whether Section 1 of PL 112-99 effects "an advance in a rate of duty or other charge on imports" or imposes "a new or more burdensome requirement [or] restriction" within the meaning of Article X:2, as requested by China.

At the outset of its analysis, the Appellate Body recalled that, in order to make such a determination, it is necessary to conduct a comparison with the prior published measure of general application that the new measure replaces or modifies. In order to establish the relevant baseline of comparison, it is necessary to ascertain the meaning of the relevant municipal law.

Accordingly, the Appellate Body examined the elements mentioned in *US – Carbon Steel* as relevant in this dispute in order to conduct the comparison required by Article X:2 between the measure at issue (i.e. Section 1 of PL 112-99) and the US countervailing duty law applicable prior to Section 1. The Appellate Body noted that its examination of these elements was a legal characterization issue, as it sought to ascertain the meaning of municipal law for purposes determining whether Section 1 of PL 112-99 is consistent with Article X:2 of GATT 1994. However, to the extent that this analysis involved examining factual elements, the Appellate Body was mindful that it would need to rely on findings by the panel or undisputed facts on the panel record in doing so.

The Appellate Body noted that the published measure of general application prior to Section 1 of PL 112-99 was Section 701(a) of the US Tariff Act. The Appellate Body highlighted that its examination would seek to determine whether the US countervailing duty law was *changed* by Section 1, as argued by China, and thereby effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement within the meaning of Article X:2. The United States in turn contended that Section 1 merely clarified or confirmed what was already required under prior municipal law.

The Appellate Body divided its analysis in several parts. First, it examined the text of the measure at issue, Section 1 of PL 112 99, as compared to the text of Section 701(a) of the US Tariff Act. Next, it assessed other elements of US countervailing duty law that are relevant to the present case, including judicial decisions by US courts and the practice of the USDOC. Based on a holistic examination, the Appellate Body assessed whether it could reach a conclusion on whether Section 1 effected an advance in a rate of duty or imposed a new or more burdensome requirement or restriction within the meaning of Article X:2 of the GATT 1994, as compared to the US countervailing duty law applicable prior to Section 1.

After examining the text of both Section 1 of PL 112 99 and Section 701(a) of the US Tariff Act, the Appellate Body concluded that the question of whether Section 1 created the USDOC's authority to apply countervailing duties to NME countries could *not* be answered by merely examining the text of relevant US laws alone. Although the title and some aspects of the text of Section 1 suggest that US countervailing duty law did *not* previously apply to imports from NME countries, the text and scope of Section 701(a) does not explicitly exclude NME countries from the scope of application of US countervailing duty law. Rather, Section 701(a) applies to imports from *any* "country" where the USDOC determines the existence of a countervailable subsidy. Consequently, the Appellate Body considered that further examination of other elements related to the application of US countervailing duty law beyond the text of Section 1 and the text of Section 701(a) was required.

The Appellate Body turned next to examine a number of other elements of municipal law including relevant court rulings and administrative practice, beginning with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) issued in 1986 in *Georgetown Steel*. The Appellate Body recalled the panel's finding that, in that ruling, "the CAFC upheld USDOC's decision not to apply CVD measures to NME countries". Although both participants accepted that the CAFC's decision in *Georgetown Steel* was final, the Appellate Body noted that they held divergent views as to the meaning of that decision. On the one hand, China argued that the CAFC's decision supports the view that the countervailing duty law was not applicable to imports from NME countries prior to Section 1, and that Section 1 should be read as having *changed* that legal scenario. On the other hand, the United States argued that the CAFC's decision suggest that the US countervailing duty law was already applicable to imports from NME countries if it was possible to identify a countervailable subsidy, and that Section 1 should be read as only having *clarified* what previously applicable US countervailing duty law already required. The Appellate Body noted that the panel did not make any findings addressing these divergent readings, and stated that the panel should have further analysed the scope and meaning of the holding of that CAFC decision. The Appellate Body considered that it was not in a position on appeal to draw conclusive guidance from the *Georgetown Steel* decision for the purposes of determining whether Section 1 *changed* or *clarified* the pre-existing countervailing duty law applicable to NME countries.

Next, the Appellate Body examined the practice of the USDOC to ascertain whether or not US countervailing duty law applicable prior to Section 1 provided authority to the USDOC to

impose countervailing duties on imports from NME countries and required such imposition whenever a countervailable subsidy could be identified.

The Appellate Body examined three elements reflecting the USDOC's practice prior to 2006. First, the Appellate Body examined the 1984 USDOC's countervailing duty determinations with respect to carbon steel wire rod from Poland and Czechoslovakia, but concluded that these negative countervailing duty determinations are not clear regarding the applicability of the US countervailing duty law to imports from NME countries. Next, the Appellate Body examined the 1998 countervailing duty regulations published by the USDOC. The participants disagreed on the meaning of the following statement by the USDOC found in the regulations: "it is important to note here our practice of not applying the CVD law to [NMEs]. The CAFC upheld this practice in *Georgetown Steel Corp. v. United States*". The Appellate Body noted that the reference to the *Georgetown Steel* holding was ultimately not of assistance in ascertaining the USDOC's statutory mandate, because, as noted above, the ruling in *Georgetown Steel* itself is amenable to different readings. Third, the Appellate Body assessed the 2002 USDOC determination in *Sulfanilic Acid from Hungary*. The Appellate Body indicated that the USDOC's determination in *Sulfanilic Acid* can be read to suggest that the countervailing duty law was not applicable to imports from NME countries. However, the Appellate Body also acknowledged the United States' argument that this determination stands for the proposition that the USDOC could not identify a subsidy because Hungary was an NME country at the time of the investigation. Due to the lack of analysis by the panel and undisputed facts on record, several aspects of the pre-2006 practice of the USDOC remained unclear, even following the Appellate Body's own analysis of that practice.

The Appellate Body then turned to examining the post-2006 practice of the USDOC. While it was clear that the USDOC's practice in applying US countervailing duty law changed in 2006, the Appellate Body considered that the USDOC's practice over the years did not ultimately permit it to ascertain whether or not the US countervailing duty law precluded or required the application of countervailing duties to imports from NME countries prior to Section 1.

Next, the Appellate Body turned to examine a series of pronouncements of US courts regarding the application of countervailing duties to imports from China after 2006.

With respect to the decision in *GPX V* rendered by the CAFC in 2011, the Appellate Body observed that the panel's analysis with respect to the *content* of the *GPX V* decision was limited, as it did not address in detail the reasoning of the CAFC in reaching its main conclusion. The Appellate Body observed that, while the participants agree on the non-finality of this decision, they disagree on the relevance of the CAFC's conclusions in *GPX V* as to the meaning of Section 701(a). Given its non-final status and the lack of findings by the panel on whether a US court could rely on the *GPX V* decision to establish what the US countervailing duty law was prior to Section 1, the Appellate Body consider that this decision was of limited import to determine whether Section 1 changed or clarified US countervailing duty law in respect of imports from NME countries.

The Appellate Body then examined the CAFC's decision in *GPX VI*. After remarking the limited nature of the panel's findings regarding this decision, and then conducting its own analysis, the Appellate Body considered that the *GPX VI* decision was of limited import for determining the state of the US countervailing duty law prior to the enactment of Section 1, because the main feature of the holding in *GPX VI* related to Section 2 of PL 112-99.

In sum, the Appellate Body's examination of the relevant elements of US countervailing duty law revealed that the text of the relevant legal instruments, the USDOC's practice and its consistency in interpreting and applying US countervailing duty law with respect to imports from NME countries, the relevant judicial pronouncements of US courts, and the opinions of legal experts presented by the participants are amenable to different readings. The Appellate Body emphasized that its task had been made difficult because the panel, as a consequence of its erroneous interpretation of the relevant baseline of comparison under Article X:2 of the GATT 1994, and its consequential focus on the USDOC's practice after 2006, did not adequately examine all relevant elements of US countervailing duty law that would have been required to arrive at a conclusion on the basis of the correct interpretation of Article X:2. For these reasons, the Appellate Body was unable to complete the analysis.

4.3 Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R; WT/DS432/AB/R; and WT/DS433/AB/R

These disputes concerned challenges brought by the United States (DS431), the European Union (DS432), and Japan (DS433) (the complainants) against China's use of export duties and export quotas (the measures at issue) on various forms of rare earths, tungsten, and molybdenum. The complainants also challenged aspects of China's administration and allocation of its export quotas for rare earths and molybdenum.

Before the panel, the complainants alleged that: (i) in respect of export duties, the measures reflected in several instruments implemented by China are inconsistent with its obligations under Paragraph 11.3 of Part I of China's Accession Protocol; (ii) in respect of export quotas, the measures reflected in various instruments implemented by China are inconsistent with Article XI:1 of the GATT 1994 and Paragraph 1.2 of Part I of China's Accession Protocol which incorporates 162 and 165 of China's Accession Working Party Report; and (iii) in respect of export quota administration and allocation, the measures reflected in several instruments are inconsistent with Paragraphs 1.2 and 5.1 of Part I of China's Accession Protocol. For its part, China argued that: (i) the general exceptions of Article XX of the GATT 1994 are available to China to defend a potential violation of Paragraph 11.3 of China's Accession Protocol; (ii) the export duties on rare earths, tungsten, and molybdenum are justified under Article XX(b) of the GATT 1994; (iii) the 2012 export quotas on rare earths, tungsten, and molybdenum are justified under Article XX(g) of the GATT 1994; and (iv) the trading rights commitments in Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Accession Working Party Report do not prevent the use of prior export performance and minimum registered capital requirements as criteria to administer the rare earths and molybdenum export quotas.

The panel found that, with respect to export duties: (i) the export duties applied by China are inconsistent with Paragraph 11.3 of China's Accession Protocol; and (ii) China may not seek to justify the export duties at issue pursuant to Article XX(b) of the GATT 1994, and even assuming *arguendo* that China could seek such justification, China has not demonstrated that the export duties at issue are justified under Article XX(b) or applied in a manner that satisfies the chapeau of Article XX. The panel also found that, with respect to export quotas: (i) the export quotas applied by China are inconsistent with Article XI:1 of the GATT 1994, and Paragraphs 162 and 165 of China's Accession Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2 of that Protocol; and (ii) China has not demonstrated that the export quotas at issue are justified pursuant to Article XX(g) of the GATT 1994, or that the measures at issue are applied in a manner that satisfies the chapeau of Article XX. In addition, with respect to export quota administration and allocation, the panel found that: (i) the restrictions on trading rights of enterprises applied by China are inconsistent with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report, and Paragraph 5.1 of China's Accession Protocol; (ii) China is entitled to seek to justify the restrictions on the trading rights of enterprises at issue pursuant to Article XX(g) of the GATT 1994; and (iii) China has failed to make a *prima facie* case that the violations of its trading rights commitments are justified pursuant to Article XX(g). Moreover, with respect to DS432, the panel found that the European Union had not established that the prior export performance criterion in the 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota is inconsistent with the commitment in Paragraph 84(b) of China's Accession Working Party Report.

On appeal, in DS431 the United States challenged as inconsistent with Articles 11 and 12.4 of the DSU the panel's rejection of 10 exhibits. The United States indicated, however, that the Appellate Body would need not reach the issues raised in its appeal in either of two scenarios: (i) if China were not to appeal the panel report; or (ii) if the Appellate Body were not to modify or reverse the legal findings or conclusions of the panel pursuant to an appeal by China.

For its part, China challenged in DS432 and DS433, and as other appellant in DS431: (i) the panel's conclusion that the legal effect of the second sentence of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that the individual provisions of the Protocol are also integral parts of the Multilateral Trade Agreements annexed to the Marrakesh Agreement; and (ii) the panel's finding that China's export quotas for rare earths and tungsten send "perverse signals" to the domestic users and, consequently, do not relate to

conservation in the sense of Article XX(g) of the GATT 1994.China further alleged that the panel had committed a number of errors under Article 11 of the DSU.

4.3.1 Availability of Article XX of the GATT 1994 – Systemic relationship between China's Accession Protocol and the Marrakesh Agreement together with its Annexes

In the prior disputes in *China – Raw Materials*, the Appellate Body found that Article XX of the GATT 1994 is not available to justify a breach of China's export duty obligations under Paragraph 11.3 of its Accession Protocol. In its appeal in *China – Rare Earths*, China did not ask the Appellate Body to reconsider its decision in *China – Raw Materials*. According to China, its appeal was intended to obtain clarification of the systemic relationship between specific provisions in China's Accession Protocol and other WTO agreements, and of the rights of WTO Members to protect and conserve their exhaustible natural resources.

China appealed the panel's "erroneous assessment of the systemic relationship" between, on the one hand, specific provisions in China's Accession Protocol, and, on the other hand, the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. China contended that the panel erred in its interpretation of Article XII:1 of the Marrakesh Agreement[33] and Paragraph 1.2, second sentence, of China's Accession Protocol in finding that the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement. China claimed that the panel should have conducted a "holistic" interpretation of Article XII:1 of the Marrakesh Agreement and the second sentence of Paragraph 1.2 of China's Accession Protocol, which would have led it to the conclusion that each provision of China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which the provision "intrinsically relates".

Before addressing the substance of China's appeal, the Appellate Body observed that the scope of China's appeal was very narrow. Specifically, the panel findings challenged by China were part of the panel's intermediate findings leading to its conclusion that Article XX of the GATT 1994 is not available to China as a defence to justify the export duties at issue in these disputes. China's appeal did not involve any challenge to the panel's finding that the export duties are inconsistent with Paragraph 11.3 of China's Accession Protocol, or the panel's conclusion that Article XX of the GATT 1994 is not available as a defence to justify these export duties. China also did not appeal the panel's other intermediate findings leading to the latter conclusion. Moreover, China did not appeal the panel's finding, reached on an *arguendo* basis, that the export duties at issue are not justified by either subparagraph (b) or the chapeau of Article XX of the GATT 1994. The Appellate Body further explained that, in addressing China's claim, it would begin with an initial assessment of Article XII:1 of the Marrakesh Agreement and the second sentence of Paragraph 1.2 of China's Accession Protocol, before proceeding to an integrated assessment of the relevant provisions and general architecture of the relevant instruments as they bear on the issues raised on appeal.

4.3.1.1 Article XII:1 of the Marrakesh Agreement

China submitted that, by virtue of Article XII:1 of the Marrakesh Agreement, specific provisions of its Accession Protocol must intrinsically relate to either the Marrakesh Agreement or one of the Multilateral Trade Agreements annexed thereto. According to China, its position followed from the requirement in the second sentence of Article XII:1 that "[s]uch accession shall apply to the

[33] Before the Panel, China drew a distinction between the Marrakesh Agreement Establishing the World Trade Organization *excluding* the Multilateral Trade Agreements annexed to it, on the one hand, and that Agreement *together* with its annexes, on the other hand. China used "the Marrakesh Agreement" to refer to the former, and "the WTO Agreement" to refer to the latter. On appeal, China drew the same distinction. In its findings regarding the availability of Article XX of the GATT 1994 to justify a breach of Paragraph 11.3 of China's Accession Protocol, the Panel also used "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes. For purposes of consistency, the Appellate Body, like the Panel, used "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization excluding its annexes. The Appellate Body emphasized that the use of such nomenclature was for purposes of these appeals only, and without prejudice to the legal issues raised by China on appeal.

[*Marrakesh Agreement*] and the Multilateral Trade Agreements annexed thereto", read together with the important context provided by Paragraph 1.2, second sentence, of China's Accession Protocol. In China's view, a proper reading of Article XII:1, second sentence, confirms that China's Accession Protocol serves to specify China's rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. China argued that, by rejecting this interpretation of Article XII:1, the panel failed to give effective meaning to this key provision governing the WTO accession process by essentially reducing the function of Article XII:1 to prescribing that newly acceding Members need to accept the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto as a single undertaking.

The Appellate Body noted that Article XII:1 of the Marrakesh Agreement provides the *general* rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished through "terms" to be agreed between the acceding Member and the WTO, and does not spell out the content of, or impose limitations on, such "terms". Moreover, the second sentence of Article XII:1 makes clear that such accession applies to the entirety of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, and not just some part thereof. The Appellate Body emphasized that the term "[s]uch accession" in the second sentence refers to the *legal act* of acceding to the Marrakesh Agreement specified in the first sentence. Thus, the second sentence does not mean, as China's argument seemed to suggest, that *the legal instrument* embodying the "terms" of accession, or specific provisions thereof, must "apply" to, or somehow be directly incorporated into, the Marrakesh Agreement or the Multilateral Trade Agreements.

The Appellate Body considered that its interpretation of Article XII:1 is confirmed by, and complements, Article II:2 of the Marrakesh Agreement. Article II:2 provides that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members." The reference to "integral parts" in Article II:2 indicates that the Multilateral Trade Agreements annexed to the Marrakesh Agreement are necessary components of a single package of WTO rights and obligations. Article II:2 thus stipulates the requirement for *existing* WTO Members to abide by the obligations under all of the agreements in this package. Article XII:1, which concerns accession, extends the same requirement to acceding Members.

Therefore, the Appellate Body found that the panel correctly stated that the second sentence of Article XII:1 requires acceding Members not to "pick and choose" among the various agreements, and rightly rejected China's arguments concerning the interpretation of Article XII:1. The Appellate Body further stated that, beyond the *general* rule governing accession set out in its two sentences, Article XII:1 itself does not speak to the question of the specific relationship between individual provisions of an accession protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements. In particular, Article XII:1, alone, does not create a substantive relationship, "intrinsic" or otherwise, between provisions of China's Accession Protocol (such as Paragraph 11.3) and provisions of the covered agreements (such as Article II or XI of the GATT 1994). The Appellate Body therefore turned to examine the other provision concerned by China's appeal – i.e. Paragraph 1.2 of China's Accession Protocol – to see whether that provision provides further guidance on this relationship.

4.3.1.2 Paragraph 1.2 of China's Accession Protocol

China contended that the panel erred in its interpretation of Paragraph 1.2, second sentence, of China's Accession Protocol in finding that the legal effect of this second sentence is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement. In China's view, the panel erroneously interpreted the term "the WTO Agreement" as referring to the Marrakesh Agreement alone, excluding its annexes. For China, the term "the WTO Agreement" in the second sentence of Paragraph 1.2 is properly understood as the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto.

The second sentence of Paragraph 1.2 of China's Accession Protocol provides that "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." The Appellate Body first noted that Paragraph 1.2, second sentence, does not, itself, define the term "the WTO Agreement". Turning to the immediate context of the term "the WTO Agreement" found in the remaining words of the

same sentence, the Appellate Body found that the term "integral part" is used frequently in the covered agreements in order to integrate one or more agreements (or legal instruments) into another agreement. For example, Article II:2 of the Marrakesh Agreement makes the Multilateral Trade Agreements "integral parts of" the Marrakesh Agreement.

Next, the Appellate Body examined the context provided by various other provisions of China's Accession Protocol. The Appellate Body found that the first sentence of Paragraph 1.2 may properly be understood to cover the possibility that the Marrakesh Agreement may have been rectified, amended, or modified during the period between 1995 and the date of ratification of the accession protocol by the acceding Member. In the Appellate Body's view, this provision does not compel a conclusion, as China argued, that "the WTO Agreement" must be read to include a reference to the Multilateral Trade Agreements. Moreover, the Appellate Body found that Paragraphs 1.1 and 1.3 of China's Accession Protocol, as well as the Decision of the Ministerial Conference of 10 November 2001 to which China's Accession Protocol is annexed, all indicate that the term "the WTO Agreement" refers to the Marrakesh Agreement alone, excluding the Multilateral Trade Agreements annexed thereto. The Appellate Body additionally noted that the first recital of the preamble of China's Accession Protocol identifies the "WTO Agreement" as the abbreviation of "the Marrakesh Agreement Establishing the World Trade Organization".

However, the Appellate Body found that the definition of the "WTO Agreement" contained in the preamble of China's Accession Protocol does not necessarily preclude the annexed Multilateral Trade Agreements from also falling within the scope of the term "the WTO Agreement" in some of the instances where this term is used in China's Accession Protocol. In particular, the Appellate Body recalled that the term "the WTO Agreement" in Paragraph 5.1 of China's Accession Protocol was interpreted by the Appellate Body in *China – Publications and Audiovisual Products* as referring to "the *WTO Agreement* as a whole, including its Annexes". In the Appellate Body's view, the fact that the term "the WTO Agreement" in China's Accession Protocol may have both narrow and broad connotations is consistent with the principle of the single undertaking reflected in both Articles II:2 and XII:1 of the Marrakesh Agreement. Pursuant to this principle, the Marrakesh Agreement is the umbrella under which all of the annexed Multilateral Trade Agreements are united in a single package of rights and obligations. Thus, whether the term "the WTO Agreement" in the second sentence of Paragraph 1.2 is understood in the broad sense (as the Marrakesh Agreement and the Multilateral Trade Agreements), or in the narrow sense (as the Marrakesh Agreement alone), is not dispositive of the key legal question raised in China's appeal, that is, the specific relationship between individual provisions of China's Accession Protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements.

The Appellate Body found that the operative term of Paragraph 1.2 – i.e. "an integral part", together with Article XII:1 of the Marrakesh Agreement – serves the function of integrating China's Accession Protocol into a single package or WTO rights and obligations, just as Article II:2 of the Marrakesh Agreement serves the same function with regard to the Multilateral Trade Agreements. As a result, the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol form one package of rights and obligations that must be read in conjunction. The Appellate Body found, however, that this understanding does not dispense with the need to analyse, on a case-by-case basis, the specific relationship between an individual provision in the Protocol and an individual provision of the Marrakesh Agreement or one of the Multilateral Trade Agreements.

4.3.1.3 The relationship between China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand

The Appellate Body found that, as has been established in relevant jurisprudence, the mere fact that each of the Multilateral Trade Agreements is an integral part of the Marrakesh Agreement by virtue of Article II:2 of the Marrakesh Agreement does not, in and of itself, answer the question as to how specific rights and obligations contained in those Multilateral Trade Agreements relate to each other. In the Appellate Body's view, like the approach to ascertaining the relationship among provisions of the Multilateral Trade Agreements, the specific relationship between the provisions of China's Accession Protocol, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, must also be determined on a case-by-case basis through a proper interpretation of all relevant provisions. Neither obligations

nor rights may be automatically transposed from one part of the WTO legal framework into another. The Appellate Body considered that such an approach is consistent with the one adopted in *China – Publications and Audiovisual Products*, in which the Appellate Body found that Article XX may be directly invoked to justify a breach of Paragraph 5.1 of China's Accession Protocol. The Appellate Body's finding was based on a thorough analysis of the text and context of Paragraph 5.1, of the circumstances in that dispute, including the specific measure subject to China's commitment under Paragraph 5.1, and of how this commitment related to China's right to regulate trade.

The Appellate Body considered, therefore, that the relevant jurisprudence indicates that the questions of whether a particular protocol provision at issue has an objective link to specific obligations under the Marrakesh Agreements and the Multilateral Trade Agreements, and of whether the exceptions under those agreements may be invoked to justify a breach of such a protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and the relevant provisions of the Accession Working Party Report, and by the relevant provisions of the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

The Appellate Body noted that, under the above approach, express textual references, or the lack thereof, to a covered agreement (such as the GATT 1994), a provision thereof (such as Article XX of the GATT 1994), or "the WTO Agreement" in general, are *not* dispositive in and of themselves. This was also confirmed by the Appellate Body's analysis in *China – Raw Materials*. In those disputes, the Appellate Body did not limit its analysis to the text of Paragraph 11.3 alone, but additionally relied on the context provided by Annex 6 of China's Accession Protocol, Article VIII of the GATT 1994, and the relevant structure of the Accession Protocol, including the specific exceptions to China's obligations to eliminate export duties. On this basis, the Appellate Body concluded in those disputes that a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994.

The Appellate Body recalled that, according to China's interpretation, Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol, read together, indicate that a specific Protocol provision must be treated as integral part of either the Marrakesh Agreement or one of the Multilateral Trade Agreements to which the Protocol provision "intrinsically relates". The Appellate Body noted that China did not provide a clear definition of the "intrinsic relationship" test that it proposed. In any event, the Appellate Body considered that its own interpretation of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol does not support the view that an inquiry into the relationship that an individual provision of China's Accession Protocol has to provisions of the Marrakesh Agreement and the Multilateral Trade Agreements must start from the premise that such provision is "intrinsically related" to some other provision(s). The Appellate Body reiterated that the specific relationship between an individual provision of China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements must be ascertained through a thorough analysis of the relevant provisions, on the basis of the customary rules of treaty interpretation and the circumstances of each dispute.

In conclusion, the Appellate Body declined to accept China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement. The Appellate Body found that the panel did not err in concluding that the legal effect of the second sentence of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is *not* that the individual provisions of China's Accession Protocol are integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement. The Appellate Body recalled that the panel also expressed the view that the term "the WTO Agreement" in Paragraph 1.2 refers to the Marrakesh Agreement. Recalling its finding that whether the term "the WTO Agreement" in Paragraph 1.2 is understood in its narrow or broad sense is not dispositive of the issue of the specific relationship between individual provisions of China's Accession Protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, the Appellate Body

found it unnecessary to opine on the scope of the term "the WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol.

4.3.2 Article XX(g) of the GATT 1994

4.3.2.1 Introduction

China appealed two sets of intermediate findings in the panel's analysis of whether China's export quotas on rare earths, tungsten, and molybdenum are justified pursuant to Article XX(g) of the GATT 1994. First, China contended that the panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g). Second, China claimed that the panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" restrictions on domestic production or consumption pursuant to Article XX(g) of the GATT 1994.

China requested the Appellate Body to reverse the panel's intermediate findings that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994, and that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions pursuant to Article XX(g) of the GATT 1994. Furthermore, to the extent that the panel's errors tainted the panel's conclusions that China's export quotas on rare earths, tungsten, and molybdenum cannot be provisionally justified under Article XX(g) of the GATT 1994, China also requested the Appellate Body to reverse these conclusions of the panel.

China's appeal of the panel's findings under Article XX(g) was limited in scope. With respect to the panel's analysis of whether China's export quotas on rare earths and tungsten "relate to" conservation, China's appeal was directed at only one aspect of the panel's overall analysis, namely, the panel's findings in respect of the "signalling function" of China's export quotas. Furthermore, China's appeal in this regard concerned only the panel's findings regarding China's export quotas on rare earths and tungsten, and did not involve any challenge to the panel's findings regarding China's export quota on molybdenum. Similarly, with respect to the panel's analysis of whether China's export quotas were "made effective in conjunction with restrictions on domestic production or consumption", China's appeal was also directed at limited parts of the panel's overall analysis, namely, the panel's findings in respect of the "even-handedness" requirement of Article XX(g). China did not appeal the panel's findings on "conservation" or "exhaustible natural resources". Moreover, China did not appeal the panel's findings that China's domestic extraction and production caps on rare earths, tungsten, and molybdenum did not qualify as "restrictions on domestic consumption or production" for the purposes of Article XX(g) of the GATT 1994. Finally, China did not appeal the panel's findings that China had not established that its export quotas on these three groups of products meet the requirements of the chapeau of Article XX of the GATT 1994.

4.3.2.2 China's claim that the panel erred in its interpretation and application of the "relating to" requirement of Article XX(g) of the GATT 1994

China requested the Appellate Body to reverse the panel's interpretation of the term "relating to" in Article XX(g) of the GATT 1994. According to China, the panel erroneously interpreted this term as requiring the panel to examine solely the design and structure of China's export quotas to the exclusion of any evidence regarding the effects of those export quotas and other elements of China's conservation scheme in the marketplace. China also requested the Appellate Body to reverse the panel's findings that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) by virtue of the signals that they send, in particular to domestic consumers of these products. In this regard, the panel expressed the view that, even if export quotas may reduce foreign demand for the products in question, they are also liable to stimulate domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic industries. The panel referred to this potential signal to domestic consumers as a "perverse signal".

Regarding China's claim that the panel erred in its interpretation of the term "relating to" in Article XX(g) of the GATT 1994, the Appellate Body addressed the two issues that arose from this claim: (i) whether the panel made the findings attributed to it by China, i.e. that the assessment of whether a measure "relates to" conservation must be limited to an examination of the design and structure of the measure at issue to the exclusion of evidence regarding the effects of those export quotas in the marketplace; and (ii) whether it was proper for the panel to place analytical emphasis on the design and structure of the measure.

The Appellate Body began by recalling that, for a measure to "relate to" conservation in the sense of Article XX(g) of the GATT 1994, there must be "a close and genuine relationship of ends and means" between that measure and the conservation objective of the Member imposing the measure. Hence, a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the "relating to" requirement of Article XX(g).

Furthermore, the Appellate Body noted that the text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision. In past disputes, the Appellate Body has emphasized the importance of scrutinizing the design and structure of the challenged measure as part of a proper assessment of whether that measure satisfies the requirements of Article XX(g). Assessing a measure based on its design and structure is an objective methodology that also helps to determine whether or not a measure does what it purports to do. This is so because the design and structure of a measure do not vary, and are not contingent on the occurrence of subsequent events. Thus, the Appellate Body considered that, by focusing on the design and structure of the measure, particularly where a measure is challenged "as such", a panel or the Appellate Body has the benefit of an objective methodology for assessing whether a measure satisfies the requirements of Article XX(g). At the same time, the analysis of the design and structure of the measure cannot be undertaken in isolation from the conditions of the market in which the measure operates. Since the characteristics and structure of the market would normally influence a Member's choice and design of a measure, such market features may also shed light on whether a given measure, in its design and structure, satisfies the requirements of Article XX(g). In addition, the Appellate Body reiterated its statement in *US – Gasoline* that, while there is no requirement to apply an "empirical effects" test under Article XX(g), consideration of the predictable effects of a measure may be relevant for the analysis under Article XX(g).

Having reviewed the panel's interpretation of the term "relating to" in Article XX(g) of the GATT 1994, the Appellate Body found that, contrary to what China alleged, the panel did not consider itself obliged to limit its analysis to an examination of the design and structure of the measures at issue. The panel also did not consider itself precluded from examining evidence of the effects of China's export quotas as well as of the operation of the other elements of China's conservation scheme in the marketplace. Instead, the panel considered that it should "focus" on the design and structure of the export quotas in its assessment of whether those measures relate to the conservation of exhaustible natural resources within the meaning of Article XX(g) of the GATT 1994. The Appellate Body found that the panel did not err in doing so.

Regarding China's claim that the panel erred in its application of the "relating to" requirement of Article XX(g) to China's export quotas on rare earths and tungsten, the Appellate Body noted that China's appeal was limited to the panel's finding that China's export quotas on rare earths and tungsten send a "perverse signal" to domestic consumers to increase consumption. These panel findings were made in addressing China's argument that its export quotas on rare earths and tungsten relate to conservation because they send a conservation "signal" to foreign consumers. China contended that the export quotas contributed to the effectiveness of China's overall conservation policy by "signalling" to foreign users the need to explore other sources of supply, including substitutes and recycling. The complainants, on their part, argued that, while an export quota may send a conservation-related signal to foreign users, by also reducing domestic prices it simultaneously sends signals to domestic consumers that they should increase their consumption of the product concerned. According to the complainants, such "perverse signals" contradicted China's claim that its export quotas relate to conservation, particularly given that most rare earths and tungsten produced in China are consumed in China.

The Appellate Body addressed two sets of issues raised by China on appeal. First, China submitted that, because of the panel's incorrect interpretation that "subparagraph (g) does not require an evaluation of the actual effects of the concerned measures", the panel did not move beyond

an examination of the design and structure of China's export quotas by examining whether: (i) the theoretical "perverse signals" were present in the marketplace for rare earths and tungsten; and (ii) there was in fact a risk that "perverse signals" sent by export quotas to domestic users might offset the positive effect of conservation signals to foreign users. Second, China contended that, even in limiting the analysis to the elements of design and structure of the export quotas, the panel erred because: (i) the panel's own factual findings based on the design and structure were sufficient for it to conclude that China's export quotas relate to conservation based on the finding that the quotas can send effective conservation signals to foreign users; and (ii) even if the panel were right that the general effect of export quotas is to send a "perverse signal" to domestic users, the panel should have found – purely as a matter of design and structure – that China's regime relates to conservation because the existence of domestic production caps mitigates any "perverse signals" sent to domestic consumers by the export quotas.

The Appellate Body found that the panel did not err in its application of the "relating to" requirement in Article XX(g) of the GATT 1994. In particular, the Appellate Body disagreed with China's contention that the panel applied an incorrect legal standard that limited its analysis to an examination of the design and structure of China's export quotas only, and that this prevented the panel from engaging with evidence of the broader operation of China's conservation regime. The Appellate Body determined that the panel did not err in focusing on the design and structure of China's export quotas in its assessment of whether those measures relate to the conservation of exhaustible natural resources within the meaning of Article XX(g). The Appellate Body also determined that the panel did not find that export quotas can send effective conservation signals to foreign users. Additionally, the Appellate Body was not persuaded by China's argument that the panel should have found – purely as a matter of design and structure – that China's regime relates to conservation because the existence of domestic production caps mitigates any "perverse signals" sent to domestic consumers by the export quotas.

4.3.2.3 China's claim that the panel erred in its interpretation and application of the "made effective in conjunction with" requirement of Article XX(g) of the GATT 1994

China requested the Appellate Body to reverse the panel's finding that China's export quotas on various forms of rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions. China further requested that, "[t]o the extent the Panel's errors in connection with the analysis of the 'made effective in conjunction with' requirement taint the Panel's conclusions … that China's export quotas on rare earths, tungsten, and molybdenum cannot be provisionally justified under Article XX(g) of the GATT 1994", the Appellate Body also reverse this conclusion.

China alleged, first, that the panel erred in its interpretation in considering the "even-handedness requirement" to be a separate requirement that had to be fulfilled in addition to the conditions expressly set out in Article XX(g). The Appellate Body stated that it did not see "even-handedness" as imposing a separate requirement that must be fulfilled in addition to the condition that a measure be "made effective in conjunction with restrictions on domestic production or consumption". Instead, for the Appellate Body, the terms of Article XX(g) themselves (in particular, the clause "made effective in conjunction with restrictions on domestic production or consumption") reflect the notion of "even-handedness" in the imposition of restrictions. The Appellate Body noted several different statements of the panel articulating its understanding of the "even-handedness requirement". The Appellate Body found certain of these statements to be in keeping with the Appellate Body's interpretation in previous cases. However, the Appellate Body also found that certain other statements of the panel raised concerns. Accordingly, the Appellate Body found that the panel erred to the extent that it found that "even-handedness" is a separate requirement that must be fulfilled in addition to the condition that a measure be "made effective in conjunction with" restrictions on domestic production or consumption.

Second, China asserted that the panel erred in its interpretation in finding that Article XX(g) requires that the burden of conservation-related measures be evenly distributed, for example in the case of export restrictions, between domestic and foreign consumers or producers. The Appellate Body again noted several different statements of the panel articulating its understanding of the balance that "even-handedness" requires. The Appellate Body found certain of these statements to be in keeping with the Appellate Body's interpretation in previous cases, however, the Appellate Body also found that certain other statements of the panel raised

concerns. Accordingly, the Appellate Body concluded that the panel erred to the extent that it found that the burden of conservation must be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. The Appellate Body clarified that Article XX(g) does not require a Member seeking to justify its measure to establish that its regulatory regime achieves an even distribution of the burden of conservation. At the same time, the Appellate Body observed that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers that could still be shown to satisfy all the requirements of Article XX(g). In this connection, the Appellate Body emphasized that the clause "made effective in conjunction with restrictions on domestic production or consumption" requires that, when GATT-inconsistent measures are in place, effective restrictions must also be imposed on domestic production or consumption. The Appellate Body further stated that such restrictions must be "real" rather than existing merely "on the books", particularly in circumstances where domestic consumption accounts for a major part of the exhaustible natural resources to be conserved. Moreover, such restrictions on domestic production or consumption must reinforce and complement the restriction on international trade.

The Appellate Body further concluded that neither of the two above errors in the panel's analysis relating to the second clause of Article XX(g) tainted the remaining elements of the panel's interpretation of the second clause of subparagraph (g), and observed that, in any event, China's appeal did not concern those other elements.

Third, China alleged that the panel erred in its interpretation of Article XX(g) in finding that it must limit its analysis under the second clause of Article XX(g) to an examination of the general design and structure of China's export quotas, to the exclusion of evidence regarding the effects of these quotas in the marketplace. The Appellate Body, based on a review of the panel's analysis, observed that the panel had in fact not considered itself precluded from reviewing evidence in the context of the analysis under subparagraph (g). Accordingly, the Appellate Body held that the panel did not err in focusing on the design and structure of the measures at issue in its analysis under the second clause of subparagraph (g).

Fourth, China submitted that the panel erred in its application of Article XX(g) by applying an "additional" requirement of "even-handedness" that required an even distribution of the conservation burden imposed by the export quotas on foreign consumers, on the one hand, and domestic consumers and producers, on the other hand; and by focusing on the structure and design of the export quotas, to the exclusion of evidence of their effects in the marketplace. The Appellate Body noted that the panel's application of Article XX(g) to China's export quotas did not contain an inquiry into whether the relative conservation burdens imposed by China on domestic and foreign producers or consumers were evenly distributed and concluded that it was therefore consistent with the Appellate Body's interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption". The Appellate Body recalled that Article XX(g) requires an effective restriction on domestic production or consumption that operates together with, and so as to reinforce and complement, the restriction imposed on international trade, but that it does not require an inquiry into whether the relative conservation burdens imposed by China on foreign consumers as opposed to domestic producers or consumers are evenly distributed between them.

4.3.2.4 China's claims under Article 11 of the DSU

China also alleged multiple failures by the panel to comply with its duties under Article 11 of the DSU. Due to these alleged failures, China requested the Appellate Body to reverse the panel's findings that the rare earth and tungsten export quotas send "perverse signals" to domestic consumers and, consequently, do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994. China further requested that the Appellate Body reverse the panel's findings that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions.

The Appellate Body observed that, in making its claims under Article 11 of the DSU, China made arguments identical or virtually identical to those it made in elaborating several other claims that the panel erred in its application of Article XX(g) of the GATT 1994. The Appellate Body considered that the latter set of claims and arguments by China all implicated the panel's assessment of the facts and evidence, rather than its characterization of the consistency or inconsistency

of certain facts with the requirements of Article XX(g). Therefore, the Appellate Body addressed all of these allegations under Article 11 of the DSU only.

Regarding the panel's analysis in respect of the "relating to" requirement of Article XX(g), China submitted that the panel acted inconsistently with Article 11 of the DSU in two main ways. First, China identified a number of panel findings that, according to China, lacked a sufficient evidentiary basis, and alleged that the panel failed to "reconcile its findings" with contrary evidence. Second, China argued that the panel's reasoning was "incoherent" insofar as the panel considered that the relevant question was whether the "perverse signals" sent by China's export quotas were offset by restrictions on domestic production, but then declined to examine evidence relevant to precisely that issue. The Appellate Body rejected all of the allegations made by China, and found that China had not demonstrated that the panel breached its duty under Article 11 of the DSU to conduct an objective assessment of the facts.

With regard to the panel's analysis under the second clause of Article XX(g), China asserted that, through its failure to engage properly with evidence relating to the operation of China's domestic restrictions, its incoherent reasoning, and its use of a "double standard" in applying its "even-handedness" test, the panel failed to make an objective assessment of the matter, including an objective assessment of the facts, under Article 11 of the DSU. With respect to one of China's claims under Article 11, the Appellate Body found that the claim did not meet the requirement of being clearly articulated and substantiated with specific arguments and rejected the claim on that basis. The Appellate Body assessed the substance of the remaining claims and, for each of them, found that China had not demonstrated that the panel failed to conduct an objective assessment of the facts of the case, or otherwise acted inconsistently with Article 11 of the DSU.

4.3.2.5 Conclusion on Article XX(g) of the GATT 1994

On the basis of the above analysis, and taking account of the unappealed aspects of the panel's Article XX(g) analysis, the Appellate Body upheld the panel's conclusion that "China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994".

4.3.3 The United States' appeal of the panel's decision to reject certain evidence

The United States requested the Appellate Body to find that the panel erred in rejecting 10 panel exhibits submitted by the complainants at a late stage of the panel proceedings. The United States maintained that, in deciding to reject this evidence, the panel erred in reasoning that it would not have been consistent with the prompt settlement of disputes to instead allow China more time to respond to the evidence. The United States contended that, in so reasoning, the panel erroneously applied Article 3.3 of the DSU, because a limited extension of time would not have undermined the value of "prompt settlement" in the context of the overall length of a panel proceeding. The United States further submitted that, in suggesting that the United States should have submitted the evidence earlier, the panel acted inconsistently with Article 12.4 of the DSU and failed to provide sufficient time to the United States to prepare its submissions. Finally, the United States contended that the panel also acted inconsistently with Article 11 of the DSU in finding that the evidence could and should have been submitted at an earlier date, and in finding that the evidence did not rebut arguments made by China at the second meeting of the panel.

The United States submitted, however, that the Appellate Body would not need to address its appeal if China were not to appeal the panel report or if the Appellate Body were not to modify or reverse the panel's intermediate or ultimate findings and conclusions after reviewing an appeal by China. The Appellate Body noted that the first of the two conditions on which the appeal was premised was met because China filed another appeal in DS431 on 13 April 2014.

With respect to the second condition, the Appellate Body recalled that it had not reversed or modified any of the ultimate findings and conclusions made by the panel. The Appellate Body noted that, in considering the panel's interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994, it had identified certain erroneous statements made by the panel. The Appellate Body recalled its finding that, notwithstanding such erroneous statements, the panel did not commit reversible legal error in its analysis and findings with respect to the "made effective in conjunction with" requirement under Article XX(g). Moreover, several other elements of the panel's analysis under that provision were in any event not appealed. Therefore, the Appellate Body considered that it had not identified any legal findings or conclusions of the panel that needed to be reversed or modified.

In these circumstances, the Appellate Body considered that one of the conditions on which the United States' appeal was premised was not met. Accordingly, the Appellate Body did not rule on the United States' claims that the panel acted inconsistently with Articles 11 and 12.4 of the DSU in excluding the 10 panel exhibits.

4.4 Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R

This dispute concerned India's challenge to the United States' imposition of countervailing duties (CVDs) on certain hot-rolled carbon steel flat products from India. The investigation at issue was initiated on 12 December 2000 and resulted in a final order on 8 January 2002, which was revised by a number of subsequent determinations. At issue in this dispute were several provisions of US law relating to CVD investigations – as set out in the United States Code or the United States Code of Federal Regulations – as well as determinations and orders published by the United States Department of Commerce (USDOC) or the United States International Trade Commission (USITC) in the original investigation; administrative reviews in 2002, 2004, 2006, 2007, and 2008; and sunset reviews in 2007 and 2013. The CVD order at issue in this dispute addressed various government programmes consisting of, *inter alia*, sales of input products, licensing schemes for mineral extraction, and financing arrangements.

Before the panel, India claimed that certain provisions contained in the USC and the CFR are "as such" inconsistent with Articles 12.7, 14(d), 15.1-15.5, 19.3 and 19.4 of the SCM Agreement. India also claimed that the United States' imposition of countervailing duties on hot-rolled carbon steel flat products from India was inconsistent with various substantive and procedural requirements contained in Articles 1.1(a)(1), 1.1(b), 2.1(a)-(c), 2.4, 11.1-11.2, 11.9, 12.5, 12.7, 13.1, 14(d), 15.1-15.5, 19.3-19.4, 21.1-21.2, 22.1-22.2 and 22.5 of the SCM Agreement. Finally, India raised consequential claims relating to Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

The panel upheld India's "as such" claims, under Articles 15.1-15.5 of the SCM Agreement, against the United States' provision governing the cumulation of the effects of subsidized imports with the effects of non-subsidized imports in original countervailing investigations. The panel also upheld a number of the procedural and substantive "as applied" claims raised by India under Articles 1.1(a)(1)(iii), 2.1(c), 12.5, 12.7, 14(d), 15.1-15.5, and 22.5 of the SCM Agreement.

On appeal, India challenged most issues on which the panel did not rule in its favour. India appealed the panel's finding upholding the USDOC's determination that the National Mineral Development Corporation (NMDC) is a "public body". India also appealed the panel's findings regarding the existence of a financial contribution. India further appealed several of the panel's findings and conclusions in respect of India's "as such" and "as applied" claims against the USDOC's benchmarking mechanism for determining benefit. Moreover, India appealed the panel's findings in connection with *de facto* specificity, USDOC's use of "facts available", the examination of new subsidy allegations in administrative reviews, and "cross-cumulation". In respect of each of these issues listed above, India also claimed that the panel acted inconsistently with its duty to make an objective assessment within the meaning of Article 11 of the DSU.

In its other appeal, the United States requested the Appellate Body to clarify that "an entity that is controlled by the government, such that the government may use the entity's resources as its own", is also a public body. In addition, the United States challenged the panel's finding that

Section 1677(7)(G) of the US Statute is inconsistent with Articles 15.1-15.5 of the SCM Agreement, and claimed that the panel acted inconsistently with Article 11 of the DSU in its examination on this matter.

4.4.1 Public body

India appealed the panel's findings regarding the USDOC's determination that the NMDC is a public body, arguing that the panel erred in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement. For its part, the United States argued that the panel interpreted and applied Article 1.1(a)(1) of the SCM Agreement in a manner consistent with the interpretation given by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, but requested, in its other appeal, that the Appellate Body clarify that "an entity that is controlled by the government, such that the government may use the entity's resources as its own", is a public body within the meaning of the SCM Agreement, "irrespective of whether the entity also possesses 'governmental authority' or exercises this authority in the performance of governmental functions".

Regarding the meaning of the term "public body", the Appellate Body recalled its finding, in *US – Anti-Dumping and Countervailing Duties (China)*, that a public body is "an entity that possesses, exercises or is vested with governmental authority" and that in determining whether an entity is a public body, it may be relevant to consider "whether the 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. The Appellate Body further recalled that "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." The Appellate Body noted that there are different ways in which a government could be understood to vest an authority with governmental authority and therefore different types of evidence may be relevant. Evidence that "an entity is, in fact, exercising governmental functions may serve as evidence that the relevant entity possesses or has been vested with governmental authority." The Appellate Body added that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." An investigating authority must therefore "evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant". In particular, mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body.

Turning to the participants' arguments on appeal, the Appellate Body rejected, as a preliminary matter, India's contention that the United States' request for the Appellate Body to clarify the meaning of Article 1.1(a)(1) of the SCM Agreement should be dismissed on the basis that the United States was not challenging "issues of law covered in the Panel report and legal interpretations developed by the Panel", and that the principles to be applied in determining whether an entity is a public body have been settled in the adopted report of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body explained that it is required, under Article 17.12 of the DSU, to address each of the legal issues raised in the appellate proceedings and that the United States had appealed a "legal interpretation" developed by the panel in the sense of Article 17.6 of the DSU.

Regarding the legal standard to be applied in determining whether an entity is a public body, the Appellate Body rejected India's contention that in order to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain conduct of others. The Appellate Body also rejected the proposition that an entity must have the power to "entrust" or "direct" a private body to carry out functions identified in Article 1.1(a)(1)(i)-(iii) in order to be a public body, and clarified that it had not made such a finding to this effect in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body also noted that the terminology advocated by the United States – "a public body may also include an entity controlled by the government … such that the government may use the entity's resources as its own" – is difficult to reconcile with that used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body recalled that a government's exercise of "meaningful control" over an entity and its conduct, including control such that the government

can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body. Similarly, government ownership of an entity, while not a decisive criterion, may serve, in conjunction with other elements, as evidence.

The Appellate Body recalled that the term "public body" in Article 1.1(a)(1) means "an entity that possesses, exercises or is vested with governmental authority"; and that the question of whether the conduct of an entity is that of a public body must be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the relevant country. The Appellate Body explained that evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. The absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body. Instead, there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant. In order to characterize a particular entity as a public body, it may be relevant to consider whether its functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member, and the classification and functions of entities within WTO Members generally.

Turning to whether the panel erred in its analysis of the USDOC's determination that the NMDC is a public body, the Appellate Body found that, in grappling with the case-by-case nature of public body determinations, the panel correctly articulated the appropriate standard when it observed that "evidence that a government *exercises* meaningful control over an entity and its *conduct* may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." However, the Appellate Body found that the panel erred in its substantive interpretation of Article 1.1(a)(1) of the SCM Agreement by construing the term "public body" and in its understanding of "meaningful control" by a government. The Appellate Body explained that the term "public body" in Article 1.1(a)(1) means "an entity that possesses, exercises or is vested with governmental authority". The *substantive legal question* to be answered is therefore whether one or more of these characteristics exist in a particular case. This *substantive standard* should not be confused with the *evidentiary standard* required to establish that an entity is a public body within the meaning of the SCM Agreement. The Appellate Body considered that, while the panel reviewed some indicia of control by the Government of India (GOI) (such as shareholding and the GOI's involvement in the selection of directors), it did not address the question of whether there was evidence that the NMDC was performing governmental functions on behalf of the GOI. Moreover, the panel failed to evaluate whether the USDOC had properly considered the relationship between the NMDC and the GOI within the Indian legal order, or the extent to which the GOI in fact "exercised" meaningful control over the NMDC as an entity and over its *conduct*. The Appellate Body explained that while the GOI's ownership interest in the NMDC, the GOI's power to appoint and nominate directors, and the reference on the NMDC's website indicating that the NMDC is under "administrative control" of the GOI, insofar as they were discussed by the USDOC in its determinations, were certainly relevant to the question at issue, such evidence of "formal indicia of control" did not, without further evidence and analysis, provide a sufficient basis for a finding that the NMDC is a public body. For these reasons, the Appellate Body found that the panel erred in its application of Article 1.1(a)(1) of the SCM Agreement in its analysis of the USDOC's determination that the NMDC is a public body, and consequently reversed the panel's finding rejecting India's claim. Having done so, the Appellate Body did not consider it necessary to rule on India's claims that the panel acted inconsistently with Article 11 of the DSU.

Turning to the question of whether it could complete the legal analysis of whether the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement, the Appellate Body found that the USDOC did not evaluate the relationship between the NMDC and the GOI within the Indian legal order, and the extent to which the GOI in fact "exercised" meaningful control over the NMDC and over its *conduct* in order to conclude properly that the NMDC is a public body. Instead, the USDOC examined evidence more appropriately seen as evidence of "formal indicia of control" such as the GOI's ownership interest in the NMDC and the GOI's power to appoint or nominate directors. The Appellate Body recalled that these factors are certainly relevant but do not provide a sufficient basis for a determination that an entity is a public body that possesses, exercises, or is vested with governmental authority. The Appellate Body

further noted that the USDOC did not refer in its determinations to evidence contained on the USDOC's administrative record that was referred to by the United States in the panel proceedings as well as on appeal. The USDOC also did not discuss in its determinations evidence on record regarding the NMDC's status as a *Miniratna* or *Navratna* company that could have been relevant to the question of whether the USDOC's determinations contain a sufficient and adequate evaluation of the degree of control exercised by the GOI over the *conduct* of the NMDC and the degree of autonomy enjoyed by the NMDC. For these reasons, the Appellate Body concluded that the USDOC did not provide a reasoned and adequate explanation of the basis for its finding that the NMDC is a public body within the meaning of Article 1.1(a)(1). Thus, the Appellate Body found that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1).

4.4.2 Financial contribution

4.4.2.1 Captive mining rights

India appealed the panel's rejection of India's claim that the USDOC's determination that the GOI's provision of goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. The participants disputed whether such a grant established a "reasonably proximate relationship", as set out by the Appellate Body in *US – Softwood Lumber IV*, between the governmental action of providing a good or service, and the use or enjoyment of that good or service by a beneficiary. India argued that the extraction process undertaken by Indian steel producers, due to its complexity and uncertainty, was a significant intervening act that undermined any reasonably proximate relationship between the GOI's grant of mining rights and the final goods consisting of extracted iron ore and coal.

The panel relied on several features of the mining rights in concluding that there is a reasonably proximate relationship between the GOI's grant of mining rights and the final goods consisting of extracted iron ore and coal. In particular, the Appellate Body noted the distinction drawn by the panel between the mining rights at issue in this case, which involve the right to extract minerals from known sites, as opposed to exploration rights, which involve the right to explore or prospect, and, if anything is found, extract it. The Appellate Body further noted that the USDOC's determinations concern the grant of mining rights, and not reconnaissance permits or prospecting licences, and that the mining rights at issue involved the payment of royalties that were tied to the amount of extracted material. The Appellate Body rejected India's contention that the panel's approach would permit other governmental acts, such as the granting of a business licence, to constitute a provision of goods, since, but for the governmental action, the mining company would not have been able to access the mineral. Unlike the general governmental acts to which India referred, the Appellate Body considered that the governmental act of granting these mining rights has a reasonably proximate relationship with the output in the sense that it is provided expressly to enable the beneficiary to extract for its use or enjoyment what was previously a government-controlled mineral, in this case, iron ore or coal. The Appellate Body therefore upheld the panel's finding rejecting India's claim that the USDOC's determination that the GOI provided goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. The Appellate Body also rejected a claim under Article 11 of the DSU relating to the panel's disagreement with India as to the significance of certain evidence considered by the panel.

4.4.2.2 Steel Development Fund (SDF) loans

India appealed the panel's rejection of India's claim that the USDOC's determination that the Steel Development Fund (SDF) Managing Committee provided direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement. India argued that Article 1.1(a)(1)(i) covers only transfers of funds that are "direct", which means that the action and its consequence must be immediately linked without involving any intermediary or intervening agency. India further contended that a "transfer" of funds within the meaning of Article 1.1(a)(1)(i) refers only to situations in which the funds are drawn from government resources or result in a charge on the public account.

The Appellate Body examined Article 1.1(a)(1)(i), which provides for the existence of a financial contribution where "a government practice involves a direct transfer of funds". The Appellate Body stated that the meaning of the term "direct" in relation to a "transfer of funds" suggests the

immediacy of the conveyance of funds, which in turn points to the existence of a close nexus concerning, for instance, the parties to, and/or the actions relating to, the transfer of the funds. At the same time, the Appellate Body observed that any such immediacy is mitigated by the language consisting of a "government practice" that "involves" the direct transfer of funds. For the Appellate Body, these latter terms suggest a more attenuated role for a government or public body for purposes of Article 1.1(a)(1)(i) than what would otherwise have been understood through an examination of the phrase "direct transfer of funds" in isolation. The Appellate Body therefore concluded that Article 1.1(a)(1)(i) does not rigidly prescribe the scope of its coverage, but rather reflects a balance of different considerations to be taken into account when assessing whether a particular transfer of funds constitutes a financial contribution.

In the light of these considerations, the Appellate Body did not consider that the fact that a government effects a transfer through an intermediary necessarily negates a finding of financial contribution under Article 1.1(a)(1)(i). Instead, an assessment of the role and involvement of any intermediaries in the relationship between the government and the recipient would be important in assessing whether a government practice involves a direct transfer of funds. The Appellate Body further considered that, if there is a government practice that involves a transfer of financial resources exhibiting sufficient indicia of directness, the transfer need not emanate from government title or possession over the resources.

The Appellate Body pointed to the panel's conclusion that, notwithstanding the role of an intermediary administrator, the Joint Plant Committee (JPC), in the disbursement and collection of funds, the SDF Managing Committee made all decisions regarding the issuance of loans, the terms on which they were approved, and any waiver conditions. This meant that no major decision regarding SDF loans could be made, and no loans could be extended, by the JPC alone. The Appellate Body stated that the panel therefore had a credible basis to conclude that, notwithstanding the JPC's role as an intermediary administrator of the SDF, the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans supports a finding that the actions of the SDF Managing Committee involve a direct transfer of funds within the meaning of Article 1.1(a)(1)(i). The Appellate Body also pointed to the panel's view that, regardless of the source of the resources used to fund the SDF loans, those funds were nevertheless held in an account and could only be issued as loans on terms and conditions as decided by the SDF Managing Committee. The Appellate Body therefore upheld the panel's finding rejecting India's claim that the USDOC's determination that the SDF Managing Committee provided direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

4.4.3 Benefit – "as such" claims

India appealed various of the panel's findings rejecting its claims that Section 351.511(a)(2)(i)-(iv) of the US Regulations is "as such" inconsistent with Article 14(d) of the SCM Agreement. Section 351.511(a)(2)(i)–(iv) sets forth the US benchmarking mechanism for calculating the benefit arising from the provision of goods or services by a government. Pursuant to Section 351.511(a)(2)(i)-(iii), the United States follows a three-tiered benchmark approach in determining the adequacy of remuneration for the provision of goods or services by the government. Under Tier I, the USDOC uses as a benchmark an "in-country" price, that is, a market-determined price resulting from actual transactions in the country in question. If the Tier I price is unavailable, the USDOC considers the world market price (Tier II), provided that it is reasonable to conclude that such price would be available to purchasers in the country in question. If the Tier II price is also unavailable, the USDOC assesses whether the government price is consistent with market principles (Tier III). Pursuant to Section 351.511(a)(2)(iv), when Tier I or Tier II benchmarks are used, the USDOC must ensure that these prices reflect the price that a firm has actually paid or would pay if it imported the product.

4.4.3.1 Adequacy of remuneration for government-provided goods

Before the panel, India argued that the US benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it does not require an assessment of the adequacy of remuneration for government-provided goods from the perspective of the government provider, prior to assessing whether a benefit has been conferred on a recipient. On appeal, India claimed that the panel erred in finding that Article 14(d) does not require an assessment from the perspective of the government provider prior to an assessment of benefit. India argued that

the terms "adequacy of remuneration" and "benefit" describe distinct concepts that require separate analyses. The Appellate Body considered that the term "unless", as used in Article 14(d), expressly links the concepts of "benefit" and "remuneration" such that a showing that "remuneration" is "less than adequate" is consonant with a finding of "benefit". Thus, the Appellate Body considered that separate analyses of "benefit" and "remuneration" are not required under Article 14(d).

The Appellate Body also considered that a proper interpretation of Article 14(d) of the SCM Agreement suggests that the assessment of the adequacy of remuneration must be conducted from the perspective of the recipient. The title of Article 14 – "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" – suggests that the adequacy of the "remuneration" paid in exchange for goods or services is, under Article 14(d), to be examined from the perspective of the recipient, rather than the government provider. In addition, the text of the second sentence of Article 14(d) prescribes how the adequacy of remuneration is to be determined, namely, in relation to prevailing market conditions in the country of provision. Recalling its finding in *Canada – Aircraft* that a benefit arises under *each* of the subparagraphs of Article 14 if the recipient has received a "financial contribution" on terms more favourable than those that are available to the recipient in the market, the Appellate Body agreed with the panel that "[o]nce it is established that the price paid to the government provider is less than the price that would be required by the market", the government price in question is inadequate, and a benefit is thereby conferred. For these reasons, the Appellate Body upheld the panel's finding rejecting India's claim that the US benchmarking mechanism is inconsistent with Article 14(d). The Appellate Body also rejected India's claim under Article 11 of the DSU, as it was premised on India's interpretation of Article 14(d), which the panel had correctly rejected.

4.4.3.2 Selection of benchmarks under the US benchmarking mechanism

Before turning to India's remaining claims, the Appellate Body set forth an interpretation of Article 14(d) of the SCM Agreement as it relates to the identification of an appropriate benchmark for calculating benefit. The Appellate Body observed that the second sentence of Article 14(d) prescribes that the adequacy of remuneration for a government-provided good or service "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase". For the Appellate Body, this means that prevailing market conditions in the country of provision is the standard for assessing the adequacy of remuneration.

The Appellate Body interpreted the terms "prevailing market conditions" in Article 14(d) of the SCM Agreement as describing generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices. Highlighting the market orientation of the inquiry, the Appellate Body considered that, because the assessment must be made in relation to *prevailing market conditions in the country of provision*, any benchmark must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision. Proper benchmark prices would normally emanate from the market for the good in question in the country of provision because, to the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision. In the Appellate Body's view, such in-country prices could emanate from a variety of potential sources, including private or government-related entities. Investigating authorities bear the responsibility to conduct the necessary analysis in order to determine, on the basis of information supplied by petitioners and respondents, whether proposed benchmark prices are market determined. The Appellate Body highlighted that, in arriving at a proper benchmark, an investigating authority must adequately explain the basis for its conclusions in its published report.

The Appellate Body recognized that some types of prices may, from an evidentiary standpoint, be more easily found to constitute market-determined prices in the country of provision. This does not suggest, however, that there is, in the abstract, a hierarchy between different types of in-country prices that can be relied upon in arriving at a proper benchmark. The Appellate Body emphasized that whether a price may be relied upon for benchmarking purposes under Article 14(d) of the SCM Agreement is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision. Accordingly, while the prices at which the same or similar goods are sold by private suppliers in the country of provision may serve as a starting point of analysis, this does not mean that,

having found such prices, the analysis must necessarily end there. For example, prices of government-related entities other than the entity providing the financial contribution at issue also need to be considered, where present on the record, to assess whether they are market determined and can therefore form part of a proper benchmark. Thus, Article 14(d) establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis. Rather, Article 14(d) requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark.

4.4.3.3 Government-related prices under the US benchmarking mechanism

On appeal, India claimed that the panel found that government prices can be presumptively rejected in the determination of a benchmark, and thus erred in its interpretation of Article 14(d) of the SCM Agreement. The Appellate Body recalled that whether a price may be relied on for benchmarking purposes is not a function of its source but, rather, whether it is market determined. Private prices and government-related prices can both reflect prevailing market conditions in the country of provision. Government-related prices on record other than the financial contribution at issue need to be considered in determining a proper benchmark, provided that such prices relate or refer to, or are connected with, the prevailing market conditions in the country of provision. A determination of a benefit benchmark cannot, at the outset, exclude consideration of any potential in-country prices, including government-related prices other than the financial contribution at issue. The Appellate Body considered that the panel erred in finding that investigating authorities should not be required to treat government prices as being representative of "prevailing market conditions", to the extent that it may suggest that Article 14(d) does not require investigating authorities to consider any in-country government-related prices in determining a benchmark for assessing benefit under Article 14(d).

Turning to the measure at issue, the Appellate Body noted that Tier I of the US benchmarking mechanism prescribes that the USDOC will normally measure the adequacy of remuneration by comparing the government price to a "market-determined price" that results from "actual transactions" in the country in question. Such a price "could include" a price based on actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In the Appellate Body's view, the fact that Tier I prices "could include" an illustrative list of sample transactions suggests that other types of transactions, including government-related prices other than government auction prices, may constitute a Tier I benchmark. Thus, the Appellate Body considered that to the extent that Section 351.511(a)(2)(i) does not exclude that government-related prices other than the financial contribution at issue can be used as Tier I benchmarks, the premise of India's claim that government-related prices are necessarily excluded as benchmarks under the US benchmarking mechanism had not been established. Accordingly, although the Appellate Body expressed concerns about the panel's interpretation of Article 14(d) of the SCM Agreement, it ultimately upheld, albeit for different reasons, the panel's finding rejecting India's claim.

4.4.3.4 World market prices under Tier II of the US benchmarking mechanism

On appeal, India took issue with the two panel's findings relating to the use of world market prices under Tier II of the US benchmarking mechanism. The Appellate Body first considered India's claim that the panel erred in finding that Article 14(d) of the SCM Agreement permits the use of out-of-country benchmarks in situations in which the government is not a predominant provider of the good in question. The Appellate Body was not persuaded by India's assertion that, in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body had established that the only situation in which out-of-country prices may be used to determine a benefit benchmark is where in-country prices are distorted by government predominance in the market. While the Appellate Body has clarified that recourse to out-of-country prices is exceptional, the Appellate Body has not, in previous disputes, addressed the issue of whether there are other circumstances in which Article 14(d) permits the use of out-of-country prices in determining benchmarks. The Appellate Body considered that the rationale underpinning its findings in *US – Softwood Lumber IV* is that Article 14(d) does not prohibit the use of alternative benchmarks in situations where in-country prices cannot properly be used as a basis for determining a benchmark. Thus, the Appellate Body considered that recourse to alternative benchmarks is permitted to determine a benchmark where in-country prices are distorted as a result of governmental intervention in the market. There may be other circumstances where an

investigating authority would not be required to use in-country prices to determine a benefit benchmark, e.g. where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined. Thus, the Appellate Body considered that the panel did not err in finding that Article 14(d) permits the use of out-of-country benchmarks in situations other than where the government is a predominant provider of the good in question.

The Appellate Body then turned to India's appeal concerning the panel's rejection of India's claim that the use of "world market prices" as Tier II benchmarks in Section 351.511(a)(2)(ii) is inconsistent "as such" with Article 14(d) of the SCM Agreement because it does not require adjustments to reflect prevailing market conditions in the country of provision. The Appellate Body first rejected India's claim under Article 11 of the DSU, stating that it did not consider that a panel acts inconsistently with this provision merely because it seeks to determine the meaning of a municipal law by reference to the legislative framework within which that municipal law is situated. The Appellate Body then stated that it could see nothing on the face of the overarching legislation or the implementing regulation to conclude that the USDOC is not mandated to make adjustments to Tier II benchmarks where necessary. Thus, upholding the panel's findings, the Appellate Body did not consider that the panel erred under Article 14(d) in rejecting India's claim.

4.4.3.5 India's claims concerning the mandatory use of "as delivered" benchmarks

The Appellate Body then examined India's appeal of the panel's rejection of India's claim that the use of "as delivered" prices, provided for in Section 351.511(a)(2)(iv), is inconsistent with Article 14(d) of the SCM Agreement. The Appellate Body first addressed India's assertion that the panel erred in its interpretation of Article 14(d). India submitted that the panel's rejection of its claim was partly based on the panel's erroneous statement that government prices are not an indicator of prevailing market conditions. The Appellate Body disagreed with this statement to the extent that it may be read as suggesting that Article 14(d) establishes a legal presumption that government prices cannot reflect prevailing market conditions in the country of provision, but did not consider that it formed the central basis upon which the panel rejected India's claim. Rather, the panel dismissed India's claim on the basis of its understanding of what India had argued, namely, that the mandatory use of "as delivered" benchmarks is inconsistent with Article 14(d) because such benchmarks will not relate to prevailing market conditions in the country of provision in cases where the "government price in question" does not include delivery charges. In this regard, the Appellate Body recalled that the panel considered that the terms "prevailing market conditions" and "conditions of sale", in the second sentence of Article 14(d), do not relate to the specific contractual terms on which the government provides goods but, rather, "relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions". The Appellate Body observed that India had not challenged this finding of the panel on appeal. The Appellate Body further addressed India's claim under Article 11 of the DSU that the panel failed to apply its own interpretation of Article 14(d) to its assessment of India's claim. Having found that the question of whether the sale of a good in the country of provision generally on an *ex works* basis constitutes a "prevailing market condition" within the meaning of Article 14(d) was not before the panel, the Appellate Body rejected India's claim in this regard.

The Appellate Body found it significant that the term "transportation" is explicitly listed among the "prevailing market conditions" illustratively identified in the second sentence of Article 14(d) of the SCM Agreement. This confirmed that the costs associated with the transportation of the good in question is a factor that must be accounted for in determining the adequacy of remuneration in relation to prevailing market conditions in the country of provision. The use of *ex works* prices for the purpose of a benefit comparison under Article 14(d) would not capture the full cost to the recipient of receiving the government-provided good in question, and would therefore fail to assess whether the financial contribution at issue makes the recipient better off than it would otherwise have been absent that contribution. Thus, the Appellate Body did not agree with India's assertion that, had the panel evaluated the question of whether the sale of a good in the market generally on an *ex works* basis constitutes a "prevailing market condition", this would have "materially affected" the panel's decision to reject India's claim.

The Appellate Body considered that India's concern with Section 351.511(a)(2)(iv) was that, in cases where the USDOC uses as a benchmark an actual import price under Tier I of the US benchmarking mechanism, or a world market price under Tier II of that mechanism, the assessment of benefit will always reflect a comparison between a government price adjusted

to reflect local delivery charges, and a benchmark price adjusted to reflect international delivery charges. Thus, to the Appellate Body, India's argument suggested that, on its face, the US benchmarking mechanism precludes adjustments to Tier I or Tier II benchmarks to reflect anything other than the international cost of delivery of the good in question. The Appellate Body noted that, in selecting Tier I prices, the USDOC is required to consider "product similarity; quantities sold, imported, or auctioned; *and other factors affecting comparability*". Similarly, in selecting Tier II prices, the USDOC is required to make "due allowance *for factors affecting comparability*". According to the Appellate Body, the extent to which international delivery charges are generally applicable, or "prevailing", in the country of provision is a factor affecting comparability of the financial contribution at issue with a benchmark. Thus, contrary to what India asserted, the Appellate Body did not consider that the US benchmarking mechanism, on its face, precludes adjustments to Tier I or Tier II benchmarks to reflect delivery charges that approximate the generally applicable delivery charges in the country of provision – e.g. local delivery charges.

Next, the Appellate Body considered India's claim concerning the panel's rejection of India's argument that the use of "as delivered" out-of-country prices as benchmarks nullifies the comparative advantage of the country of provision in terms of providing the goods locally. The panel considered that, "[t]o *the extent that* a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have." The Appellate Body recalled its guidance in *US – Softwood Lumber IV* that, although the countervailing of comparative advantages between countries would not be in accordance with the very purpose of levying countervailing duties, any comparative advantage would be reflected in the prevailing market conditions in the country of provision. Thus, it would be taken into account in the adjustments made to any method used for the determination of the adequacy of remuneration if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision. The Appellate Body concluded that the panel had not erred in its interpretation and application of Article 14(d) of the SCM Agreement in rejecting India's claim. Thus, the Appellate Body upheld, albeit for different reasons, the panel's finding rejecting India's claim that Section 351.511(a)(2)(iv) is inconsistent "as such" with Article 14(d).

4.4.4 Benefit – "as applied" claims

4.4.4.1 Provision of iron ore by the NMDC

The Appellate Body considered India's claims concerning the USDOC's determination that the NMDC provided iron ore for less than adequate remuneration. The Appellate Body first considered India's claim that the panel acted inconsistently with Article 11 of the DSU by making findings on the *ex post rationales* put forward by the United States to justify the USDOC's failure to consider certain domestic pricing information in determining a Tier I benchmark. The Appellate Body considered that the panel's findings were *alternative* findings, and that a panel does not act inconsistently with its duty under Article 11 merely because it makes *alternative* findings that might become relevant if the Appellate Body reverses other findings made by that panel. Thus, the Appellate Body rejected India's claim under Article 11 of the DSU, declined to review the panel's alternative findings, and declared these alternative findings moot and of no legal effect.

The Appellate Body then examined India's claims concerning the USDOC's exclusion of the NMDC's export prices from the determination of a Tier II benchmark for assessing whether the NMDC provided iron ore for less than adequate remuneration. The Appellate Body observed that the panel had rejected India's claim on the basis that Article 14(d) of the SCM Agreement does not require an investigating authority to rely on a government's domestic prices when determining market benchmarks because a government may set prices on the basis of public policy considerations rather than market principles. The Appellate Body considered that the fact that a government provider may set its export prices in pursuit of public policy objectives, rather than market-based profit maximization, does not permit a *per se* conclusion that Article 14(d) does not require the consideration of any export prices of government providers for the purpose of determining an alternative benchmark. As the basis for the panel's rejection of India's claim was in error, the Appellate Body reversed the panel's finding rejecting India's claim that the USDOC should have used the NMDC's export prices to determine a Tier II benchmark in the 2006, 2007, and 2008 administrative reviews. Upon examining the USDOC's determination, the Appellate Body considered that the USDOC did not provide a reasoned and adequate explanation as to why the benchmark data that it relied on, namely, world market prices from Australia and Brazil, are more

appropriate than the benchmark data that it had relied upon in previous reviews but subsequently excluded, namely, the NMDC's export prices at issue. The Appellate Body completed the legal analysis and found that the USDOC's exclusion of these prices is inconsistent with Article 14(d).

Finally, the Appellate Body considered India's claim concerning the USDOC's use of "as delivered" prices from Australia and Brazil as benchmarks for assessing whether the NMDC provided iron ore for less than adequate remuneration. Turning first to India's claim under Article 14(d) of the SCM Agreement, the Appellate Body considered whether, as India argued, the panel erred in finding that the "as delivered" prices from Australia and Brazil – that the USDOC used as benchmarks – reflect prevailing market conditions in India. With regard to the "as delivered" Brazilian price, the Appellate Body recalled that the panel considered that, because this price was based on a transaction made by an Indian steel producer established in India, it necessarily relates to the prevailing market conditions in India. The Appellate Body saw merit in India's argument that an isolated import transaction for a good may not necessarily reflect the prevailing market conditions for that good in the country of provision. In the Appellate Body's view, the fact that an importer has paid a price, inclusive of international delivery charges, for a particular good may, as an evidentiary matter, provide some indication as to the generally applicable delivery charges for that good in the country of provision. However, the Appellate Body did not consider that it can be inferred, without more, that a single, isolated import transaction for a particular good reflects or relates to prevailing market conditions for that good in the country of provision.

Turning to the "as delivered" prices from Australia and Brazil more generally, the Appellate Body recalled that the panel referred to evidence on the record and observed that, in the course of the countervailing duty investigation, NMDC officials had explained that the NMDC sets its domestic prices in the light of competition from Australia and Brazil, and therefore in the light of how much an Indian steel producer would be willing to pay to import iron ore from mines in those countries. For the panel, because the "as delivered" prices at issue indicate what an Indian steel producer would be "willing to pay" to import iron ore from Australia and Brazil, such prices necessarily relate to the prevailing market conditions in India. The Appellate Body expressed several concerns with the panel's reliance on the statement referred to above as a basis for rejecting India's claims. First, the Appellate Body noted that the USDOC's determination did not contain a reference to the statement relied on by the panel, or an explanation of how that statement supports the conclusion that "as delivered" prices from Australia and Brazil relate to prevailing market conditions in India. The Appellate Body thus expressed concern that the panel did not base its assessment of India's claims under Article 14(d) on reasoning provided by the USDOC in its written determination. Second, the Appellate Body considered that, although the panel relied on a statement by NMDC officials that, in setting the price for iron ore in the domestic market, the "NMDC reviews the negotiated international price when determining how much the purchaser would be willing to pay to import", it was not disputed that the reference to the "negotiated international price" is not a reference to a price inclusive of international delivery charges, but rather a reference to prices in a report which do not reflect the cost of international delivery. Thus, the statement relied on by the panel did not, in the Appellate Body's view, necessarily permit an inference that the NMDC's domestic prices were set based on international prices inclusive of international delivery charges. Third, the Appellate Body expressed concern that the statement relied on by the panel focuses solely on the NMDC. The Appellate Body considered that, without further explanation and substantiation, evidence focusing on one provider of the good in question in the country of provision may not be sufficient to establish the prevailing market conditions for that good. The Appellate Body therefore reversed the panel's findings rejecting India's claim that the USDOC's use of "as delivered" prices from Australia and Brazil in assessing whether the NMDC provided iron ore for less than adequate remuneration is inconsistent with Article 14(d) of the SCM Agreement.

Upon examining the USDOC's determination, the Appellate Body considered that the USDOC had not provided a reasoned and adequate explanation for concluding that world market prices from Australia and Brazil, adjusted to reflect the cost of international delivery to India, relate to the "prevailing market conditions" for iron ore in India. The Appellate Body reiterated that an analysis of prevailing market conditions in the country of provision requires an analysis of the market generally in order to draw a conclusion about the conditions prevailing in that market. The Appellate Body therefore completed the legal analysis and found that the USDOC's use of "as delivered" prices from Australia and Brazil in assessing whether the NMDC provided iron ore for less than adequate remuneration is inconsistent with Article 14(d) of the SCM Agreement.

4.4.4.2 Captive mining rights

India appealed the panel's rejection of India's claim that the USDOC's use of a methodology to construct a government price for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. In respect of grants of mining rights for iron ore and coal, the USDOC determined benefit by constructing government prices, and then comparing those prices with Tier I and Tier II benchmarks. The USDOC constructed the government prices by calculating royalties paid to the GOI for mining rights, and then adding per unit operational mining costs associated with the extraction of iron ore and coal. India argues that the panel erred under Article 14(d) by endorsing the USDOC's constructed price methodology. India's claim was premised on its view that, because the financial contribution at issue consists only of the GOI's grants of mining rights – i.e. what the GOI actually provided to the recipients, and what the GOI was actually paid for – the analysis must necessarily be limited to any benefit arising from the grant of the mining rights, and not the final extracted material in the form of iron ore and coal.

The Appellate Body recalled its conclusion that, in connection with the panel's financial contribution analysis in respect of a grant of mining rights, it was proper to consider that the provided good consists of the extracted minerals. Accordingly, the Appellate Body considered that it is permissible for an investigating authority in a benefit calculation to construct a price on the basis of any fees and royalties paid for the mining rights plus the cost plus profit of the extraction process. The Appellate Body noted that this is what the USDOC did when it calculated the royalties for the mining rights and then added operational mining costs associated with the extraction of the iron ore and coal, and that, in this case, India has not challenged the manner in which the USDOC actually constructed the government prices for iron ore and coal. The Appellate Body therefore concluded that, in the circumstances of this case, the panel did not err in finding that the USDOC did not act inconsistently with Article 14(d) in constructing government prices for iron ore and coal. The Appellate Body also rejected India's claim that the panel committed legal error under Article 11 of the DSU in refusing to assess India's claim regarding a good faith interpretation of Article 14(d). The Appellate Body considered that India presented arguments relating to a distinct legal claim that the United States had breached the international law principle of good faith in performing its treaty obligations, and that the panel was therefore warranted in rejecting this claim as not falling within its terms of reference. The Appellate Body therefore upheld the panel's finding rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

4.4.4.3 Steel Development Fund (SDF) loans

India appealed the panel's rejection of India's claim that the USDOC's determination that Steel Development Fund (SDF) loans confer a benefit is inconsistent with Articles 1.1(b) and 14(b) of the SCM Agreement. India argued that, under a proper understanding of the term "comparable commercial loan" in Article 14(b), the benchmark to be chosen must have a similar structure as the loan under challenge. According to India, because the steel producers that benefit from the loans also first contribute the funds to the SDF loan programme, the USDOC was required to use benchmark loans that have a similar entry fee.

The Appellate Body stated that a proper assessment under Article 14(b) examines what the total cost of the investigated loan is to the loan recipient, and whether there is a difference between that cost and the total cost of a comparable commercial loan. The Appellate Body considered that the distinction the panel drew between costs associated with the interest or repayment terms of a loan, and other costs arising from entry or administrative charges, does not seem to reflect accurately the cost of the relevant loans from the perspective of the recipient. Moreover, failing to take into account a cost that potentially alters a commercial actor's valuation of a loan simply because it does not relate to interest or repayment terms appears unduly artificial and contrary to the requirements of Article 14(b). The Appellate Body therefore considered that the panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient for purposes of a benchmark analysis, and that the panel therefore erred in finding that Article 14(b) does not require the USDOC to take into account the costs incurred by SDF loan recipients in obtaining SDF loans. The Appellate Body therefore reversed the panel's finding rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit, within the meaning of Article 1.1(b) and 14(b) of the SCM Agreement.

The Appellate Body then turned to consider whether it could complete the legal analysis. The Appellate Body noted the panel's reliance on a GOI statement that, once collected, the steel levies are remitted to the SDF. The Appellate Body noted, however, that this statement does not provide any indication as to the source of the funds, and therefore did not appear to support the conclusion that the steel levies necessarily consist of consumer funds. The panel also did not refer to the USDOC's own reasoning as it pertains to the question of whether participating steel companies incur entry costs in the funding and allocation of SDF loans and the Appellate Body noted conflicting statements in the USDOC's underlying determinations relating to the USDOC's selection of a benchmark loan. In the light of disagreement between the parties, and conflicting indications in the USDOC and panel records, regarding the question of whether, and to what extent, entry costs for steel companies affected the terms on which the SDF Managing Committee issues SDF loans, the Appellate Body did not consider that it had a basis upon which to complete the legal analysis of whether the prime lending rates on which the USDOC relied constitute a "comparable commercial loan" within the meaning of Article 14(b) of the SCM Agreement.

4.4.5 Specificity

India appealed, under Articles 1.2 and 2.1 of the SCM Agreement, aspects of the panel's analysis in respect of the USDOC's determination that the sale of iron ore by the NMDC is *de facto* specific within the meaning of Article 2.1(c). The factor on which the USDOC based its *de facto* specificity finding concerns the "use of a subsidy programme by a limited number of certain enterprises", and India presented three challenges to the panel's analysis concerning this factor under Article 2.1(c). First, India submitted that the panel erred in interpreting this factor because it failed to recognize that the "limited number" of users of the subsidy must form a subset of enterprises within a broader group of "certain enterprises". The Appellate Body interpreted the first factor of Article 2.1(c) and concluded that the term "limited number" is meant to convey a finite and limited quantity of "certain enterprises". According to the Appellate Body, this suggests that a limited quantity of enterprises or industries qualifying as "certain enterprises" must be found to have used the subsidy programme, without requiring that the limited quantity represents a subset of some larger grouping of "certain enterprises". Such a reading is also compatible with a contextual understanding of the term "certain enterprises" and its relationship to the term "limited number"; the latter serves to determine whether the known and particularized enterprises or industries can be quantitatively assessed as limited in number. The Appellate Body therefore upheld the panel's finding that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme.

Second, India argued that the panel erred in finding that Article 2.1(c) of the SCM Agreement did not require an examination of whether the subsidy programme discriminates between "certain enterprises" and other, "similarly situated" enterprises. The Appellate Body did not see a textual basis in Article 2.1(c), and specifically in the terms "certain" and "limited number", for a requirement to identify which enterprises or industries are "similarly situated" prior to then having to assess whether only a subset of those "similarly situated" have *de facto* access to, or are otherwise eligible for, the subsidy. The Appellate Body moreover considered that India had not explained why trade distortions potentially resulting from the selective distribution of subsidies would be more likely to result where the set of subsidy recipients constitutes a subset of similarly situated enterprises. In addition, that a *de facto* analysis of a subsidy granted to a single industry would not, in India's view, indicate the existence of specificity is difficult to square with the aim of determining whether a subsidy is specific to "certain enterprises". The Appellate Body also rejected India's reliance on language from the Appellate Body report in *US – Large Civil Aircraft (2nd complaint)*, considering that this analysis was particular to the third factor (i.e. the granting of disproportionately large amounts of subsidy to certain enterprises) in Article 2.1(c), which necessarily involves a relational concept not present in the first factor (i.e. the use of a subsidy programme by a limited number of certain enterprises). The Appellate Body therefore upheld the panel's finding rejecting India's argument that specificity must be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities.

Third, India argued that the panel erred in finding that the provision of goods by a government can be *de facto* specific, merely based on the inherent limitations of the goods provided. In India's view, the panel's interpretation creates redundancy in the SCM Agreement by permitting the authority to find specificity as a matter of course. The Appellate Body considered that it may be the case that, in respect of a provision of goods, there is a greater likelihood of a finding

of specificity in instances where the input good is used by only a circumscribed group of entities and/or industries. At the same time, this does not mean that *every* provision of goods with limitations inherent in the characteristics of the goods will necessarily lead to a finding of specificity. The Appellate Body noted, however, that the analyses under Articles 1.1(a)(1)(iii) and 2.1(c) focus on different legal questions, neither of which is itself capable of rendering a determination of a specific subsidy. The Appellate Body upheld the panel's finding rejecting India's argument that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless the subsidy is further limited to a subset of this industry.

4.4.6 Article 12.7 of the SCM Agreement

India requested the Appellate Body to reverse the panel's rejection of a number of India claims regarding the consistency of Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations, "as such" and "as applied", with Article 12.7 of the SCM Agreement. India claimed on appeal that the panel erred in its interpretation and application of Article 12.7, and that the panel failed in its duty under Article 11 of the DSU to make an objective assessment of the matter before it, in respect of a number of its claims.

First, the Appellate Body considered India's claim that the panel erred in its interpretation of Article 12.7 of the SCM Agreement. India argued that the panel's statement that investigating authorities are not required under Article 12.7 to engage in a comparative evaluation of all available evidence with a view to selecting the best information reflected an incorrect interpretation. Rather, India argued that Article 12.7 includes what it termed an "obligation of conduct" to engage in a comparative evaluation of all of the available evidence, prior to making a determination on the "facts available". The Appellate Body reaffirmed its finding in *Mexico – Anti-Dumping Measures on Rice* that, pursuant to Article 12.7, an investigating authority must use those "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination. The Appellate Body found that, under this legal standard, an investigating authority is called upon to engage in a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case. Where there are several "facts available" from which to choose, the Appellate Body considered that it would follow naturally that this process of reasoning and evaluation would involve a degree of comparison. The Appellate Body disagreed with India's argument that Article 12.7 necessarily entails a comparative evaluation in all cases, since the extent and nature of the evaluation required depends on the circumstances of a given case, e.g. on whether one or several sets of information are otherwise available to replace the missing information. Turning to the specific statement of the panel appealed by India, the Appellate Body observed that it is somewhat ambiguous and open to different readings. To the extent it can be read to exclude, in all instances, a comparative evaluation of all available evidence from the legal standard for Article 12.7 of the SCM Agreement, the Appellate Body modified the panel's finding and found that Article 12.7 requires a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case.

Second, the Appellate Body considered India's claim that the panel failed in its duty under Article 11 of the DSU to make an objective assessment of the meaning of Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations by disregarding material evidence. The Appellate Body considered that, where a party seeks to support its argument on the meaning and operation of a domestic measure with evidence beyond its text, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies and domestic court rulings. While a review of such evidence may ultimately reveal that it is not particularly relevant, that it lacks probative value, or that it is not of a nature or significance to establish a *prima facie* case, the Appellate Body considered that this can only be determined after its probative value has been reviewed and assessed. The Appellate Body noted that India submitted evidence on the meaning of the challenged laws in the form of judicial decisions, the US Statement of Administrative Action, and quantitative and qualitative information on their application, and that the United States submitted evidence on their legislative history, as well as evidence of examples of their application. Since the panel's assessment of these US laws did not address this evidence, and was limited to reproducing excerpts of text of the laws together with some cursory observations, the Appellate Body found that the panel failed to comply with its duty

under Article 11 of the DSU. Consequently, the Appellate Body reversed the panel's finding that India failed to establish a *prima facie* case that Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations are inconsistent "as such" with Article 12.7 of the SCM Agreement.

The Appellate Body then considered whether it could complete the legal analysis. In this regard, the Appellate Body recalled that India made two alternative claims of inconsistency, first that the very grant of an authorization in the laws to draw an inference that is adverse to the interests of non-cooperating parties is inconsistent with Article 12.7; and second that, although the laws are "innocuous" on their face, the evidence beyond their text establishes that they are applied mandatorily and are hence inconsistent with Article 12.7 of the SCM Agreement. Turning to the first of these claims, the Appellate Body recalled that, under its interpretation of Article 12.7, and particularly in the light of the context provided by Articles 12.4 and 12.11 of the SCM Agreement and Annex II to the Anti-Dumping Agreement, the permissibility of using an inference derived from the procedural circumstances in which information is missing depends on whether such use comports with the legal standard for Article 12.7. The Appellate Body added that the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7. Turning to the challenged laws, the Appellate Body considered that, in the light of their discretionary framing, the use of an adverse inference is capable in this case of being limited to those instances where it accords with the legal standard for Article 12.7. The Appellate Body then evaluated India's claim that the laws represent a system created to punish non-cooperation by drawing adverse inferences in every case of non-cooperation. Contrary to India's claim, the Appellate Body's review of this evidence did not establish conclusively that the laws require the USDOC to act inconsistently with of Article 12.7 reflexively in all cases of non-cooperation. Thus, the Appellate Body found that India did not establish that Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations are "as such" inconsistent with Article 12.7 of the SCM Agreement.

The Appellate Body then considered India's claims regarding the panel's "as applied" findings under Article 12.7 of the SCM Agreement. Beginning with India's appeal that the panel applied an "unnecessary burden of proof" regarding India's claim on the use of a "rule" to select the highest non-*de minimis* subsidy rates, the Appellate Body observed that the panel did not appear to have analysed and discussed the existence or scope of this "rule", or whether India sufficiently identified the particular instances of its alleged application. The Appellate Body viewed this as problematic, since the existence and scope of the "rule", and whether it was in fact applied in the instances claimed by India, appeared to constitute threshold matters. Notwithstanding those concerns, the Appellate Body noted that India's claim on appeal did not call for an assessment of whether India discharged its burden of proof, but rather, whether the panel erred in the burden of proof that it set. In this regard, the Appellate Body noted that India brought a claim before the panel in relation to a number of instances of application of the measure, and requested it to find that each specific application resulted in a breach of Article 12.7. The Appellate Body found that the burden of proof set by the panel, namely, requiring India to explain how each specific application of the measure breached the legal standard for Article 12.7, was not in error. Rather, the Appellate Body considered that India could not have made a *prima facie* case for its specific "as applied" claims without demonstrating that each impugned application was inconsistent with Article 12.7. Thus, the Appellate Body upheld the panel's finding that India failed to establish a *prima facie* case of inconsistency with Article 12.7 of the SCM Agreement. The Appellate Body also rejected India's claim that the panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter before it in rejecting India's "as applied" claim against the 2013 sunset review.

4.4.7 New subsidy allegations in administrative reviews

India appealed the panel's finding rejecting India's claims that the examination by the USDOC of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement. India argued that the panel erred in interpreting the relationship between Articles 11 and 21 of the SCM Agreement by concluding that the requirements of Article 11 do not apply to administrative reviews conducted pursuant to Article 21 of the SCM Agreement. India also alleged that the panel breached its duties under Articles 11 and 12.7 of the DSU to conduct an objective assessment of the matter before it and to provide a "basic rationale" for its findings. Consequently, India requested the Appellate Body to reverse the panel's finding rejecting India's claims under Articles 11.1, 13.1, 22.1, and 22.2 of the

SCM Agreement, and further requested the Appellate Body to complete the legal analysis in respect of these claims.

India's position on appeal differed somewhat from its position before the panel. Before the panel, India contended that Article 21 of the SCM Agreement does not allow an investigating authority to examine new subsidy allegations in an administrative review. However, India did not appeal the panel's finding that an investigating authority may examine new subsidy allegations in the conduct of an administrative review pursuant to Article 21 of the SCM Agreement. India also did not challenge the precise considerations that the USDOC took into account in deciding to examine each of the new subsidy allegations at issue. Rather, India's position on appeal was that, where any Article 21 review is conducted and involves the examination of new subsidy allegations, such examination must comply with the requirements set out in Articles 11, 13, and 22 of the SCM Agreement.

The Appellate Body determined that Articles 21.1 and 21.2 of the SCM Agreement permit investigating authorities to examine new subsidy allegations in the conduct of an administrative review. Such examination, while subject, *mutatis mutandis*, to the public notice requirements set out in Article 22 of the SCM Agreement, would not be subject to the obligations set out in Articles 11 and 13 of the SCM Agreement. The Appellate Body added that Article 21 of the SCM Agreement requires an investigating authority to establish that there is a sufficiently close nexus between the subsidies that are the subject of the original investigation and the new subsidy allegations that the investigating authority proposes to examine as part of its administrative review. However, India's appeal did not call upon the Appellate Body to determine which of these factors were applicable or ought to have been taken into account in this case. The Appellate Body therefore upheld the panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement, but reversed the panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 22.1 and 22.2 of the SCM Agreement.

The Appellate Body then assessed whether it was in a position to complete the legal analysis in respect of India's claims under Articles 22.1 and 22.2 of the SCM Agreement. The Appellate Body observed that the panel, having determined that Article 22 does not apply to administrative reviews, did not further examine India's claims under Article 22. Moreover, the Appellate Body did not find, on the panel record, sufficient arguments and evidence specific to the eight new subsidy allegations to which India's claims related that would have assisted the Appellate Body in addressing this issue. For these reasons, the Appellate Body was unable to complete the legal analysis in respect of India's claim under Articles 22.1 and 22.2 of the SCM Agreement. The Appellate Body also rejected India's claims that the panel acted inconsistently with Articles 11 and 12.7 of the DSU.

4.4.8 Cross-cumulation

With regard to Article 15 of the SCM Agreement, the United States alleged that the panel erred in finding that Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 do not authorize investigating authorities to assess cumulatively the effects of imports that are not subject to countervailing duty investigations ("non-subsidized imports") with the effects of imports that are subject to such investigations ("subsidized imports"). The Appellate Body found that the text of Article 15.3 is clear in stipulating that only subsidized imports may be subject to a cumulative assessment of the effects of imports under Article 15.3. Furthermore, the fact that several provisions of Article 15, as well as other provisions throughout Part V of the SCM Agreement refer to "subsidized imports", rather than to "imports" in general, suggests that the injury analysis must be limited to consideration of "subsidized imports".

The Appellate Body further considered Article 3.1 of the Anti-Dumping Agreement as relevant context, noting that it contains a similar requirement concerning injury determinations in anti-dumping investigations. The Appellate Body recalled that with respect to this provision it had previously held that investigating authorities must ensure they consider only imports that are dumped, and exclude imports that are not dumped. The Appellate Body held that the same rationale applies in the context of Article 15.1 of the SCM Agreement. Accordingly, the Appellate Body found that the panel did not err in finding that Articles 15.3 and 15.1, 15.2, 15.4,

and 15.5 do not authorize investigating authorities to assess cumulatively the effects of non-subsidized, dumped imports with the effects of subsidized imports.

In addition, the Appellate Body found no support in the SCM Agreement for the United States' argument that Article 15 of the SCM Agreement must allow an investigating authority to take account of the effects that all unfairly traded imports (i.e. dumped as well as subsidized imports) are having on the domestic industry. Moreover, the Appellate Body found that the panel did not err in rejecting the United States' argument that Article 15.3 is silent on the issue of whether cross-cumulation of the effects of dumped and subsidized imports is permissible. The Appellate Body agreed with the panel that Article 15 is not silent on the question of cross-cumulation and concurred with the panel that imports being subject to simultaneous countervailing duty investigations is a necessary pre-condition for a cumulative assessment to be undertaken consistently with Article 15.3 of the SCM Agreement.

The United States further alleged that the panel failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it, because it failed to provide reasoning as to the meaning of the domestic law at issue and in particular why Section 1677(7)(G) requires, in certain situations, that the USITC assess cumulatively the effects of subsidized imports with the effects of dumped, non-subsidized imports. The Appellate Body noted the limited nature of the parties' submissions before the panel as to the meaning of Section 1677(7)(G) and whether it requires the USITC to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Nevertheless, the Appellate Body found that the panel was required to analyse whether and to what extent Section 16777(7)(G) requires the USITC to assess cumulatively the effects of subsidized imports with the effects of dumped, non-subsidized imports. The Appellate Body found that the panel had failed to articulate clearly the scope of its finding of inconsistency, and thus failed to comply with its duty under Article 11 of the DSU to conduct an objective assessment of the matter before it. Consequently, the Appellate Body reversed the panel's finding that Section 1677(7)(G) is inconsistent "as such" with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

Having reversed the panel's finding that Section 1677(7)(G) is inconsistent "as such" with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, the Appellate Body, in seeking to complete the legal analysis, turned to consider whether Section 1677(7)(G) indeed requires the USITC to cumulate the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Section 1677(7)(G) contemplates three scenarios. With regard to two scenarios under Section 1677(7)(G)(i and ii), the Appellate Body concluded that it was unclear whether these provisions require such cross-cumulation, namely, where petitions to initiate countervailing duty investigations or anti-dumping duty investigations were filed on the same day, and where countervailing duty investigations or antidumping duty investigations were initiated by the investigating authority investigation on the same day. However, with regard to the third scenario under Section 1677(7)(g)(iii), the Appellate Body found that it does require the USITC to cumulate the effects of subsidized imports with the effects of non-subsidized, but dumped imports. More specifically, Section 1677(7)(g)(iii) requires the investigating authority to cumulatively assess the volume and effect of subject merchandise from all countries with respect to which petitions to initiate countervailing duty investigations *or* anti-dumping duty investigations were filed *and* countervailing duty investigations *or* antidumping duty investigations were initiated by the investigating authority on the same day. Thus, the Appellate Body concluded that Section 1677(7)(G)(iii) of the US Statute is inconsistent "as such" with Article 15.3 and with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

4.5 Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R

This dispute concerned countervailing duties imposed by the United States following 17 countervailing duty investigations initiated by the US Department of Commerce (USDOC) between 2007 and 2012.[34]

[34] China's request for the establishment of a panel (WT/DS437/2) originally set forth "as applied" claims against 22 countervailing duty investigations. However, in its first written submission to the Panel, China stated that it did not wish to pursue its claims with respect to five of the 22 investigations listed in its panel request.

Before the panel, China challenged several aspects of the investigations leading to the imposition of these duties, including the United States' application of an alleged "rebuttable presumption" to determine whether Chinese state-owned enterprises (SOEs) can be characterized as "public bodies" within the meaning of the SCM Agreement. Specifically, China claimed that: (i) the USDOC's findings of financial contribution are inconsistent with Article 1.1(a)(1) of the SCM Agreement because the USDOC incorrectly determined, or did not have a sufficient basis to determine, that certain SOEs are "public bodies"; (ii) the USDOC's "rebuttable presumption" is, as such, inconsistent with Article 1.1(a)(1) of the SCM Agreement; (iii) the USDOC's initiation of four investigations is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement due to insufficient evidence that SOEs constitute "public bodies"; (iv) the USDOC's determinations that a benefit was conferred because SOEs provided inputs for less than adequate remuneration were inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement; (v) the USDOC's findings of specificity are inconsistent with Articles 2.1 and 2.4 of the SCM Agreement; (vi) the USDOC's initiation of investigations is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement due to insufficient evidence of specificity; (vii) the USDOC's use of adverse "facts available" is inconsistent with Article 12.7 of the SCM Agreement; (viii) the USDOC's findings of regional specificity are inconsistent with Articles 2.2 and 2.4 of the SCM Agreement; (ix) The USDOC's initiation of investigations is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in two investigations; (x) the USDOC's determination that export restraints provided a "financial contribution" is inconsistent with Article 1.1(a) of the SCM Agreement in two investigations; and (xi) in each instance where the panel made a finding of inconsistency under the SCM Agreement, the United States had also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

The panel found that: (i) in 12 countervailing duty investigations, the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC found that SOEs were public bodies; (ii) the USDOC's policy to presume that a majority government-owned entity is a public body is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement; (iii) in four investigations, China failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of a financial contribution; (iv) in 12 investigations, China failed to establish that the USDOC acted inconsistently with the United States' obligations under Articles 14(d) or 1.1(b) of the SCM Agreement by rejecting in-country private prices in China; (v) in 12 investigations, the United States acted inconsistently with the last sentence of Article 2.1(c) of the SCM Agreement, but China failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 2.1(c) by failing: (a) to apply the first of the "other factors" in the provision at issue; (b) to apply a "subsidy program"; or (c) to identify a "granting authority"; (vi) in 14 investigations, China failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of specificity; (vii) in 13 investigations, China had not established that the USDOC acted inconsistently with the United States' obligations under Article 12.7 of the SCM Agreement by not relying on facts available; (viii) in six investigations, the USDOC acted inconsistently with Article 2.2 of the SCM Agreement by failing to establish regional specificity; (ix) in two investigations, the USDOC acted inconsistently with the United States' obligations under Article 11.3 of the SCM Agreement by initiating investigations in respect of certain export restraints; and (x) consequently, the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

On appeal, China challenged the panel's findings that China failed to establish that the USDOC acted inconsistently with the United States' obligations under Articles 14(d) and 1.1(b) of the SCM Agreement. In particular, China alleged that the panel: (i) erred in its interpretation of Article 14(d) of the SCM Agreement in finding that China's claims rested on an erroneous interpretation of that provision; (ii) acted inconsistently with Article 11 of the DSU in finding that China failed to establish the factual premise for its claims in four investigations; and (iii) erred in its application of Articles 14(d) and 1.1(b) of the SCM Agreement in finding that China failed to establish that the USDOC's benefit determinations are inconsistent with these provisions. With respect to the panel's findings on the USDOC's determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement in respect of 12 investigations, China maintained that the panel erred in: (i) finding that the USDOC did not act inconsistently with the United States' obligations under Article 2.1 of the SCM Agreement by analysing specificity exclusively under Article 2.1(c); (ii) rejecting China's claims that the USDOC acted inconsistently with the United States' obligations under Article 2.1(c) of the SCM Agreement by failing to identify

a "subsidy programme"; and (iii) rejecting China's claims that the USDOC acted inconsistently with the United States' obligations under Article 2.1 of the SCM Agreement by failing to identify a granting authority. As regards the panel's findings under Article 12.7 of the SCM agreement on the instances of use of adverse "facts available" by the USDOC, China claimed that the panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it.

In its other appeal, the United States argued that the panel erred in finding that China's panel request, as it relates to its claims under Article 12.7 of the SCM Agreement, is not inconsistent with Article 6.2 of the DSU.

4.5.1 The panel's terms of reference

China's panel request alleged that, with respect to all of the countervailing duty investigations identified therein in which the USDOC issued preliminary or final determinations, the United States acted inconsistently with "Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called 'adverse' facts available, in manners that were inconsistent with that provision". China's panel request also stated that it was bringing "as applied" claims "in respect of each instance in which the USDOC used facts available, including 'adverse' facts available, to support its findings of financial contribution, specificity, and benefit". The United States argued on appeal that China'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, for failing to "plainly connect" the "facts available" obligation in Article 12.7 of the SCM Agreement to the 22 investigations in the panel request.

The Appellate Body noted that the two requirements under Article 6.2 of the DSU to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" are central to the establishment of a panel's jurisdiction, and fulfils a due process objective by putting the respondent and the third parties on notice of the case against them. Article 6.2 requires that the legal basis of the complaint (the claim) be set out in the panel request in a manner that is sufficient to present the problem clearly. A "claim" is an allegation that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. While a panel request must set out the claim(s), there is no requirement under Article 6.2 that a panel request must provide arguments in support thereof. While arguments are put forth to prove a claim, a "brief summary" of the claim aims to explain succinctly how or why a measure at issue is considered to be violating a WTO obligation.

The Appellate Body noted that, under Article 6.2 of the DSU, it is the measures at issue that are to be "plainly connected" to the provision at issue, which in this case refers to Article 12.7 of the SCM Agreement, and not to the "instances" of the use of facts available by the USDOC. The language of China's panel request was clear that China was challenging all "instances" of the use of facts available by the USDOC. China's panel request also specified that China's claims under Article 12.7 concerned those instances in which the USDOC used facts available "in support of its findings of financial contribution, specificity and benefit" in the context of the specific measures at issue. The Appellate Body disagreed with the United States that the inadequacy of the identification of instances in China's panel request was evidenced by the inconsistency between China's assertions at the initial stages of the dispute (i.e. all instances of the use of facts available would be challenged), and the instances identified in the later stages (i.e. "only 48 instances of the use of 'adverse' facts available were being challenged"). The Appellate Body noted that a complainant's prerogative to narrow or abandon its claims is different from an assessment of the consistency of a panel request with the requirements under Article 6.2, which must be assessed in the light of the language used in the panel request at the time it was filed.

The Appellate Body also rejected the United States' argument that Article 12.7 contained multiple, distinct obligations that made it necessary for China to specify which of the various obligations under Article 12.7 the United States was alleged to have breached. The fact that, under Article 12.7, an investigating authority can resort to facts available in different scenarios involving non-cooperation specified in that provision does not mean that Article 12.7 contains multiple, distinct obligations. Instead, Article 12.7 imposes the obligation on an investigating authority to use those facts available that reasonably replace the missing information, with a view to arriving at an accurate determination.

China's panel request indicated that China took issue with the "manners" in which the USDOC "resorted to facts available, and used facts available, including so-called 'adverse' facts available". For the Appellate Body, this language shows that the challenge concerned the consistency of each instance in which the USDOC used facts available with the "manners" in which an investigating authority can act inconsistently with Article 12.7. Thus, the "problem", for the purpose of Article 6.2, was the "manners" in which the USDOC "resorted to" and "used facts available". The Appellate Body agreed with the panel that providing further details would amount to setting out arguments, which do not need to be included in a panel request. For these reasons, the Appellate Body upheld the panel's finding that China's panel request was consistent with Article 6.2.

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

China argued on appeal that the panel erred in finding that China failed to establish that the USDOC acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting private prices in China as benchmarks in its benefit analyses. China argued that the legal standard for determining what constitutes "government" – in particular, a "public body" – for purposes of the financial contribution inquiry under Article 1.1(a)(1)(iii) of the SCM Agreement should also apply when determining what constitutes "government" for purposes of the selection of a benefit benchmark under Article 14(d). According to China, the panel erred in its interpretation of Article 14(d), and acted inconsistently with Article 11 of the DSU in concluding that China failed to establish that the USDOC treated SOEs as public bodies and as part of the government in the collective sense. Accordingly, China requested the Appellate Body to reverse the panel's ultimate finding that China failed to establish that the USDOC acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement in respect of the benefit analysis in four investigations, namely, the Oil Country Tubular Goods (OCTG), Solar Panels, Pressure Pipe, and Line Pipe investigations.

According to the United States, the panel properly concluded that there was nothing in the text of Article 14(d) or in WTO jurisprudence requiring the same analysis with respect to the financial contribution and benefit elements of a subsidy, as these are distinct aspects of a countervailing duty investigation that play different roles. The United States argued that China's approach would prevent investigating authorities from properly analysing the ways in which a government can interfere in a given marketplace and distort prices, and would result in a benefit calculation that would not capture how much better off the recipient is through a financial contribution.

4.5.2.1 The panel's interpretation of Article 14(d) of the SCM Agreement

The Appellate Body agreed with China that there is a single legal standard that defines the term "government" under the SCM Agreement. The term "government" under Article 1.1(a)(1) of the SCM Agreement, encompasses both the government in the "narrow sense" and "any public body within the territory of a Member". However, the fact that the SCM Agreement establishes a single definition does not mean that, under Article 14(d), a proper analysis for selecting a benefit benchmark is dependent on an examination of whether any relevant entities in the market fall within the definition of "government", including on the basis of a finding that an SOE is a public body. The existence of a single standard for defining "government" does not answer the question of whether the prices of goods provided by private or government-related entities in the country of provision are market determined for purposes of selecting a benefit benchmark.

The Appellate Body recalled that the second sentence of Article 14(d) prescribes that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase". In *US – Carbon Steel (India)*, the Appellate Body found that "prevailing market conditions" in the context of Article 14(d) "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices". The inquiry under Article 14(d) has a market orientation because it requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to prevailing market conditions in the country of provision. Thus, any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in the country of provision. Proper benchmark prices for purposes of the benefit determination would normally emanate from the market for the goods in the country of provision. To the extent

that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d). According to the Appellate Body, such in-country prices could emanate from a variety of sources, including private or government-related entities.

The Appellate Body further noted its finding in *US – Carbon Steel (India)* that investigating authorities bear the responsibility of conducting the necessary analysis in order to determine whether the proposed benchmark prices are market determined such that they can be used to assess whether remuneration is less than adequate. This responsibility encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts, and to base a determination on positive evidence on the record. The chapeau of Article 14 requires investigating authorities to explain adequately, consistent with the guidelines set out in the provision, the application of the methodology to calculate the amount of benefit that is conferred by a government-provided financial contribution. According to the Appellate Body, what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benefit benchmark will, however, 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 that an investigating authority seeks to ensure that it may base its determination on positive evidence on the record. In all cases, in arriving at a proper benchmark, an investigating authority must explain the basis for its conclusions in its determinations.

The Appellate Body noted that, depending on the circumstances, some types of prices may, from an evidentiary standpoint, be more easily found to constitute market-determined prices in the country of provision. In *US – Carbon Steel (India)*, the Appellate Body observed that "the primary benchmark, and therefore the starting point of the analysis in determining a benchmark for the purposes of Article 14(d)…, is the price at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision". This is because private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, there is no hierarchy, in the abstract, between in-country prices from different sources that can be relied upon in arriving at a proper benchmark because the issue of whether a price may be relied upon for benefit benchmarking purposes under Article 14(d) is not a function of its source, but whether the price is a market-determined price reflective of prevailing market conditions in the country of provision.

The Appellate Body pointed out that, while in-country private prices may serve as the starting point of the analysis under Article 14(d), this does not mean that, having identified such prices, the analysis must necessarily end there. Prices of goods provided by government-related entities, other than the entity providing the financial contribution at issue, must also be examined to determine whether they are market determined that can form part of a proper benchmark. The reason why the prices of goods provided by government-related entities for which there has not been a "public body" determination need to be examined in selecting a benefit benchmark under Article 14(d) is because there is no legal presumption under this provision that in-country prices from any particular source can or should be discarded in a benchmark analysis. Rather, Article 14(d) requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark. Although prices found to exist in the market for the good in question in the country of provision should normally be taken into account in identifying a proper benchmark, there may be circumstances in which the use of such in-country prices would not be appropriate. In *US – Carbon Steel (India)*, the Appellate Body observed that it would not be appropriate to rely on such prices when they are not market determined, as "a government, in its role as a provider of a good, may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align". In such circumstances, those prices cannot be said to be market determined. The Appellate Body emphasized that the ability of a government provider to have such an influence on in-country private prices presupposes that it has sufficient market power to do so.

The Appellate Body noted that, in conducting the necessary analysis to determine whether in-country prices are distorted, an investigating authority may be called upon to examine various aspects of the relevant market. Although a government's predominant role as a supplier in the market makes it likely that prices will be distorted, the distortion of in-country prices must be established on the basis of the particular facts underlying each countervailing duty investigation.

In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body indicated that an investigating authority may reject in-country prices if there is price distortion, and, thus, the analysis is not limited to determining whether the government is a predominant supplier. The Appellate Body cautioned against equating the concept of government predominance with the concept of price distortion, and highlighted that the link between the two concepts is an evidentiary one. Also, in conducting the necessary analysis to determine whether in-country prices are distorted or market determined, an investigating authority may be called upon to examine "the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices." Such an analysis may lead an investigating authority to conclude that in-country prices cannot be relied upon in determining a benchmark for the purposes of Article 14(d), and that an alternative benchmark should be employed. The Appellate Body, however, underscored the importance of making appropriate adjustments to ensure that alternative benchmarks reflect prevailing market conditions in the country of provision.

Thus, while the Appellate Body agreed with China that there is a single definition of the term "government" for purposes of the SCM Agreement, it did not consider that the panel erred by rejecting China's claim partly on the basis that "a government can distort prices in other ways than through its role as a provider of the financial contribution." China's argument that there is a single standard for defining the term "government" did not answer the question of whether a proposed in-country price is a market-determined price for the same or similar goods in the country of provision and, thus, whether it may serve as a benchmark for determining benefit.

Furthermore, while the Appellate Body agreed with China that, in *US – Anti-Dumping and Countervailing Duties (China)*, the focus of the analysis was not on the same interpretative issue as raised by China in this dispute, the Appellate Body considered that its report in *US – Anti-Dumping and Countervailing Duties (China)* clarified several issues relevant for addressing China's claims in this case. In that dispute, the Appellate Body explained that price distortion must be established on a case-by-case basis and that an investigating authority cannot base a finding of price distortion merely on the finding that the government is a predominant supplier, and cannot refuse to consider evidence relating to factors other than market share.

The Appellate Body considered that the panel correctly relied on the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* in rejecting China's argument that "SOE presence in the market could support a distortion finding only if the SOEs at issue were properly found to be public bodies within the meaning of Article 1.1(a)(1)."

In the Appellate Body's view, China's argument was premised on the understanding that it is sufficient for purposes of establishing a *prima facie* case of inconsistency under Article 14(d) with respect to each of the USDOC's benefit determinations at issue to show that: (i) the USDOC's price distortion findings were predicated on its equation of SOEs with government; and (ii) the USDOC's equation of SOEs with government was not made in accordance with the legal standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body rejected China's argument that the decision to have recourse to an alternative benchmark was inconsistent with Article 14(d) if it is established that the SOEs were equated with government without meeting the legal standard in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body stated that, instead of hinging on whether a government-owned entity has been properly found to constitute a public body, a finding of inconsistency with Article 14(d) in the selection of a benefit benchmark depends on whether or not the investigating authority at issue conducted the necessary market analysis to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate.

While the Appellate Body acknowledged that investigating authorities may have to examine the structure of the relevant market, including the nature of the entities operating in that market, their respective market shares, and any entry barriers, it nevertheless emphasized that evidence relating to government ownership of SOEs and their respective market shares does not in itself provide a sufficient basis for concluding that in-country prices are distorted. Investigating authorities may be required to assess "the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices". Thus, investigating authorities may be

called upon to examine the conditions of competition in the relevant market in order to assess whether the government is influencing the pricing conduct of any government-related or private entities. The Appellate Body recalled that the specific type of analysis that an investigating authority must conduct for the purpose of arriving at a proper benchmark 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 additional information that an investigating authority may seek in order to base its determination on positive evidence on the record. In all cases, the Appellate Body stressed that, in arriving at a proper benchmark, an investigating authority must provide a reasoned and adequate explanation of the basis for its conclusions in its determination. Once an investigating authority has properly established and explained that in-country prices are distorted, it is warranted to have recourse to an alternative benchmark for the benefit analysis under Article 14(d).

Thus, while there is a single definition of "government" for purposes of the SCM Agreement, it does not follow that, in determining the appropriate benefit benchmark under Article 14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to be government in the narrow sense, or public bodies. Because the issue of whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but whether it is a market-determined price reflective of prevailing market conditions in the country of provision, the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices other than the financial contribution at issue.

4.5.2.2 China's claim under Article 11 of the DSU

China argued that the panel acted inconsistently with Article 11 of the DSU in finding that China failed to establish the "factual premise" of its claims, i.e. that the USDOC actually treated SOEs as public bodies and thus as part of the government in the collective sense in the context of the benefit analysis in the four countervailing duty investigations.

The Appellate Body understood China's claim under Article 11 to be premised on its interpretation of Article 14(d) of the SCM Agreement. Having rejected China's arguments concerning the panel's findings regarding the legal predicate of China's claim, the Appellate Body saw no need to make additional findings with respect to China's claim regarding the factual predicate of its claims under Article 11 of the DSU in order to provide a positive solution to this dispute.

4.5.2.3 The panel's application of Article 14(d) of the SCM Agreement

The panel rejected China's argument that "SOE presence in the market could support a distortion finding only if the SOEs at issue were properly found to be public bodies within the meaning of Article 1.1(a)(1)". China argued that the panel erred in its application of Article 14(d) of the SCM Agreement to the USDOC's determinations at issue by applying the reasoning in *US – Anti-Dumping and Countervailing Duties (China)* as regards the USDOC's benefit findings. The Appellate Body considered this to be in line with its findings in that case, to the extent that the panel understood these findings as indicating that the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, and that a proper finding that recourse to an alternative benchmark is justified requires an investigating authority to carry out the necessary market analysis in order to determine whether the proposed benchmark prices are market determined or distorted by government intervention.

Nonetheless, the Appellate Body did not consider that the panel properly applied the standard required by Article 14(d) of the SCM Agreement to the challenged determinations. The panel failed to conduct a case-by-case analysis of whether the USDOC had properly examined whether the relevant in-country prices are market determined or distorted by government intervention in each of the investigations at issue. Rather, the panel simply assumed that because the Appellate Body had faced a similar situation in *US – Anti-Dumping and Countervailing Duties (China)*, China failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 14(d). In the light of the correct interpretation of Article 14(d), the Appellate Body did not consider the panel's analysis and reasoning sufficient to conclude that the USDOC properly rejected in-country prices in China as benchmarks for purposes of the benefit analysis.

The Appellate Body therefore reversed the panel's finding upholding the USDOC's rejection of private prices as potential benchmarks in the investigations under challenge on the grounds that such prices were distorted. The Appellate Body also reversed the panel's conclusion that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for the relevant challenged investigations. Consequently, as requested by China, the Appellate Body reversed the panel's ultimate finding that China failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China in respect of the OCTG, Solar panels, Pressure Pipe, and Line Pipe countervailing duty investigations.

4.5.2.4 Completion of the legal analysis

The Appellate Body examined China's request for it to complete the legal analysis and find that the USDOC determinations that SOEs provided inputs for less than adequate remuneration in four investigations were inconsistent "as applied" with Articles 14(d) and 1.1(b) of the SCM Agreement.

Regarding the legal standard to be applied under Articles 14(d) and 1.1(b), the Appellate Body recalled that the chapeau of Article 14 requires investigating authorities to explain adequately, consistent with the guidelines under Article 14, the application of the methodology for calculating the amount of benefit conferred by a government-provided financial contribution. In arriving at a proper benchmark, an investigating authority must explain the basis for its conclusions in its determination. Further, Article 14(d) of the SCM Agreement "establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis." Thus, prices of government-related entities other than the entity providing the financial contribution at issue must also "be examined to assess whether they are market determined and can therefore form part of a proper benchmark." The Appellate Body also recalled that, in conducting the necessary analysis to determine whether proposed in-country prices can be relied upon in arriving at a proper benchmark, an investigating authority may be called upon to examine various aspects of the relevant market and that "what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending on, *inter alia*, the circumstances of the case and the characteristics of the market being examined.

4.5.2.4.1.1 The OCTG countervailing duty investigation

The Appellate Body found that the USDOC did not consider whether the prices of Government of China (GOC) owned or controlled firms as such were market determined. The USDOC accepted without any examination that those government-related prices were automatically distorted by governmental intervention. Thus, the Appellate Body found that the USDOC's analysis and explanation for rejecting in-country prices in China in its benchmark analysis was inconsistent with the United States' obligations under Articles 14(d) and 1.1(b) of the SCM Agreement.

4.5.2.4.1.2 The Solar Panels countervailing duty investigation

The Appellate Body observed that the essence of the USDOC's findings was that 37 out of a total of 47 producers of polysilicon in China were the entities through which the GOC influenced and distorted the domestic market. While the role of these 37 producers in the relevant market could, in principle, suggest that the presence of these government-related entities could be "significant" or "predominant", "an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share." The USDOC neither explained whether and how the 37 producers possessed and exerted market power distorting other in-country prices, nor explained whether the prices of the government-related entities were market determined. Thus, the Appellate Body found that the USDOC's analysis and explanation for rejecting in-country prices in its benchmark analysis in the Solar Panels countervailing duty investigation was inconsistent with the United States' obligations under Articles 14(d) and 1.1(b) of the SCM Agreement.

4.5.2.4.1.3 The Pressure Pipe countervailing duty investigation

The Appellate Body noted that the USDOC's decision to have recourse to an alternative benchmark was based on the market share of government-owned/-controlled firms in domestic production. The USDOC concluded that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's actions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration." However, Article 14(d) of the SCM Agreement establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis. Moreover, the USDOC did not explain in its determination whether and how the mentioned market shares held by SOEs actually resulted in the government's possession and exercise of market power such that price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods. Thus, the Appellate Body found that the USDOC's analysis and explanation for rejecting in-country prices in China in its benchmark analysis in the Pressure Pipe countervailing duty investigation was inconsistent with the United States' obligations under Articles 14(d) and 1.1(b) of the SCM Agreement.

4.5.2.4.1.4 The Line Pipe countervailing duty investigation

The Appellate Body noted that, through the application of "adverse" facts available, the USDOC assumed that government-owned producers manufactured *all* hot-rolled steel produced in China during the period of investigation. The USDOC's distortion finding appeared to have been predicated on its determination that entities "owned or controlled" by the government can be treated as "GOC authorities", and that prices of goods provided by such entities can be discarded in a benchmark analysis solely on the basis of government ownership or control. Yet, the relevant inquiry for finding a proper benchmark under Article 14(d) of the SCM Agreement is whether or not certain in-country prices are distorted, rather than whether such prices originate from a particular source (e.g. government-owned entities). In addition, a finding of government ownership and control of certain entities alone cannot serve as the sole basis for establishing price distortion, and government-related prices cannot be discarded in a benchmark analysis without an examination of whether or not they are market-determined. The Appellate Body thus found that the USDOC's analysis and explanation for rejecting "prices stemming from private transactions" in China in its benchmark analysis in this investigation was inconsistent with the United States' obligations under Articles 14(d) and 1.1(b) of the SCM Agreement.

4.5.3 Article 2.1 of the SCM Agreement – Specificity

China argued that the panel erred in its interpretation and application of Article 2.1 when it found that the USDOC did not act inconsistently with the United States' obligations under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement. China also asserted that the panel erred in its interpretation and application of the term "subsidy programme" in Article 2.1(c) by finding that the consistent provision by the SOEs of inputs for less than adequate remuneration provided an objective basis for the USDOC to identify sufficiently a subsidy programme under Article 2.1(c). Lastly, China argued that the panel erred in its application of Article 2.1 when it found that "the relevant jurisdiction was at the very least implicitly understood to be China" in the challenged investigations, and that China had therefore failed to establish that the USDOC acted inconsistently with Article 2.1 by not identifying the relevant granting authority.

4.5.3.1 The panel's finding that the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement

China contended that the USDOC's consideration of the "other factors" under Article 2.1(c) of the SCM Agreement in the absence of an "appearance of non-specificity" was contrary to its first sentence, which conditions any examination of such other factors upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b) of Article 2.1.

In the Appellate Body's view, China's appeal raised the question of whether it may be permissible in certain circumstances for an investigating authority to proceed directly to a specificity analysis under Article 2.1(c), or whether an application of the principles in subparagraphs (a) and (b) is always required before an analysis can be conducted under subparagraph (c).

The Appellate Body reviewed the analytical framework and structure of the specificity analysis under Article 2.1 in the light of relevant Appellate Body jurisprudence. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body held that "the structure of Article 2.1 suggests that the specificity analysis will ordinarily proceed in a sequential order by which subparagraph (c) is examined following an assessment under subparagraphs (a) and (b)" of whether there are "explicit limitations as to which enterprises or industries have access to the subsidy". There is a logical progression in the type of evidence that should be examined under each subparagraph of Article 2.1 and the specificity analysis should thus "ordinarily" proceed in a certain sequence. However, the Appellate Body did not exclude the possibility that an investigating authority in certain circumstances could properly conduct the specificity analysis without examining the subparagraphs of Article 2.1 in a strict sequential order.

The Appellate Body found that, based on the language of the first sentence of Article 2.1(c), the application of the principles in subparagraphs (a) and (b) is necessarily a condition to be met in order to consider "other factors" under subparagraph (c). This is confirmed by the reference to an appearance of specificity in Article 2.1, suggesting that examining the factors in subparagraph (c) does not presuppose a formal finding or determination under subparagraphs (a) and (b). The word "if" in the first sentence of Article 2.1(c) relates to the phrase "there are reasons to believe that the subsidy may in fact be specific", meaning that the analysis under Article 2.1(c) may proceed "if" or "where" there are "reasons to believe that the subsidy may in fact be specific." Thus, in certain situations, investigating authorities are not required to examine specificity with respect to the subsidy at issue under all three subparagraphs. Rather, depending on the type of evidence present in a given case, an investigating authority may limit its specificity analysis to *de jure* elements under subparagraphs (a) and (b) or to *de facto* elements under subparagraph (c). The Appellate Body cautioned, however, against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case.

The Appellate Body noted that China's interpretative position was based on the proposition that the first sentence of Article 2.1(c) conditions an examination of *de facto* specificity upon an "appearance of non-specificity" from the application of subparagraphs (a) and (b). Recalling that "there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary", the Appellate Body disagreed with China that the first sentence of Article 2.1(c) conditions the assessment of *de facto* specificity on the basis of the factors listed under that subparagraph upon an application of the principles set out in subparagraphs (a) and (b). While there may be circumstances where "unwritten measures" providing subsidies may be analysed under the principles set forth in subparagraphs (a) and (b), an analysis under these provisions focuses on explicit limitation of access to a subsidy that would ordinarily be found in written instruments. By contrast, a *de facto* specificity analysis under subparagraph (c) is most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are not explicitly provided for in a law or regulation.

The Appellate Body recalled that the panel had indicated that the unwritten nature of the subsidies in the underlying investigations had led the USDOC to examine whether those subsidies are *de facto* specific under Article 2.1(c). The panel had further observed that the USDOC's findings were not based on an explicit limitation of access to the subsidy by the granting authority or the legislation pursuant to which the granting authority operates, nor on criteria or conditions that are spelled out in a law, regulation, or other official document. Since China had not pointed to any evidence that was before the USDOC of the kind that would ordinarily be examined in determining *de jure* specificity under subparagraphs (a) and (b), the panel did not err in its assessment of China's claim. The Appellate Body therefore upheld the panel's finding that the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c).

4.5.3.2 The panel's interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement

China argued that the panel erred in the interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement, contending that any examination of the first of the "other factors" under Article 2.1(c) must begin with the identification of the relevant

"subsidy programme" and that the USDOC provided no evidentiary basis for the existence, scope, and content of these alleged "programmes".

The Appellate Body recalled that the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1 of the SCM Agreement, and that a determination that a given measure constitutes a financial contribution therefore informs the scope and content of the analysis required to establish *de facto* specificity. The ordinary meaning of the word "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done." Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, such as in the form of a law, regulation or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. Thus, the existence of a subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. The Appellate Body pointed out that this is so particularly in the context of Article 2.1(c) where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, even when there is no explicit limitation of access to the subsidy set out, for example, in a law, regulation, or other official document.

The Appellate Body added that an examination of the existence of a plan or scheme regarding the use of the subsidy may also require assessing the operation of such plan or scheme over a period of time. Supporting this proposition is the last sentence of Article 2.1(c), which establishes that, "[i]n applying this subparagraph, account shall be taken of … the length of time during which the subsidy programme has been in operation." The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that these have been granted pursuant to a plan or scheme for purposes of Article 2.1(c). To establish that the provision of financial contributions emanates from a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.

The Appellate Body agreed with the panel to the extent it suggested that, in the absence of any written instrument or explicit pronouncement, evidence of a "systematic activity or series of activities" may provide a sufficient basis to establish the existence of an unwritten subsidy programme in the context of assessing *de facto* specificity under the first factor of Article 2.1(c) of the SCM Agreement. The Appellate Body found it troubling, however, that the panel did not provide any case-specific discussion or references to the USDOC's determinations of *de facto* specificity at issue prior to reaching its conclusion. The panel had thereby failed to apply Article 2.1(c), as properly interpreted, to the USDOC's determinations at issue. Accordingly, the Appellate Body reversed the panel's finding that China had not established that the USDOC acted inconsistently with the United States' obligations under Article 2.1 of the SCM Agreement by failing to identify a subsidy programme in each of the specificity determinations at issue.

Having reversed the panel's finding, the Appellate Body examined China's request to complete the legal analysis in respect of 15 specificity determinations in 12 countervailing duty investigations. The Appellate Body recalled that the panel found that the USDOC had acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take into account, in each of the determinations of *de facto* specificity challenged by China, "the extent of diversification of the economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation". These findings by the panel were not challenged by the United States on appeal, and they therefore stand.

In the light of these findings, and having laid out the legal standard that applies under Article 2.1(c) insofar as it relates to the first factor under Article 2.1(c), the Appellate Body saw limited value, for purposes of resolving the dispute between the parties, in completing the analysis with respect to the issue of whether the USDOC sufficiently identified and substantiated the existence of a "subsidy programme" in each of the determinations at issue. Moreover, the Appellate Body considered that much of the evidence regarding the existence of the alleged subsidy programmes in this dispute had not been subject to the panel's scrutiny. As noted, the panel did not refer to any of the challenged countervailing duty determinations on the record in reaching its finding that the provision of inputs was "systematic". The Appellate Body also did not consider the participants to have addressed sufficiently, in their submissions, the issues of whether the USDOC sufficiently identified and substantiated the existence of a "subsidy programme" in each of the determinations at issue. In these circumstances, the Appellate Body decided not to

complete the legal analysis with respect to this particular aspect of China's appeal.

4.5.3.3 The "jurisdiction of the granting authority" under Article 2.1 of the SCM Agreement

China argued that the panel erred in its application of Article 2.1 of the SCM Agreement to China's claim concerning the USDOC's failure to identify a "granting authority" in the specificity determinations at issue. China asserted that, without identifying the granting authority (or authorities), it is not possible to identify the jurisdiction (or jurisdictions) within which to situate the specificity analysis. China argued that, because the USDOC did not identify the granting authority (or authorities), it acted inconsistently with Article 2.1 of the SCM Agreement.

The Appellate Body noted that the chapeau of Article 2.1 "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority". In situations where the granting authority is the central government, the scope of the jurisdiction is usually the entire territory of the relevant Member. By contrast, where the granting authority is a regional or local government, the scope of the jurisdiction is usually limited to the territory of that regional or local government. Determining whether the jurisdiction at issue covers the entire territory of the relevant WTO Member or whether it is limited to a designated geographical region within that territory is, therefore, important because, as indicated by the panel in *EC and certain member States – Large Civil Aircraft*, "if the granting authority was a regional government, a subsidy available to enterprises throughout the territory over which that regional government had jurisdiction would not be specific." Conversely, if the granting authority was the central government, a subsidy available to the very same enterprises would be specific.

The Appellate Body observed that an investigating authority's determination under Article 1.1 as to the existence of a subsidy will inform the assessment of whether it is specific to certain enterprises "within the jurisdiction of the granting authority". In determining whether a financial contribution exists, investigating authorities must inquire into its nature and determine whether it was provided by the "government", by "any public body within the territory of a Member", or by a "private body" entrusted or directed by the government. The Appellate Body considered that such assessment will inform the identification of the "jurisdiction of the granting authority".

While an analysis of the "jurisdiction of the granting authority" could start with an identification of the granting authority, the Appellate Body did not see why China's suggested order of analysis would always be required. Rather, identifying the "jurisdiction of the granting authority" involves a holistic analysis of the relevant facts and evidence in each case. As the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority, a proper identification of "the jurisdiction of the granting authority" requires an analysis of the "granting authority" and its "jurisdiction" in a conjunctive manner. The Appellate Body thus refused to read Article 2.1 in a manner that focuses on the identity of the granting authority independently from its jurisdiction, stressing that a holistic analysis of the jurisdiction of the granting authority is what provides the framework within which specificity is to be analysed. Provided that an investigating authority adequately substantiates its finding as to whether the jurisdiction covers the entire territory of the relevant WTO Member or is limited to a designated geographical region within that territory, in conducting this holistic assessment it would normally also identify the granting authority.

The Appellate Body noted that, in assessing China's "as applied" claims with respect to the investigations, the panel found that the relevant jurisdiction was "at the very least implicitly understood to be China in the challenged investigations" without any case-specific discussion of the USDOC's determinations or any other evidence on the record, despite the fact that evidence had been presented to the panel. Thus, the Appellate Body found that the panel had failed to apply Article 2.1(c), as properly interpreted, to the USDOC's determinations at issue. Accordingly, the Appellate Body reversed the panel's finding that China had not established that the USDOC acted inconsistently with the United States' obligations under Article 2.1 by failing to identify a granting authority and ergo the relevant jurisdiction, in each of the specificity determinations at issue.

Having reversed the panel's finding, the Appellate Body examined whether it was in a position to complete the legal analysis in respect of 15 determinations of *de facto* specificity in 12 countervailing duties investigations. The Appellate Body recalled the panel's finding that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) by failing

to take into account, in each of the determinations of *de facto* specificity challenged by China, "the extent of diversification of the economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation". In the light of the panel's findings relating to both the USDOC's identification of the jurisdiction of the granting authority and the nature and scope of the relevant "subsidy programme", and, having laid out the legal standard that applies under Article 2.1(c) insofar as it relates to the first factor under Article 2.1(c), the Appellate Body saw limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the issue of whether the USDOC sufficiently identified the jurisdiction of the granting authority in each of the determinations.

4.5.4 Article 12.7 of the SCM Agreement – Facts available

China appealed the panel's finding that China had not established that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by not relying on facts on the record. China claimed that the panel acted inconsistently with Article 11 of the DSU because it failed to examine, with respect to each of the 42 instances of the use of adverse "facts available" challenged by China, whether there was a reasoned and adequate explanation, discernible from the USDOC's published determination, providing the factual basis for the USDOC's conclusion. China requested the Appellate Body to reverse the panel's finding under Article 12.7, and to complete the legal analysis and find, instead, that the USDOC acted inconsistently with Article 12.7 by not relying on the facts available on the record in each of the 42 instances of the use of adverse "facts available" across the 13 challenged countervailing duty investigations.

The Appellate Body recalled the panel's interpretation of Article 12.7 and the standard of review articulated by it, as well as its interpretation of Article 12.7 in *Mexico – Anti-Dumping Measures on Rice* and *US – Carbon Steel (India)*. Article 12.7 permits the use of facts on the record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination. Since there must be a "connection" between the "necessary" information which is missing and the particular facts available on which a determination under Article 12.7 is based, an investigating authority, when proceeding under Article 12.7, must use those facts available that "reasonably replace" the missing information to arrive at an accurate determination. Moreover, as determinations made under Article 12.7 are to be made on the basis of "the facts available", they cannot be based on non-factual assumptions or speculation. Further, in reasoning and evaluating which facts available can reasonably replace the missing information, "all substantiated facts on the record must be taken into account" by an investigating authority.

The Appellate Body explained that, in order to assess reasonable replacements for the missing "necessary" information, an investigating authority should engage in a process of reasoning and evaluation. Where there are several facts available to an investigating authority that it needs to choose from, the process of reasoning and evaluation would involve a degree of comparison in order to arrive at an accurate determination. The evaluation of the facts available that is required, and the form it may take, depends on the particular circumstances of a given case, including the nature, quality, and amount of evidence on the record and the particular determinations to be made. Thus, whereas the explanation and analysis provided in a published report must be sufficient to allow a panel to assess how and why the facts available employed by the investigating authority are reasonable replacements for the missing information, the nature and extent of the explanation and analysis required will necessarily vary from determination to determination.

4.5.4.1 The panel's conformity with Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement

The Appellate Body addressed whether the panel was required to assess whether the USDOC's adverse "facts available" determinations were "reasoned and adequate". The Appellate Body agreed with China that, in the context of reviewing factual findings made by investigating authorities, a panel is required to examine whether an investigating authority's conclusions are reasoned and adequate. Based on the Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*, however, the standard of review to be applied by a panel in a case depends, in part, on the particular provision of the covered agreement that is at issue – Article 12.7 of the SCM Agreement in this case – and the specific claim(s) of a complainant. In the present case, in order to comply with Article 12.7, the USDOC was required to provide an explanation sufficient to establish that it had

engaged in a process of reasoning and evaluation of the various facts before it in order to determine which of the facts available could reasonably replace the missing "necessary" information. Although China's challenge focused on whether the USDOC's adverse "facts available" determinations were based on the facts on the record, it did not follow that the panel was not required to scrutinize the USDOC's analysis and explanation in support of its facts available determinations. The Appellate Body recalled the panel's statements that its task in the present case was "to consider whether the USDOC provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts" (emphasis added by the Appellate Body). The Appellate Body thus rejected the United States' argument that the panel was not required to examine whether the USDOC provided a "reasoned and adequate" explanation of its adverse "facts available" determinations in order to evaluate China's claims under Article 12.7.

The Appellate Body noted that Article 11 imposes a general duty on panels to, *inter alia*, scrutinize whether the reasoning of an investigating authority is coherent and internally consistent and carry out an in-depth examination of the explanations provided by an investigating authority. In the context of Article 12.7, an in-depth examination would entail, *inter alia*, assessing whether an investigating authority's published report provided an explanation that sufficiently disclosed its process of reasoning and evaluation such that the panel could assess how the authority chose from the facts available those that could reasonably replace the missing information.

The Appellate Body considered that, with respect to China's first contention that the panel failed to examine and address each of the 42 instances challenged by China, instead of examining China's arguments and evidence in relation to the 42 instances, the panel limited its analysis to only some instances of the use of adverse "facts available" by the USDOC. The panel's approach was directed towards ascertaining whether China had successfully established that the USDOC applied the same "legal standard" across the 42 challenged instances. However, in the light of the arguments and evidence provided by the parties, the Appellate Body stated that the panel was required to scrutinize each instance of the use of adverse "facts available" challenged by China in order to address properly China's "as applied" claims under Article 12.7.

China's second contention was that, as to the instances of the use of adverse "facts available" that the panel did discuss, it failed to engage in an in-depth examination, as required under Article 11. Instead, the panel simply accepted the USDOC's references to the term "facts available", without inquiring whether the USDOC actually applied the facts available. The Appellate Body observed that the panel focused, in large part, on the words employed by the USDOC in its determinations, rather than on whether the USDOC acted inconsistently with Article 12.7. Instead of assessing whether the USDOC had "provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts", the panel focused on the language and the formulations used by the USDOC in its determinations, without critically examining the USDOC's statements in order to assess whether the USDOC had complied with its obligations under Article 12.7. The Appellate Body therefore concluded that instead of conducting its own analysis, the panel simply relied on language in the USDOC's determinations referring to the application of facts available in order to reject China's claims.

Finally, China contended that the panel acted inconsistently with Article 11 to the extent that it relied on examples of record evidence supporting the USDOC's determinations at issue provided by the USDOC on an ex post basis. The Appellate Body noted that the relevant exhibit provided by the United States contained references to facts on the record before the USDOC, as well as excerpts from the USDOC's determinations and memoranda. The Appellate Body did not consider it clear whether the panel, if at all, relied on the references to the facts on the record provided by the United States, and concluded that the panel's discussion of the United States' exhibit was a further example of the cursory nature of the panel's analysis.

Therefore, the Appellate Body found that the panel acted inconsistently with its obligations under Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement. Thus, the Appellate Body reversed the panel's finding that China had not established that the USDOC acted inconsistently with the United States' obligations under Article 12.7 of the SCM Agreement by not relying on facts available on the record in the 42 instances challenged by China.

4.5.4.2 Completion of the legal analysis

Having reversed the panel's findings under Article 12.7, the Appellate Body considered China's request to complete the legal analysis and to find, instead, that the USDOC acted inconsistently with Article 12.7 in each of the 42 instances challenged by China. The Appellate Body had, in some disputes, completed the legal analysis with a view to facilitating the prompt and effective resolution of the dispute. However, it could only complete the legal analysis if the factual findings of the panel and the undisputed facts on the panel record provide sufficient basis to do so. Several factors could prevent the Appellate Body from completing the legal analysis, such as: the complexity of the legal issues; the absence of full exploration of the issues before the panel, and, consequently, considerations pertaining to the parties' due process rights; the panel's failure to examine a particular claim at all; and where completion is not required to resolve the dispute.

In this case, the Appellate Body noted that, on appeal, China presented an instance-by-instance discussion of why the USDOC acted inconsistently with Article 12.7 in each of the 42 instances challenged by it. Before the panel, however, China did not present detailed argumentation with respect to each of these instances. Noting that China requested it to complete the legal analysis with respect to all of the 42 instances across the 13 investigations, the Appellate Body recalled that the evaluation of the facts available that is required on the part of an investigating authority, and the form it may take, depends on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record and the particular determinations to be made. Moreover, the nature and extent of the explanation that is required on the part of an investigating authority necessarily varies from determination to determination.

The Appellate Body noted that the 42 instances with respect to which China requested it to complete the legal analysis included several instances wherein the USDOC relied on adverse "facts available" in support of its public body, benefit, specificity, and export restraints determinations. The Appellate Body recalled the panel's findings of inconsistency, not challenged on appeal, with respect to the public body, specificity and export restraints determinations by the USDOC. Further, the Appellate Body recalled its finding that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in making its benefit determinations in the context of the OCTG, Line Pipe, Pressure Pipe, and Solar Panels investigations. Having laid down the legal standard that applies under Article 12.7, the Appellate Body saw limited value, for the purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the instances in which the USDOC used adverse "facts available" in support of its public body, benefit, specificity, and export restraints determinations. The Appellate Body was also of the view that completing the legal analysis in the present case would also raise due process concerns.

For these reasons, the Appellate Body declined to complete the legal analysis with respect to each of the 42 instances of the use of adverse "facts available" challenged by China.

5 PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

Table 5 lists the WTO Members that participated in appeals for which an Appellate Body report was circulated in 2014. It distinguishes between Members that filed a Notice of Appeal pursuant to Rule 20 of the Working Procedures (appellants) and Members that filed a Notice of Other Appeal pursuant to Rule 23(1) (known as the "other appellants"). Rule 23(1) provides that "a party to the dispute other than the original appellant may join in that appeal, or appeal on the basis of other alleged errors in the issues of law covered in the Panel report and legal interpretations developed by the Panel". Under the Working Procedures, parties wishing to appeal a panel report pursuant to Rule 23(1) are required to file a Notice of Other Appeal within 5 days of the filing of the Notice of Appeal.

Table 5 also identifies those Members that participated in appeals as third participants under paragraphs (1), (2), or (4) of Rule 24 of the Working Procedures. Under Rule 24(1), a WTO Member that was a third party to the panel proceedings may file a written submission as a third participant within 21 days of the filing of the Notice of Appeal. Pursuant to Rule 24(2), a Member that was a third party to the panel proceedings and that does not file a written submission with the Appellate Body may, within 21 days of the filing of the Notice of Appeal, notify its intention to appear at the oral hearing and indicate whether it intends to make a statement at the hearing. Rule 24(4) provides that a Member that was a third party to the panel

proceedings and neither files a written submission in accordance with Rule 24(1), nor gives notice in accordance with Rule 24(2), may notify its intention to appear at the oral hearing and request to make a statement.

Table 5: Participants and third participants in appeals for which an Appellate Body report was circulated in 2014

Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (DS400)	Canada Norway	European Union	Canada Norway European Union	Iceland Japan Mexico United States		Argentina China Ecuador Colombia Russia
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (DS401)	Canada Norway	European Union	Canada Norway European Union	Iceland Japan Mexico United States	Namibia	Argentina China Ecuador Colombia Russia
United States — Countervailing and Anti-dumping Measures on Certain Products from China	China	United States	China United States	Australia European Union Japan	Canada India Turkey Russia Viet Nam	
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS431)	United States	China	United States China	European Union Japan Argentina Australia Brazil Canada Colombia Saudi Arabia	India Indonesia Korea Norway Peru Russia Chinese Taipei	Oman Turkey Viet Nam
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS432)	China		European Union	United States Japan Argentina Australia Brazil Canada Colombia Saudi Arabia	India Indonesia Korea Norway Peru Russia Chinese Taipei	Oman Turkey Viet Nam

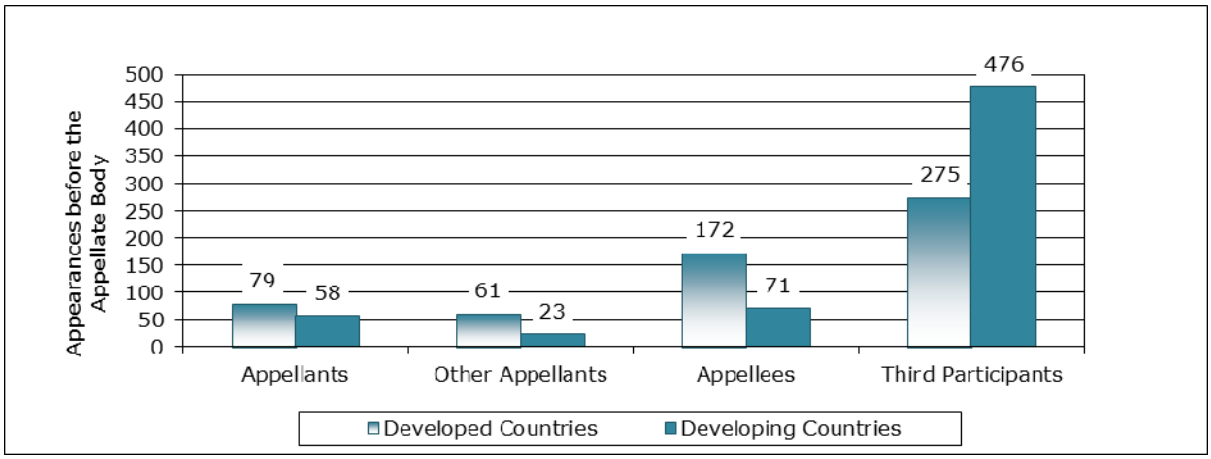
Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS433)	China		Japan	United States European Union Argentina Australia Brazil Canada Colombia Saudi Arabia	India Indonesia Korea Norway Peru Russia Chinese Taipei	Oman Turkey Viet Nam
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436)	India	United States	India United States	Australia Canada China European Union Saudi Arabia		Turkey
United States — Countervailing Duty Measures on Certain Products from China (DS437)	China	United States	China United States	Brazil Canada European Union Saudi Arabia	Australia India Japan Korea Norway	Turkey Russia Viet Nam

[a] Pursuant to Rule 20 of the Working Procedures.
[b] Pursuant to Rule 23(1) of the Working Procedures.
[c] Pursuant to Rule 22 or 23(3) of the Working Procedures.

A total of 24 WTO Members appeared at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated in 2014.

Chart 3 shows the ratio of developed country Members to developing country Members in terms of appearances made as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2014.

Chart 3: WTO Member participation in appeals 1996–2014



Annex 9 provides a statistical summary and details on WTO Members' participation as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2014.

6 WORKING PROCEDURES FOR APPELLATE REVIEW

6.1 Procedural issues arising in appeals in 2014

No amendments were made to the Working Procedures during 2014. The current version of the Working Procedures is contained in document WT/AB/WP/6, which was circulated to WTO Members on 16 August 2010.

The procedural issues that arose in appellate proceedings in 2014 are the following: (i) public observation of the oral hearing; (ii) allocation of appeal numbers; (iii) challenge to a notice of appeal; (iv) consolidation of appellate proceedings; (v) extension of time to file submissions; (vi) amendments to the official Working Schedule; (vii) timeliness and adequacy of notifications; (viii) unsolicited *amicus curiae* briefs; and (ix) extension of the time period for circulation of reports; and (x) request for separate reports These procedural issues are discussed below.

6.2 Procedural issues arising from appeals

6.2.1 Open oral hearing

In *EC – Seal Products*, the Appellate Body received a joint communication from Canada and Norway requesting that the oral hearing in the appellate proceedings be opened to public observation. Both complainants proposed that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off should a third participant wish to keep its oral statement confidential. They further requested the adoption of additional procedures to ensure the security and orderly conduct of the proceedings. The Appellate Body also received a communication from the European Union joining Canada and Norway's request for public observation of the hearing, and indicating that it had no objections to the proposed additional security arrangements.

The Division issued a Procedural Ruling authorizing the request of Canada, Norway, and the European Union to open the hearing to public observation and adopting additional procedures for the conduct of the hearing. Public observation of the oral hearing in the proceedings took place via simultaneous closed-circuit television broadcast to a separate room. Transmission was turned off during statements made by those third participants who had indicated their wish to maintain the confidentiality of their statements.

6.2.2 Allocation of appeal numbers

The respective appeals of China and the United States in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) and *China – Rare Earths* (DS431) were filed simultaneously. In the past, the Appellate Body had attributed appeal numbers sequentially based on the date and time of receipt of the Notice of Appeal. Given the unprecedented situation of simultaneous filings of appeals, the Chairman of the Appellate Body invited the parties to these disputes to provide their views as to the considerations relevant to the determination of how to allocate appeal numbers AB-2014-3 and AB-2014-4 between the two appeals.

The Appellate Body received comments from China, the European Union, Japan, and the United States. On the same day, the Chairman of the Appellate Body sent a letter to the parties to these disputes informing them that, after consideration of their submissions, the Appellate Body determined that the usual manner of assigning such numbers – according to the sequence in which they were appealed – was not available. The Appellate Body underlined the necessity of assigning an appeal number to each appeal before the Appellate Body Members constituting the respective divisions could be selected. The Appellate Body recalled that Rule 6(2) of the Working Procedures calls for the Members constituting a division to be selected taking into account, *inter alia*, "the principles of random selection [and] unpredictability". In order to ensure respect for these principles in the specific circumstances of a simultaneous filing of two appeals, the Appellate Body invited the parties to the disputes to the Appellate Body Secretariat to witness the assignment

of appeal numbers through a random draw. As a result of this draw, the appeal initiated by the United States in *China – Rare Earths* was assigned appeal number AB-2014-3, and the appeal by China in *US – Countervailing and Anti-Dumping Measures (China)* was assigned appeal number AB-2014-4.

6.2.3 Challenge to Notice of Appeal

In *China – Rare Earths*, China requested the Appellate Body to reject the United States' Notice of Appeal in DS431 on the grounds that, due to its "conditional" nature, the Notice of Appeal did not constitute a proper Notice of Appeal within the meaning of the Working Procedures.[35] The Chairman of the Appellate Body sent a letter to the participants, and third participants inviting them to provide their comments on China's request. After receiving comments from Australia, Brazil, Canada, China, the European Union, Japan, and the United States, the Appellate Body Division hearing the appeal in DS431 issued a Procedural Ruling, declining China's request to reject the United States' Notice of Appeal due to its "conditional" nature. The Division considered that its jurisdiction to hear the United States' appeal was validly established given that the Notice of Appeal conformed to the requirements of Rule 20 of the Working Procedures. Such jurisdiction was not, in the opinion of the Division, affected by the possibility that it might not need to rule on the issues raised by the United States in the event that the scenarios identified in its Notice of Appeal were to materialize.

6.2.4 Consolidation of appellate proceedings

In *China – Rare Earths*, the Division decided, pursuant to Rule 16(1) of the Working Procedures, to consolidate the appeals of the panel reports in *China – Rare Earths* (WT/DS431/R; WT/DS432/R; WT/DS433/R). Given this consolidation, and taking account of certain requests made by the participants and third participants, the Division found it necessary to make certain additional modifications to the Working Schedules in order to ensure fairness and orderly procedure in the conduct of these appeals.[36] More specifically, the Division set a single deadline for the third participants' submissions in respect of all these disputes; allowed the United States, the European Union, and Japan to elect to have their submissions filed in the capacity of participant in their respective disputes also serve as their third participants' submissions in the disputes in which they were third participants, without prejudice to their respective rights to file third participants' submissions separate from their appellees' submissions; and decided to hold a single oral hearing for all these appellate proceedings.

6.2.5 Extension of time to file submissions

In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested an extension of the deadline for the filing of certain documents pursuant to Rule 16(2) of the Working Procedures on account of "exceptional circumstances", particularly: (i) the filing of China's Notice of Appeal and appellant's submission 12 days after the circulation of the panel report; (ii) the simultaneous filing of the appeals in this dispute and in *China – Rare Earths*; and (iii) the granting of an extension to China to file its Notice of Other Appeal in *China – Rare Earths.* The Appellate Body Division issued a Procedural Ruling extending the time period for the United States to file its Notice of Other Appeal and other appellant's submission.[37] The Division also extended the deadlines for the filing of the appellees' submissions and the third participants' submissions.

In the same appeal, Japan also requested the Appellate Body, pursuant to Rule 16 of the Working Procedures, to extend the date for the filing of the third participants' submission because the original deadline fell within a holiday period in Japan. The Division denied Japan's request on

[35] The United States indicated in its Notice of Appeals that "[i]f China were not to appeal the Panel Report, or if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China, then the Appellate Body would not need to reach" the issues raised by the United States in its appeal. (Appellate Body Reports, *China – Rare Earths*, paras. 5.253-5.258, and Annex 4)

[36] The Procedural Ruling was attached as Annex 5 to *China Rare – Earths*, WT/431AB/R, WT/432/AB/R, WT/433/AB/R.

[37] The Procedural Ruling was attached as Annex 3 to *United States – Countervailing and Anti-Dumping Measures (China)*, WT/DS449/AB/R.

the ground that the difficulties that Japan could encounter in finalizing its submission during this period did not constitute "exceptional circumstances" that would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures.[38]

In *China – Rare Earths*, along with its challenge to the Notice of Appeal filed by the United States, China also requested the Appellate Body, pursuant to Rule 16(2) of the Working Procedures, to extend the time limits for filing relevant documents in the event that the Appellate Body were not to reject the United States' Notice of Appeal. After inviting the participants, and third participants to provide their comments on China's request, the Division granted China's request for an extension of the time period for China to file a Notice of Other Appeal and appellant's submission in DS431.[39] As a consequence of this decision, and in order to preserve the sequence of and periods between the other deadlines prescribed under the Working Procedures, the Appellate Body also modified the dates for the filing of other submissions set out in the Working Schedule.

In the same appellate proceedings, the Appellate Body Division hearing the appeal in DS431 received a letter from Japan requesting an extension of the deadline for filing the third participants' submissions pursuant to Rule 16 of the Working Procedures. The Division sent a letter to the participants and the third participants in DS431 stating that it was considering the request by Japan and would revert to the matter in due course. However, the Division subsequently observed in its Procedural Ruling that, having decided to consolidate the appeals in DS431, DS432, and DS433, and to establish a single deadline for the filing of all third participants' submissions in respect of all these appeals, it was not necessary to deal separately with Japan's request for an extension of the deadline for the filing of the third participants' submissions in DS431.[40]

In *US – Carbon Steel (India)*, the United States requested the Appellate Body Division to extend the deadline for filing the United States' appellee's submission by seven calendar days due to the size and complexity of India's appeal. The Division invited India and the third parties to comment in writing on the United States' request. India requested that any extension of the deadline for the United States to file its appellee's submission be granted equally to India. The European Union requested the Division, if it accepted the United States' request, to consequently extend the deadline for third participants to file their notifications and written submissions. The Division issued a Procedural Ruling to the participants and third parties in respect of the United States' request.[41] Pursuant to Rule 16 of the Working Procedures, the Division decided to extend the date for filing the appellees' submissions by six calendar days, and the third participants' written submissions and notifications by five calendar days.

6.2.6 Amendments to the official Working Schedule

In *EC – Seal Products*, Canada, Norway, and the European Union requested the Appellate Body to postpone the dates for the oral hearing due to logistical difficulties faced by the parties. The Division invited the third parties to comment in writing on this request. Japan, Mexico, and the United States indicated that they had no objection. The Division issued a Procedural Ruling rescheduling the oral hearing.[42]

In *China – Rare Earths*, China requested the Appellate Body to extend the time limits, pursuant to Rule 16(2) of the Working Procedures, for filing relevant documents in the event that the Appellate Body were not to reject the United States' Notice of Appeal. The Division granted China's

[38] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 1.15.
[39] The Procedural Ruling was attached as Annex 4 to *China Rare – Earths*, WT/431AB/R, WT/432/AB/R, WT/433/AB/R.
[40] The Procedural Ruling was attached as Annex 5 to *China Rare – Earths*, WT/431AB/R, WT/432/AB/R, WT/433/AB/R.
[41] The Procedural Ruling was attached as Annex 3 to *United States – Carbon Steel (India)*, WT/DS436/AB/R.
[42] The Procedural Ruling was attached as Annex 5 to the Appellate Body Reports in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R WT/DS401/AB/R.

request.[43] As a consequence, and in order to preserve the sequence of and periods between the other deadlines prescribed under the Working Procedures, the Appellate Body also modified the dates for the filings of other submissions set out in the Working Schedule.

6.2.7 Timeliness and adequacy of notifications

In *US – Countervailing Measures (China)*, Russia and Viet Nam provided their delegation lists for the oral hearing to the Appellate Body Secretariat and the participants and third participants in these appellate proceedings two days before the first day of the oral hearing. Without prejudice to rulings the Appellate Body may make in future appeals, the Division hearing the appeal interpreted the actions of Russia and Viet Nam as notifications expressing an intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures. The Division emphasized that while strict compliance with Rule 24(4) of the Working Procedures requires written notification of such intention, it was nevertheless satisfied that, in this case, the lack of strict compliance with Rule 24(4) did not raise any due process concerns.[44]

6.2.8 Unsolicited *amicus curiae* briefs

In *EC – Seal Products*, the Appellate Body received three unsolicited *amicus curiae* briefs from: (i) a group of animal welfare organizations[45]; (ii) the International Fur Federation; and (iii) three individuals. The participants and third participants were given an opportunity to express their views on the admissibility and substance of these briefs at the oral hearing. The Appellate Body Division noted that the third *amicus curiae* brief was received on the first day of the oral hearing. In the light of its late filing, and mindful of the requirement to ensure that participants and third participants are given an adequate opportunity fully to consider any written submission filed with the Appellate Body, the Division deemed this brief inadmissible. The Division did not find it necessary to rely on the other two *amicus curiae* briefs in rendering its decision.[46]

6.2.9 Extension of time period for circulation of reports

The 90-day time period stipulated in Article 17.5 of the DSU for the circulation of reports was exceeded in *EC – Seal Products*, *China – Rare Earths*, *US – Carbon Steel (India)*, and *US – Countervailing Measures (China)*. The Appellate Body Report in *US – Countervailing and Anti-Dumping Measures (China)* was circulated within the 90-day time period.

The Appellate Body communicated to the DSB Chair the reasons why it was not possible to circulate the Appellate Body report within the 90-day time period in each of the appeals for which this time period was not met in 2014.[47] These reasons included the postponement and rescheduling of the oral hearing; requests for extension of deadlines for filing appellees' and third participants' submissions; the volume and complexity of issues raised on appeal; the time required for translation; the heavy workload of the Appellate Body; the overlap in the composition of the divisions hearing different appeals; the unfilled vacancy on the Appellate Body; and the consolidation of several appellate proceedings.

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[43] The Procedural Ruling was attached as Annex 4 to *China Rare – Earths*, WT/431AB/R, WT/432/AB/R, WT/433/AB/R.

[44] Appellate Body Report, *US – Countervailing Measures (China)*, footnote 46 to para. 1.13.

[45] These organizations include Anima, Animal Rights Action Network, Asociación Nacional para la Defensa de los Animales, Bont Voor Dieren, Compassion in World Farming, Djurens Rätt, Eurogroup for Animals, Fondation Brigitte Bardot, Fondation Franz Weber, Four Paws, GAIA, Humane Society of the United States/Humane Society International, International Fund for Animal Welfare, Lega Anti Vivisezione, Prijatelji životinja, Respect for Animals, Royal Society for the Prevention of Cruelty to Animals, Svoboda zvířat, and World Society for the Protection of Animals.

[46] Appellate Body Report, *EC – Seal Products*, para. 1.15.

[47] For *EC – Seal Products*, see WT/DS400/10, WT/DS400/11, WT/DS401/11, WT/DS401/12; for *China – Rare Earths*, see WT/DS431/11, WT/DS431/12, WT/DS432/10, WT/DS433/10; for *US – Carbon Steel (India)*, see WT/DS436/8; and for *US – Countervailing Measures (China)*, see WT/DS437/9.

6.2.10 Request for separate reports

In the appellate proceedings in *China – Rare Earths*, the European Union requested "an Appellate Body Report issued as a single document, with separate pages for the findings and conclusions in each of the three disputes". Japan and the United States submitted a joint letter requesting "that the Division issue a separate Appellate Body report for each of the appeals, in the form of a single document with separate findings and conclusions bearing the document symbol only relating to that appeal." At the oral hearing in these appeals, the Division afforded all participants and third participants an opportunity to comment on these requests. No comments were made, and the Division acceded to these requests.

7 ARBITRATIONS UNDER ARTICLE 21.3(c) OF THE DSU

Individual Appellate Body Members have been appointed to serve as arbitrators under Article 21.3(c) of the DSU to determine the "reasonable period of time" for the implementation by a WTO Member of the recommendations and rulings adopted by the DSB in dispute settlement cases. The DSU does not specify who shall serve as arbitrator. The parties to the arbitration select the arbitrator by agreement or, if they cannot agree on an arbitrator, the Director-General of the WTO appoints the arbitrator. To date, all 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 carried out in 2014.

8 WTO TECHNICAL ASSISTANCE AND TRAINING PLAN

Appellate Body Secretariat staff participated in the WTO Biennial Technical Assistance and Training Plan 2014–2015[48], particularly in activities relating to training in dispute settlement procedures. Annex 10 provides a list of the technical assistance activities carried out by Appellate Body Secretariat staff in 2014 under the WTO Technical Assistance and Training Plan.

9 OTHER ACTIVITIES

9.1 Briefings, conferences, moot court competitions

Appellate Body Secretariat staff participate in briefings organized for groups visiting the WTO, including students. In these briefings, Appellate Body Secretariat staff speak to visitors about the WTO dispute settlement system in general, and appellate proceedings in particular. Appellate Body Secretariat staff also participate as judges in moot court competitions. A list of these activities carried out by Appellate Body Secretariat staff during the course of 2014 can be found in Annex 11.

9.2 WTO internship programme

The Appellate Body Secretariat participates in the WTO internship programme, which allows post-graduate university students to gain practical experience and a deeper knowledge of the global multilateral trading system in general, and WTO dispute settlement procedures in particular. Interns in the Appellate Body Secretariat obtain first-hand experience of the procedural and substantive aspects of WTO dispute settlement and, in particular, appellate proceedings. The internship programme is open to nationals of WTO Members and to nationals of countries and customs territories engaged in accession negotiations. An internship is generally for a three-month period. During 2014, the Appellate Body Secretariat welcomed interns from Australia, Brazil, Colombia, Georgia, Germany, India, Italy, Romania, the Russian Federation, and the United States. A total of 124 post-graduate students, of 51 nationalities, have completed internships with the Appellate Body Secretariat since 1998. Further information about the WTO internship programme, including eligibility requirements and application instructions, may be obtained online at:
<https://erecruitment.wto.org/public/hrd-cl-vac-iew.asp?jobinfo_uid_c=3475&vaclng=en>

[48] WT/COMTD/W/200.

9.3 The WTO Digital Dispute Settlement Registry

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

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

As a storage facility, the Digital Registry will provide access to information about WTO disputes, in particular, it will serve as an online repository of all panel and Appellate Body records. Over the course of 2014, a large amount of dispute-related documents were scanned, catalogued and entered into the system.

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

The creation of the Digital Registry is a cross-divisional project led by the Legal Affairs Division and involving the Appellate Body Secretariat, the Rules Division, and the Information Technology Solutions, Languages, Documentation and Information Management Divisions. Work on this project began in 2010. In 2014, work focused on scanning dispute-related documents; developing the design, functionality, and security of the new system; and consulting and training delegates of WTO Members. The Appellate Body Secretariat participated in the review and cataloguing of data to be uploaded into the database. A pilot phase is expected to start in 2015.

ANNEX 1

In April 2014, the Appellate Body issued a communication addressing post-employment guidelines for former Appellate Body Members, former Appellate Body Secretariat staff, and former interns at the Appellate Body Secretariat. This communication was communicated to the WTO Membership, and is reproduced below.

WT/AB/22 16 April 2014

POST-EMPLOYMENT GUIDELINES

COMMUNICATION FROM THE APPELLATE BODY

The Appellate Body and its Secretariat are bound by various rules of conduct in their work. For example, Articles 17.10 and 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), together with paragraphs II and VII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules of Conduct) and WTO Staff Regulation 1.7 provide for the comprehensive protection of confidential information relating to appellate proceedings. In respect of certain obligations of conduct, in particular those relating to confidentiality, the Rules of Conduct and WTO Staff Regulations expressly provide that such obligations continue even after the individual concerned has ceased to serve as an Appellate Body Member or as part of the Appellate Body Secretariat.

In order to facilitate compliance with relevant obligations and to set clear expectations for individuals involved in WTO dispute settlement following a term of service as an Appellate Body Member, or in the Appellate Body Secretariat, the Appellate Body has decided to adopt post-employment guidelines in respect of former Appellate Body Members, former Appellate Body Secretariat staff, and former interns at the Appellate Body Secretariat.

The guidelines articulate limitations on the ability of these individuals to serve as advisers or panelists in disputes in which they were involved while serving the Appellate Body, or disputes in which the same measures are challenged and the same claims are raised (the same "matter"), as well as limitations on the ability of such individuals to attend an oral hearing in an appeal for some period following their departure (a so-called "cooling-off" period). Apart from the limitation on advising or serving as a panelist in the same dispute or matter, which is prohibited indefinitely for all former Appellate Body Members, former Appellate Body Secretariat staff, and former interns at the Appellate Body Secretariat, the limitations are applied for different lengths of time to each of these classes of individuals, based on the degree of their involvement in a given case. In addition, the guidelines call upon former Appellate Body Members not to accept any appointment as a panelist for a period of two years following their term of office.

The guidelines seek to safeguard the independence of the Appellate Body and secure its reputation by guarding against actual and perceived conflicts of interests and risks of bias. The guidelines also seek to minimize the likelihood that former Appellate Body Members, Secretariat staff, and interns will be placed in circumstances where incentives or pressure could be brought to bear on them to divulge confidential information regarding their work with, or the inner workings of, the Appellate Body. At the same time, the guidelines aim to strike a balance between promoting these institutional considerations and safeguarding the independence of the Appellate Body, on the one hand, and avoiding undue or unreasonable restrictions on the future employment of the individuals concerned, on the other hand.

The Appellate Body requests the cooperation of WTO Members in facilitating compliance with these guidelines.

POST-EMPLOYMENT GUIDELINES IN RESPECT OF FORMER APPELLATE BODY MEMBERS, FORMER APPELLATE BODY SECRETARIAT STAFF, AND FORMER INTERNS AT THE APPELLATE BODY SECRETARIAT

The Appellate Body expects the individuals concerned to abide by, and requests WTO Members to assist in the respect of, the guidelines below.

1. A former Appellate Body Member shall not:

a. be involved as an adviser or panelist in any dispute or matter the same as one that was before the Appellate Body during his or her term of office as an Appellate Body Member. A former Appellate Body Member may, however, accept appointment as an arbitrator in an arbitration under Article 21.3(c) of the DSU in respect of any dispute;

b. for a period of three years following the end of his or her term of office, attend the oral hearing in any appeal before the Appellate Body as a member of a delegation of a participant or third participant;

c. for a period of two years following the end of his or her term of office, accept appointment as a panelist in any WTO dispute.

2. A former member of staff of the Appellate Body Secretariat shall not:

a. be involved as an adviser or panelist in any dispute or matter the same as one in which he or she had a significant degree of involvement as part of his or her responsibilities at the Appellate Body Secretariat;

b. for a period of one year following the cessation of his or her service, attend the oral hearing in any appeal before the Appellate Body as a member of a delegation of a participant or third participant.

3. A former intern in the Appellate Body Secretariat shall not:

a. be involved as an adviser or panelist in any dispute or matter when, during the internship period, he or she carried out substantive tasks or attended meetings in connection with an appeal in the same dispute or matter as part of his or her responsibilities at the Appellate Body Secretariat;

b. for a period of one year following the completion of his or her internship, attend the oral hearing in any appeal before the Appellate Body as a member of a delegation of a participant or third participant unless he or she has obtained prior written authorization from the Director of the Appellate Body Secretariat. Such authorization will be granted unless the specific circumstances of the appeal are such that the Director of the Appellate Body Secretariat reasonably considers that the former intern's attendance at the oral hearing is likely to give rise to an actual or perceived conflict of interest or risk of bias.

4. A short-term staff member who was employed by the Appellate Body Secretariat for a total period of less than two years shall abide by the guidelines applicable to interns. A short-term staff member who was employed by the Appellate Body Secretariat for a total period of two years or more shall abide by the guidelines applicable to Appellate Body Secretariat staff.

5. For purposes of these guidelines, a "dispute" includes original proceedings, as well as any proceedings under Articles 21.3(c), 21.5, 22.6, and 25 of the DSU.

6. For purposes of these guidelines, a "matter" consists of two elements: a specific legal basis of the complaint (claim) and a specific measure at issue. (See Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, para. 72) Thus, the same claim brought against the same measure of a Member would constitute the same "matter", even if the claim were brought by a WTO Member other than the original complaining party.

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ANNEX 2

SPEECH TO THE DISPUTE SETTLEMENT BODY ON 26 SEPTEMBER 2014 BY ROBERT AZEVÊDO, DIRECTOR-GENERAL OF THE WTO

I would like to talk to you about the current situation in the DSB: the challenges we face, what we are doing to overcome them — and what more we may need to do.

There is no question that the WTO's dispute settlement system has been a success. The numbers tell their own story about how valued it has become. In just under 20 years since the system came into being, 482 requests for consultation have been received. In 47 years under the GATT, 300 disputes were received. And in 68 years the International Court of Justice has received 162 cases.

So we have seen a remarkable level of activity. Looking at the economic importance of the system, researchers found that, in the first 16 years of the DSB, we handled disputes covering at least US$1 trillion of trade flows. And members clearly hold the system in high esteem. Two thirds of our membership have participated in the system in one way or another.

It has been suggested that the ever-increasing number of RTAs might pose a challenge, but this has not proved to be the case. Most dispute settlement mechanisms provided for in RTAs are rarely used — indeed, some have never been used at all. Yet one in every five of WTO disputes involve parties who are also parties to RTAs. This means that the system is in very high demand. In fact, as you are aware, we are experiencing unprecedented volume of work in dispute settlement. And while this is welcome, it does create some very real challenges.

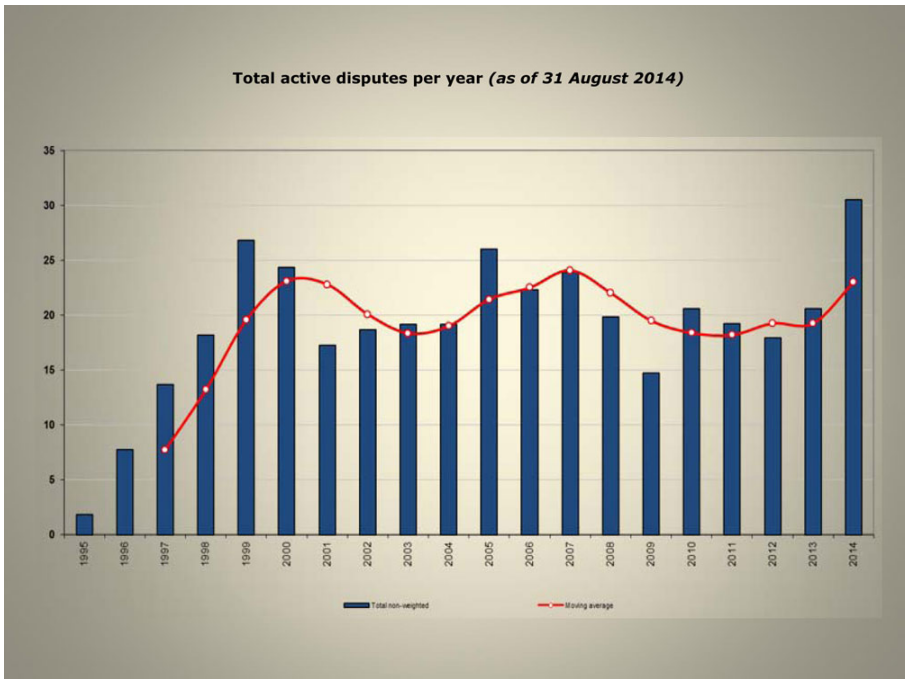
CURRENT SITUATION

So let us take a look at the current situation in the DSB. I will not be spending too much time on this today as I want to focus more on prescription, rather than diagnosis. The total number of active proceedings being serviced by the Legal Affairs Division, Rules Division, and the Appellate Body Secretariat has roughly doubled since 2012. Today there are 19 active panels requiring full-time assistance, 3 ongoing appeals, and 4 panels in composition. Our estimates suggest that this is not just a temporary surge and I do not believe that dispute settlement volume will soon diminish. In fact, 2014 is moving faster than 2013 in terms of the number of panels established by this time of year.

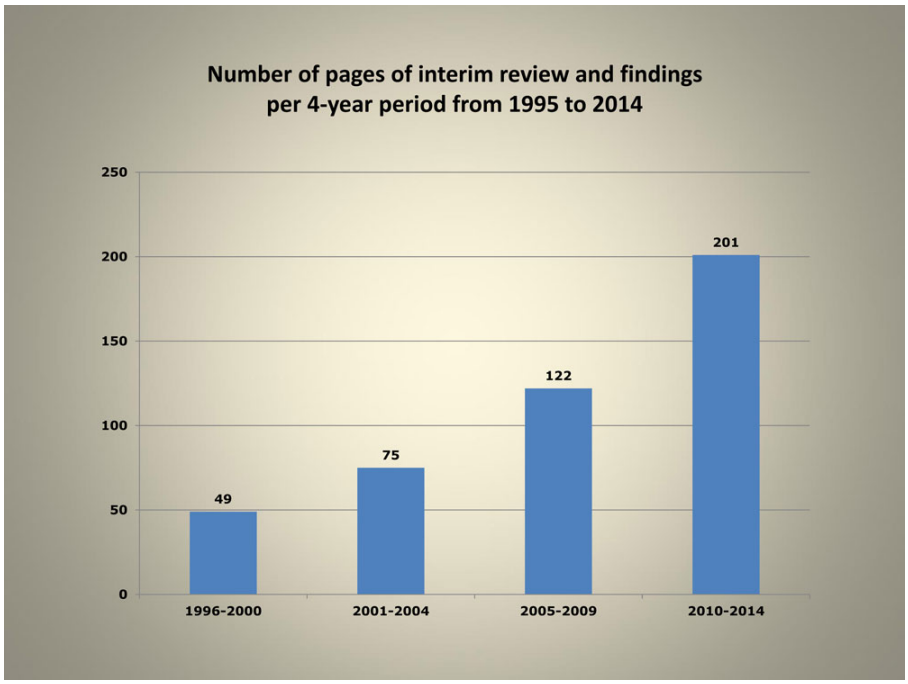
As for appeals, you are well aware that the rate of appeal has always been very high — and much higher than expected when the negotiators created a body of 7 part time Members. The average rate of appeal is approximately two-thirds. This means we should prepare for around 10-12 appeals being filed per year during the next 24 months including possible appeals in the two complex aircraft cases. If we shut the doors today, panels and the Appellate Body will have enough work to keep them and their Secretariat staff busy for the next 2 years. But of course the doors will not be shut — new requests will keep coming in. But it is not just the number of disputes and appeals that places demands on the dispute settlement system. Disputes are generally much more complex now than they were in the first decade. It is now common for disputes to involve multiple parties advancing a variety of claims with more voluminous submissions, increased third-party participation, more demand for translation, and greater procedural complexity.

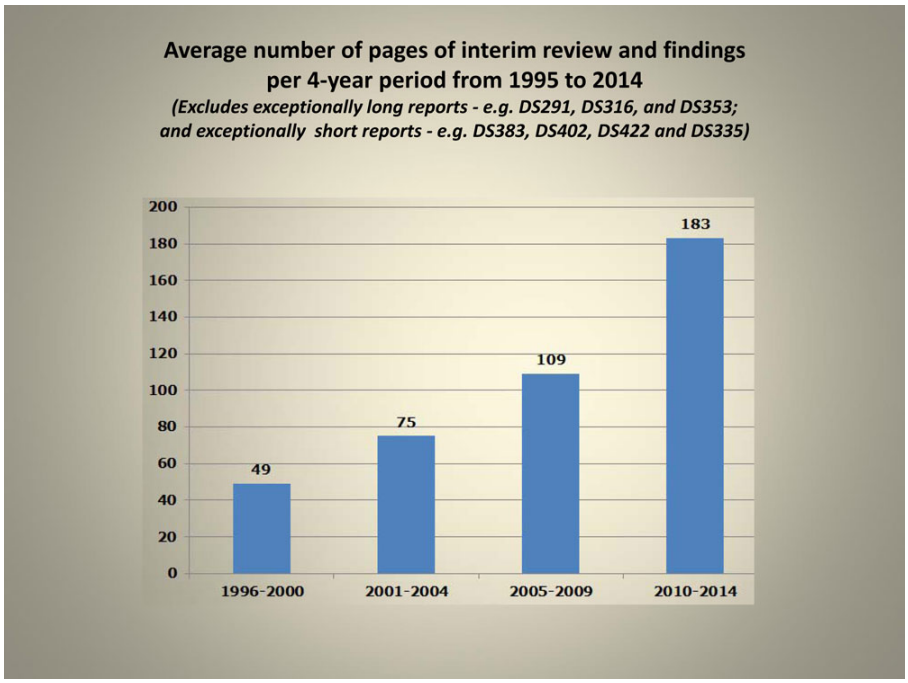
I am now going to show a few slides illustrating the upward trend in the complexity of disputes:

The first graph shows the total number of active disputes per year since the beginning of the system in 1995 including all stages of disputes.



The next two graphs show the number of pages of interim review and findings in the panel reports per 4-year period from 1995 to 2014.

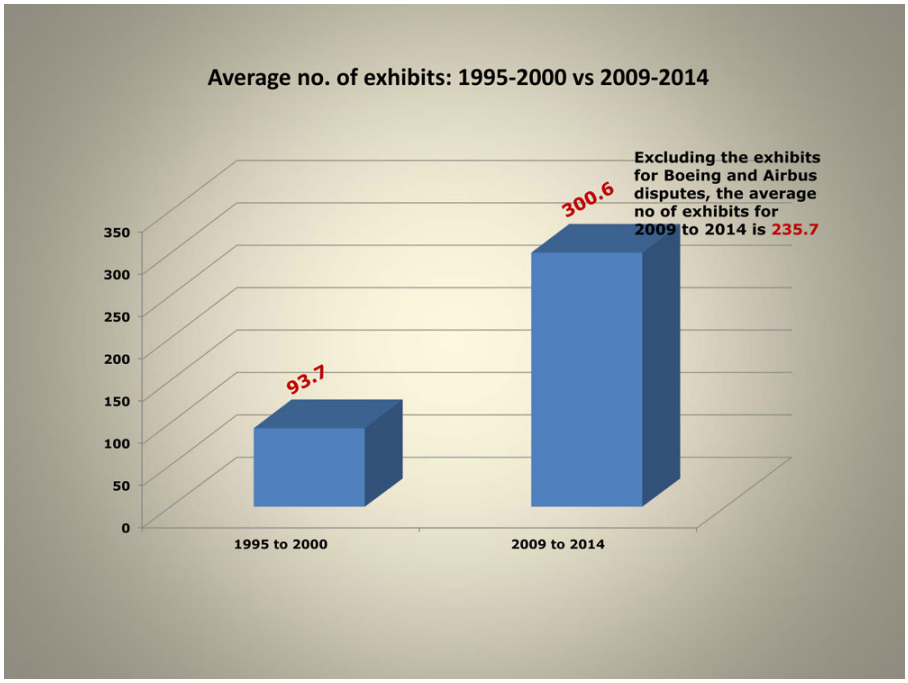




The first includes the two LCA reports.

The second excludes those two reports as they are outliers in terms of their length. Nevertheless you can see that the trend is unchanged. For the most recent 4-year period the average is nearly 200 pages — which is almost four times greater than the first 4-year period, when there was an average of 50 pages.

The final graph shows the average number of exhibits for the first five years of the system at about 94 — and for the most recent five years of the system, at just over 300.



As with the upward trend in the number of cases, I do not expect this increased level of complexity to change.

We are in a situation where the demand is severely testing our capacity. And there are some clear constraints on our ability to extend that capacity — such as the budgetary situation and some aspects of how the system was designed. For example, we have had some difficulties in retaining staff, which have contributed to some extent to the challenges we are facing. Speaking frankly, the private sector, and others, can offer WTO dispute settlement lawyers more stable and lucrative long-term working conditions and better career advancement opportunities. That is just reality. We therefore lost a number of trained and experienced lawyers — and their institutional and case law memory. Under the present circumstances, we need senior and experienced lawyers to lead panel teams, especially bearing in mind that panellists are part-time. And some of them are not experienced with the system.

We must also be mindful of the fact that the capacity of the Appellate Body is limited, first and foremost by the fact that the DSU stipulates that the Appellate Body shall be composed of 7 members. The intensity of the work required to complete an appeal within the 90 day timeframe means that it is not possible for an Appellate Body Member to serve on two divisions with identical or largely overlapping schedules. The likelihood that appeals will remain too numerous for the Appellate Body, composed of 7 members, to handle in parallel is to be continued. Even with somewhat staggered appeal filings the Appellate Body cannot hear more than three of the nowadays more complex appeals in parallel. Therefore, even if we could service more panels than we currently do, we still have an insurmountable bottleneck at the Appellate Body stage.

All these factors explain why some Members are experiencing delays with panels getting up and running after composition. It also explains why the Appellate Body will need more than 90 days to complete some appeals over the coming months and why parties may have to wait for an appeal slot to become available. I can assure you that we are cognisant of the delays that some of you have experienced recently, particularly after panel composition. I understand that this can pose difficulties for you, including financial difficulties. I want to be clear that in working through cases, we are proceeding in a strictly chronological order without discrimination or favouritism. There is no arbitrary or subjective approach to determining the sequence.

ADDRESSING THE SITUATION

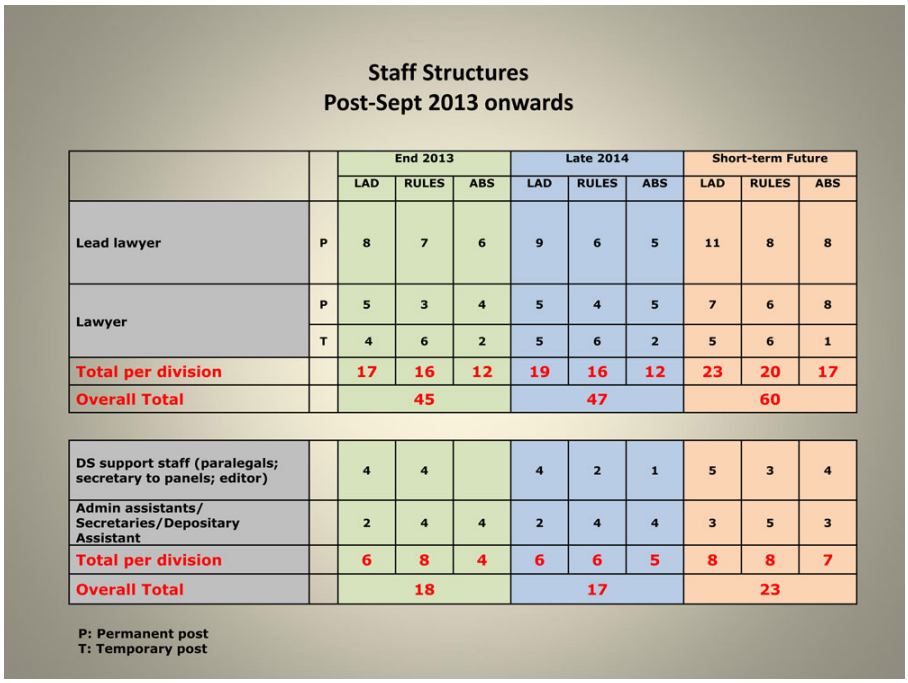
So, in very plain terms, that is where we stand today.

When I started the job this time last year, I found that things were even worse than I had expected. It was an emergency situation.

Staff Structures
1995, 2000 and Sept 2013

		1995			2000			Sept 2013		
		LAD	RULES	ABS	LAD	RULES	ABS	LAD	RULES	ABS
Lead lawyer	P	2	2	1	6	4	2	6	7	6
Lawyer	P	2		2	3	3	4	5	3	3
	T							4	6	1
Total per division		4	2	3	9	7	6	15	16	10
Overall Total		9			22			41		
DS support staff (paralegals; secretary to panels; editor)						1		4	3	
Admin assistants/ Secretaries/Depositary Assistant		3	2	2	3	2	3	1	4	4
Total per division		3	2	2	3	3	3	5	7	4
Overall Total		7			9			16		

P: Permanent post
T: Temporary post



Staff Structures
Post-Sept 2013 onwards

		End 2013			Late 2014			Short-term Future		
		LAD	RULES	ABS	LAD	RULES	ABS	LAD	RULES	ABS
Lead lawyer	P	8	7	6	9	6	5	11	8	8
Lawyer	P	5	3	4	5	4	5	7	6	8
	T	4	6	2	5	6	2	5	6	1
Total per division		17	16	12	19	16	12	23	20	17
Overall Total		45			47			60		
DS support staff (paralegals; secretary to panels; editor)		4	4		4	2	1	5	3	4
Admin assistants/ Secretaries/Depositary Assistant		2	4	4	2	4	4	3	5	3
Total per division		6	8	4	6	6	5	8	8	7
Overall Total		18			17			23		

P: Permanent post
T: Temporary post

Despite the number of disputes rising to its highest in a decade starting in 2012, this slide shows that in 2013 the Secretariat did not have enough lawyers who could be assigned in new disputes. This is partly because we had lost a number of trained and experienced lawyers in the preceding few years. So I took immediate steps to deal with the problems. I reallocated resources so that the 3 dispute settlement divisions could recruit junior lawyers through temporary contracts for 1 to 2 years, using funds that were available from vacant posts. A total of 17 temporary contracts have been awarded in the three divisions since February 2013. Part of this reallocation has addressed the need for additional native speakers of Spanish.

And we have achieved some results through staff mobility. I am envisaging to temporarily assign 2-3 staff members from non-dispute settlement divisions to pending and upcoming disputes as lead lawyers. These staff members had previously worked on disputes, but they are currently in different divisions. Of course, there is a very limited number of staff with this experience. The same is true for support staff, which require specific expertise more akin to that of registrars, paralegals and professional editors. Therefore mobility (in short, moving people from one division to another) is not the silver bullet that some may think it is. We need to be prepared to take some bigger steps. Simply put, the need for specialised skills means that we will need to hire new staff at both the senior and junior levels.

Although we have been able to attract qualified people through temporary contracts in the recent past, we are unable to retain them without offering more stability and long-term career opportunities. And when they leave, the considerable effort and time that we have invested in training them is completely lost. So we must find ways to retain the best and the brightest once we have recruited and trained them. Moreover we must bring new people in at the senior level — and this is where the most acute problem is at the moment. The supply is just not there. Let us be realistic. Even if we bring in new people at the senior level, it also takes at least a year to 18 months for them to develop specialized skills and experience necessary to lead a panel or an appeal team. So this is something that we will address.

I have recently allocated 15 additional posts to the 3 dispute settlement divisions — 6 at the senior level and 9 at the junior level. Vacancies for these posts will be announced shortly. In fact, my intention is to create overcapacity in the dispute settlement area. Should dispute settlement activity wane in a year or two, which is again very unlikely, then we will put these talents to work elsewhere in the Secretariat — and bring them back if the work in dispute settlement so requires.

Of course hiring staff at present is problematic. Members have put very clear limitations on what I can do. And I am not whining. First, there is the overall cap on the budget. Second, there is the

cap on the proportion of the budget which can be used for personnel. Of course I must observe both of these caps, and therefore my options are limited. I am reallocating resources within the organization. When senior posts are vacated elsewhere in the Secretariat, a significant proportion saved there will be reallocated to disputes.

Of course this approach will inevitably have some consequences. It means, for example, that we will have to stop doing some things or that we will have to do certain things with less and perhaps we will also have to outsource even more of our work, including translation. Clearly there are limits to the sustainability of this approach, which Members will want to consider. There are some other steps that we can take to alleviate some of the pressure on the system, in addition to those we are taking on staff. To start, we must address the complexity of disputes. There are precedents for this. For example:

Simplifying the descriptive part of a panel report by annexing parties' executive summaries to the report. That simplifies things a little. Sometimes setting time limits for oral presentations before panels. Seeking ways to streamline selection of panel experts. And, in the Appellate Body, standardizing the content and format of routine communications and rulings.

Members could think about taking additional steps in a similar vein in going forward. I am trying to ask you to be helpful! Members could also consider some more fundamental steps. And this is for you to consider. Some years ago there was a proposal to increase the number of AB Members. Under the current situation the 7 member AB can handle around 10-12 appeals at most per year. That is stretching the envelope. And this is with AB Members working almost full-time. This operational cap is thus simply not enough given the level of demand. If, for example, Members decided to increase the number of members to 9, the maximum per year could be increased by approximately a third. This could potentially address the bottleneck at the AB stage to some degree. But of course this is entirely in your hands.

CONCLUSION

We will continue to work hard to address these issues. But, I think that members need to reflect on the situation that I have outlined today. I think it is important to consider how the system was designed — and how it has evolved since then. We thought we had built a sailboat — but now we have discovered that what we have on our hands is an ocean liner. And of course an ocean liner requires more resources, more fuel and a bigger crew. So we will need to consider what resources we are prepared to provide if we want to stay afloat. I am taking concerted action to resolve the challenges before us — but I am working within constraints. No amount of mobility or invention will adequately resolve our situation definitely. We need to confront the situation as we find it today — and we need to be honest about what it means if it goes unaddressed.

The WTO dispute settlement system has served the membership extremely well. It is recognized the world over for providing fair, high quality results that respond to both developing and developed country members. It is faster than most if not all international adjudicative systems operating today, to say nothing of domestic courts the world over. We need to ensure that this remains the case. And for this, I invite you to start thinking seriously about the hard options and decisions we will have to face to fix the system.

Finally, I would like to take this opportunity to thank staff members for their very hard work in assisting panels and the Appellate Body Members. The WTO dispute settlement system would not have achieved its current success without their professionalism and dedication.

ANNEX 3

MEMBERS OF THE APPELLATE BODY
(1 JANUARY TO 31 DECEMBER 2014)

BIOGRAPHICAL NOTES

Ujal Singh Bhatia (India) (2011–2015)

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

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

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

Seung Wha Chang (Korea) (2012–2016)

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

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

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

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

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

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

Thomas R. Graham (United States) (2011–2015)

Born in the United States on 23 November 1942, Tom Graham is the former head of the international trade practice at a large international law firm, and the founder of the international trade practice at another large international law firm. He was one of the first US lawyers to represent respondents in trade remedy cases in various countries around the world, and he was among the first to bring economists, accountants, and other non-lawyer professionals into the international trade practices of private law firms. Mr Graham also headed his international trade practice group's committee on long-term planning and development.

In private law practice, Mr Graham often collaborated with local counsel and national authorities in various countries to develop legal interpretations of laws and regulations consistent with GATT/WTO agreements, and in negotiating the resolution of international trade disputes.

Mr Graham served as Deputy General Counsel in the Office of the US Trade Representative, where he was instrumental in the negotiation of the Tokyo Round Agreement on Technical Barriers to Trade and where he represented the US Government in dispute settlement proceedings under the GATT. Earlier in his career, Mr Graham served for three years in Geneva as a Legal Officer at the United Nations Conference on Trade and Development (UNCTAD).

Mr Graham was the first chairman of the American Society of International Law's Committee on International Economic Law, and the chair of the American Bar Association's Subcommittee on Exports. He has been a visiting professor at the University of North Carolina Law School and an adjunct professor at the Georgetown University Law Center and the American University Washington College of Law. He has edited books on international trade policy, and international trade and environment, and he has written many articles and monographs on international trade law and policy as a Guest Scholar at the Brookings Institution, and as a Senior Associate at the Carnegie Endowment for International Peace.

Mr Graham holds a BA in Political Science, with emphasis on International Relations and Economics, from Indiana University and a JD from Harvard Law School.

Ricardo Ramírez-Hernández (Mexico) (2009–2017)

Born in Mexico on 17 October 1968, Ricardo Ramírez-Hernández holds the Chair of International Trade Law at the Mexican National University (UNAM) in Mexico City. He was Head of the International Trade Practice for Latin America of an international law firm in Mexico City. His practice focused on issues related to NAFTA and trade across Latin America, including international trade dispute resolution.

Prior to practicing with a law firm, Mr Ramírez-Hernández was Deputy General Counsel for Trade Negotiations of the Ministry of Economy in Mexico for more than a decade. In this capacity, he provided advice on trade and competition policy matters related to 11 free trade agreements signed by Mexico, as well as with respect to multilateral agreements, including those related to the WTO, the Free Trade Area of the Americas (FTAA), and the Latin American Integration Association (ALADI).

Mr Ramírez-Hernández also represented Mexico in complex international trade litigation and investment arbitration proceedings. He acted as lead counsel to the Mexican government in several WTO disputes. He has also served on NAFTA panels.

Mr Ramírez-Hernández holds an LLM degree in International Business Law from the American University Washington College of Law, and a law degree from the Universidad Autónoma Metropolitana.

Shree Baboo Chekitan Servansing (Mauritius) (2014–2018)

Born in Mauritius on 22 April 1955, Shree Baboo Chekitan Servansing enjoyed a long and distinguished career with the Mauritian civil service. From 2004 to 2012, Mr Servansing was Mauritius' Ambassador and Permanent Representative to the United Nations Office and other International Organizations in Geneva, including the WTO. During his tenure as Permanent Representative, he served on various Committees at the WTO, and chaired the Committees on Trade and Environment, and Trade and Development. He also chaired the Work Programme on Small Economies, the dedicated session on Aid-for-Trade, and the African Group, and was coordinator of the African Caribbean Pacific (ACP) Group.

Mr Servansing previously worked, in various capacities, for the Mauritius Ministry of Foreign Affairs in Mauritius, India and Belgium. During his tenure at the Mauritius Embassy in Belgium, he was intensively involved in the ACP-EU negotiations leading to the Cotonou Agreement and subsequently in the Economic Partnership Agreement (EPA) negotiations. Mr Servansing also served as the personal representative of the Prime Minister of Mauritius on the Steering Committee of the New Partnership for Africa's Development (NEPAD). In this capacity he was engaged in the strategic formulation of Africa's flagship development framework.

Upon retiring from civil service, Mr Servansing served as the head of the ACP-EU Programme on Technical Barriers to Trade in Brussels from 2012 to 2014. In this position, he was responsible for facilitating the building of capacity among ACP countries in order to enhance their export competitiveness, and improve their Quality Infrastructure to comply with technical regulations.

Mr Servansing's experience in trade policy, trade negotiations, and the multilateral trading system spans three decades. He has frequently spoken on international trade issues, and has published numerous papers and articles in Mauritian and foreign journals on a variety of trade-related issues.

Mr Servansing holds an M.A. from the University of Sussex, a Postgraduate Diploma in Foreign Affairs and International Trade from Australian National University, and a B.A. (Hons.) from the University of Mauritius.

Peter Van den Bossche (European Union; Belgium) (2009–2017)

Born in Belgium on 31 March 1959, Peter Van den Bossche is Professor of International Economic Law at Maastricht University, the Netherlands. Van den Bossche is also visiting professor at the College of Europe, Bruges (since 2010); the University of Barcelona (IELPO Programme) (since 2008); the China-EU School of Law, Beijing (since 2008); and the World Trade Institute, Berne (MILE Programme) (since 2002). He is member of the Board of Editors of the *Journal of International Economic Law* and member of the Advisory Board of the *Journal of World Investment and Trade* and the *Revista Latinoamericana de Derecho Comercial Internationa*l. He is also member of the Advisory Board of the WTO Chairs Programme (WCP).

Mr Van den Bossche holds a Doctorate in Law from the European University Institute in Florence, an LLM from the University of Michigan Law School, and a Licence en Droit *magna cum laude* from the University of Antwerp. From 1990 to 1992, he served as a référendaire of Advocate General W. van Gerven at the European Court of Justice in Luxembourg. From 1997 to 2001, Mr Van den Bossche was Counsellor and subsequently Acting Director of the WTO Appellate Body Secretariat. In 2001, he returned to academia and from 2002 to 2009 frequently acted as a consultant to international organisations and developing countries on issues of international economic law. He also served on the faculty of the Université libre de Bruxelles (2002–2009); at the Trade Policy Training Centre in Africa (trapca), Arusha, Tanzania (2008 and 2013); at the Foreign Trade University, Hanoi & Ho Chi Minh City, Vietnam (2009 and 2011); at the Universidad San Francisco de Quito, Ecuador (2013); and at the Law School of Koç University, Istanbul, Turkey (2013).

Mr Van den Bossche has published extensively in the field of international economic law. He is author of the book *The Law and Policy of the World Trade Organization*, of which the third edition (with Werner Zdouc) was published by Cambridge University Press in 2013.

Yuejiao Zhang (China) (2008–2016)

Yuejiao Zhang is Professor of International Economic Law at Tsinghua University and at Shantou University in China. She is an arbitrator at the International Chamber of Commerce (ICC) and at China's International Trade and Economic Arbitration Commission (CIETAC). She served as Vice-President of China's International Economic Law Society. She is also a member of the Advisory Board of the International Development Law Organization (IDLO).

Professor Zhang served as a Board Director to the West African Development Bank from 2005 to 2007. Between 1998 and 2004, she held various senior positions at the Asian Development Bank (ADB), including as Assistant General Counsel, Co-Chair of the Appeal Committee, and Director-General. She was the head of the ADB experts group on international trade and the ADB contact point to the WTO. Prior to this, she held several positions in government and academia in China, including as Director-General of Law and Treaties at the Ministry of Foreign Trade and Economic Cooperation (1984–1997). She participated in the preparation of China's first joint-venture law, general principles of civil law, contract law, and foreign trade law. From 1987 to 1996, she was one of China's chief negotiators on intellectual property and was involved in the preparation of China's patent law, trademark law, and copyright law. She also served as the chief legal counsel for China's GATT resumption. Between 1982 and 1985, she worked as legal counsel at the World Bank. She was a Member of the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) from 1987 to 1999 and a Board Member of IDLO from 1988 to 1999. Professor Zhang was a member of the UNIDROIT and UNCITRAL drafting committees concerning several international trade and economic conventions, such as the General Principles of Commercial Contract and the International Financial Leasing Convention.

Professor Zhang has authored several books and articles on international economic law and international dispute settlement. She has a BA from China High Education College, a BA from Rennes University, France, and an LLM from Georgetown University. Professor Zhang also lectured at universities in France and in Hong Kong, Macau of China.

* * *

DIRECTOR OF THE APPELLATE BODY SECRETARIAT

Werner Zdouc

Director of the WTO Appellate Body Secretariat since 2006, Werner Zdouc obtained a law degree from the University of Graz in Austria. He then went on to earn an LLM from Michigan Law School and a Ph.D. from the University of St Gallen in Switzerland. Dr Zdouc joined the WTO Legal Affairs Division in 1995, advised many dispute settlement panels, and conducted technical cooperation missions in many developing countries. He became legal counsellor at the Appellate Body Secretariat in 2001. He has been a lecturer and Visiting Professor for international trade law at Vienna Economic University, the Universities of Zurich and Barcelona and the Geneva Graduate Institute. From 1987 to 1989, he worked for governmental and non-governmental development aid organizations in Austria and Latin America. Dr Zdouc has authored various publications on international economic law and is a member of the Trade Law Committee of the International Law Association.

ANNEX 4

WELCOME OF A NEW APPELLATE BODY MEMBER

Remarks of the Director-General Azevêdo to the Dispute Settlement Body of the WTO, Geneva, 20 October 2014

Thank you Ambassador de Mateo for that introduction, and for your work both as chair of the Dispute Settlement Body, and also as the chair of the Appellate Body Selection Committee.

I'm pleased to join you in welcoming Mr Shree Baboo Chekitan Servansing, who will shortly be sworn in as the newest Member of the Appellate Body. It is great to see the Appellate Body's membership restored to seven, following the departure of Mr David Unterhalter in December last year.

And I would like to extend my sincere congratulations to Mr Servansing on his appointment. As Ambassador de Mateo has noted, Mr Servansing has vast knowledge and experience of the WTO disciplines, trade policy, trade negotiations, and the multilateral trading system itself. His insight and perspective will be extremely valuable as he and his colleagues on the Appellate Body continue to assist WTO Members to resolve disputes in the balanced, impartial, and independent manner that we have grown to expect from the Appellate Body. I would especially like to thank Mr Servansing for his courage in accepting to join the Appellate Body at a time when the dispute settlement system is facing unprecedented challenges due to its ever-increasing workload.

As I detailed at last month's DSB meeting, the dispute settlement system has undergone a significant evolution since 1995, as a result of Members' growing confidence in the system — and their growing use of it. And of course this is very welcome. Recourse to the dispute settlement system has ensured adherence to negotiated rules, thereby helping to provide the security and predictability in international trade that is so essential. To date, the dispute settlement system has handled disputes covering at least US$1 trillion of world trade flows. Two-thirds of the WTO Membership has participated in the system in one way or another.

And the Appellate Body lies at its heart. Through its prompt settlement of the disputes that have come before it, its rigour in reviewing panel decisions, and its clarification of Members' rights and obligations under the WTO's covered agreements, the Appellate Body has proven its value beyond any doubt.

However, this success comes with a price. Appellate Body Members are called upon to do more as disputes increase, not just in volume but in complexity as well. Judging from the number of ongoing panel proceedings, the workload of the Appellate Body is likely to remain high for the foreseeable future. Therefore, this appointment is very timely. The Appellate Body really can use the help!

The dispute settlement system negotiated in the Uruguay Round was an extraordinary achievement. Today, as it approaches the end of its second decade, it should not be taken for granted. To ensure that the system continues to function at optimal levels for the benefit of all WTO Members, each of us has a responsibility to contribute to its consolidation and further development. We must protect, at all times, the system's hallmarks of total independence and impartiality. Members must use the system wisely, recognising the practical challenges faced by the system as a whole — and they must be willing to work together in addressing them. And we must keep equipping the system properly, not only in terms of Appellate Body Members and panelists, but also in terms of the secretariat resources that we make available in support.

In closing, Mr Servansing, I want to congratulate you on your appointment once again — and welcome you back to the WTO. The system owes a large measure of its success to your colleagues and predecessors — the Appellate Body Members and panellists who have served, and continue to serve, the system with dedication, courage, independence, and integrity. I have no doubt that you will maintain this tradition.

We wish you all the best in the weeks and months ahead. Good luck and bon courage!

Remarks of the then Chair of the Appellate Body, Mr Ricardo Ramírez Hernández, to the Dispute Settlement Body of the WTO, Geneva, 20 October 2014

Estas ocasiones normalmente me generan sentimientos encontrados, pues nos despedimos de uno de nuestros colegas y le demos la bienvenida a uno nuevo. Afortunadamente hoy solo tenemos un momento alegre al celebrar el nombramiento del Sr. Servansing como miembro del Órgano de Apelación, puesto que hace ya algunos meses escuchamos el memorable discurso de despedida de David.

Permítanme comenzar por felicitar al Comité de Selección por su extraordinario trabajo. Dada la cantidad de candidatos altamente cualificados, estoy seguro que su tarea no fue fácil. A todos los candidatos y a los gobiernos que los nominaron, les ofrecemos nuestro reconocimiento y apreciación por participar en este proceso.

One of the unique features of the Appellate Body is not only its multicultural but also its multidisciplinary nature. 7 cultures, 7 backgrounds, 7 personalities. The fact that we can look at a problem not only from various angles but also through different lenses allows us to resolve disputes to the best of our collective abilities. As just highlighted by Ambassador de Mateo and the Director-General, Mr Servansing vast experience on trade policy and negotiations will certainly add a valuable perspective to our deliberations. Today, Mr Servansing's presence makes our institution wiser and stronger. I am sure that, like all of us, he will embrace collegiality as one of the fundamental pillars of our institution. We look forward to working with you Shree.

We see with great satisfaction that the Appellate Body workload paper circulated last year, has started to pay dividends. We were pleased to hear the DG's presentation at the September 26th DSB meeting and welcome the allocation by the DG of additional human resources to the Appellate Body along with the allocation to the divisions servicing panels at a time of strongly increasing workload. However, as mentioned in previous messages, there are structural problems which need to be address by the full Membership. In this respect, we are encouraged to see the growing awareness by the Membership of the problems ahead as reflected in their statements at the last DSB meeting. Given the extraordinary challenges the Appellate Body is facing with the growing number and complexity of cases, it will be necessary not only to hire the best legal minds to support us, but also to retain their expertise and experience and to reward them for the extraordinary demands we place on them.

ANNEX 5

I. FORMER APPELLATE BODY MEMBERS

Name	Nationality	Term(s) of office
Said El-Naggar	Egypt	1995–2000 *
Mitsuo Matsushita	Japan	1995–2000 *
Christopher Beeby	New Zealand	1995–1999 1999–2000
Claus-Dieter Ehlermann	Germany	1995–1997 1997–2001
Florentino Feliciano	Philippines	1995–1997 1997–2001
Julio Lacarte-Muró	Uruguay	1995–1997 1997–2001
James Bacchus	United States	1995–1999 1999–2003
John Lockhart	Australia	2001–2005 2005–2006
Yasuhei Taniguchi	Japan	2000–2003 2003–2007
Merit E. Janow	United States	2003–2007
Arumugamangalam Venkatachalam Ganesan	India	2000–2004 2004–2008
Georges Michel Abi-Saab	Egypt	2000–2004 2004–2008
Luiz Olavo Baptista	Brazil	2001–2005 2005–2009
Giorgio Sacerdoti	Italy	2001–2005 2005–2009
Jennifer Hillman	United States	2007–2011
Lilia Bautista	Philippines	2007–2011
Shotaro Oshima	Japan	2008–2012 **
David Unterhalter	South Africa	2006-2009 2009-2013

* Messrs El-Naggar and Matsushita decided not to seek a second term of office. However, the DSB extended their terms until the end of March 2000 in order to allow the Selection Committee and the DSB the time necessary to complete the selection process of replacing the outgoing Appellate Body Members. (See WT/DSB/M70, pp. 32-35)
** Mr Oshima's resignation became effective on 6 April 2012.

Mr Christopher Beeby passed away on 19 March 2000.
Mr Said El-Naggar passed away on 11 April 2004.
Mr John Lockhart passed away on 13 January 2006.

II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

Name	Nationality	Term(s) as Chairperson
Julio Lacarte-Muró	Uruguay	7 February 1996 – 6 February 1997 7 February 1997 – 6 February 1998
Christopher Beeby	New Zealand	7 February 1998 – 6 February 1999
Said El-Naggar	Egypt	7 February 1999 – 6 February 2000
Florentino Feliciano	Philippines	7 February 2000 – 6 February 2001
Claus-Dieter Ehlermann	Germany	7 February 2001 – 10 December 2001
James Bacchus	United States	15 December 2001 – 14 December 2002 15 December 2002 – 10 December 2003
Georges Abi-Saab	Egypt	13 December 2003 – 12 December 2004
Yasuhei Taniguchi	Japan	17 December 2004 – 16 December 2005
Arumugamangalam Venkatachalam Ganesan	India	17 December 2005 – 16 December 2006
Giorgio Sacerdoti	Italy	17 December 2006 – 16 December 2007
Luiz Olavo Baptista	Brazil	17 December 2007 – 16 December 2008
David Unterhalter	South Africa	18 December 2008 – 11 December 2009 12 December 2009 – 16 December 2010
Lilia Bautista	Philippines	17 December 2010 – 14 June 2011
Jennifer Hillman	United States	15 June 2011 – 10 December 2011
Yuejiao Zhang	China	11 December 2011 – 31 May 2012 1 June 2012 – 31 December 2012
Ricardo Ramírez Hernández	Mexico	1 January 2013 – 31 December 2013 1 January 2014 – 31 December 2014

ANNEX 6

APPEALS FILED: 1995–2014

Year	Notices of Appeal filed	Notices of Appeals in original proceedings	Notices of Appeals in Article 21.5 proceedings
1995	0	0	0
1996	4	4	0
1997	6 [a]	6	0
1998	8	8	0
1999	9 [b]	9	0
2000	13 [c]	11	2
2001	9 [d]	5	4
2002	7 [e]	6	1
2003	6 [f]	5	1
2004	5	5	0
2005	10	8	2
2006	5	3	2
2007	4	2	2
2008	13 [g]	10	3
2009	3	1	2
2010	3	3	0
2011	9	9	0
2012	5	5	0
2013	1	1	0
2014	9	8	1
Total	**129**	**109**	**20**

[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*. A single Appellate Body report was circulated in relation to those appeals.

ANNEX 7

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF ADOPTION: 1995–2014[a]

	All panel reports			Panel reports other than Article 21.5 reports [b]			Article 21.5 panel reports		
Year of adoption	Panel reports adopted [c]	Panel reports appealed [d]	Percentage appealed [e]	Panel reports adopted	Panel reports appealed	Percentage appealed	Panel reports adopted	Panel reports appealed	Percentage appealed
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
2006	7	6	86%	4	3	75%	3	3	100%
2007	10	5	50%	6	3	50%	4	2	50%
2008	11	9	82%	8	6	75%	3	3	100%
2009	8	6	75%	6	4	67%	2	2	100%
2010	5	2	40%	5	2	40%	0	0	–
2011	8	5	63%	8	5	63%	0	0	–
2012	18	11	61%	18	11	61%	0	0	–
2013	4	2	50%	4	2	50%	0	0	–
2014	15	13	87%	13	11	85%	2	2	100%
Total	**201**	**136**	**68%**	**172**	**115**	**67%**	**29**	**21**	**72%**

[a] No panel reports were adopted in 1995.

[b] Under Article 21.5 of the DSU, a panel may be established to hear a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB upon the adoption of a previous panel or Appellate Body report.

[c] The panel reports in *EC – Bananas III (Ecuador)*, *EC – Bananas III (Guatemala and Honduras)*, *EC – Bananas III (Mexico)*, and *EC – Bananas III (US)* are counted as a single panel report. The panel reports in *US – Steel Safeguards*, in *EC – Export Subsidies on Sugar*, and in *EC – Chicken Cuts*, are also counted as single panel reports in each of those disputes.

[d] Panel reports are counted as having been appealed where they are adopted as upheld, modified, or reversed by an Appellate Body report. The number of panel reports appealed may differ from the number of Appellate Body reports because some Appellate Body reports address more than one panel report.

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

ANNEX 8

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED THROUGH 2014[a]

Year of circulation	DSU	WTO Agmt	GATT 1994	Agri-culture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	Safe-guards	GATS	TRIPS
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	0	1	1
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	1	0	0
2000	8	1	7	2	0	0	0	0	2	0	5	2	1	1
2001	7	1	3	1	0	1	1	0	4	0	1	2	0	0
2002	8	2	4	3	0	0	1	0	1	0	3	1	1	1
2003	4	2	3	0	1	0	0	0	4	0	1	1	0	0
2004	2	0	5	0	0	0	0	0	2	0	1	0	0	0
2005	9	0	5	2	0	0	0	0	2	0	4	0	1	0
2006	5	0	3	0	0	0	0	0	3	0	2	0	0	0
2007	5	0	2	1	0	0	0	0	2	0	1	0	0	0
2008	8	1	9	1	2	0	0	0	3	0	3	0	0	0
2009	3	0	4	0	0	0	0	0	3	0	0	0	1	0
2010	1	0	0	0	1	0	0	0	0	0	0	0	0	0
2011	7	1	6	0	0	0	0	0	1	0	2	0	0	0
2012	9	0	7	0	0	0	4	0	1	0	2	0	0	0
2013	0	0	2	0	0	0	0	2	0	0	2	0	0	0
2014	6	4	7	0	0	0	2	0	0	0	3	0	0	0
Total	**100**	**15**	**84**	**13**	**7**	**3**	**8**	**2**	**29**	**2**	**33**	**7**	**5**	**3**

[a] No appeals were filed in 1995.

ANNEX 9

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1995–2014

As of the end of 2014, there were 160 WTO Members, of which 74 have participated in appeals in which Appellate Body reports were circulated between 1996 and 2014.[1]

The rules pursuant to which Members participate in appeals as appellant, other appellant, appellee, and third participant are described in section 5 of this Annual Report.

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua & Barbuda	0	1	1	0	2
Argentina	2	3	5	18	28
Australia	2	2	6	40	50
Bahrain, Kingdom of	0	0	0	1	1
Barbados	0	0	0	1	1
Belize	0	0	0	4	4
Benin	0	0	0	1	1
Bolivarian Republic of Venezuela	0	0	1	6	7
Bolivia, Plurinational State of	0	0	0	1	1
Brazil	5	7	12	32	56
Cameroon	0	0	0	3	3
Canada	14	9	22	29	74
Chad	0	0	0	2	2
Chile	3	0	2	12	17
China	14	3	9	40	66
Colombia	0	0	0	20	20
Costa Rica	1	0	0	3	4
Côte d'Ivoire	0	0	0	4	4
Cuba	0	0	0	4	4
Dominica	0	0	0	4	4
Dominican Republic	1	0	1	4	6
Ecuador	0	2	2	12	16

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

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Egypt	0	0	0	2	2
El Salvador	0	0	0	4	4
European Union	21	18	44	63	146
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	1	1	8	11
Guyana	0	0	0	1	1
Honduras	0	2	2	3	7
Hong Kong, China	0	0	0	8	8
Iceland	0	0	0	2	2
India	7	2	8	41	58
Indonesia	0	1	1	4	6
Israel	0	0	0	1	1
Jamaica	0	0	0	5	5
Japan	6	5	13	60	84
Kenya	0	0	0	1	1
Korea	3	4	6	31	44
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1
Malaysia	1	0	1	0	2
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2
Mexico	5	4	7	35	51
Namibia	0	0	0	1	1
New Zealand	0	3	6	13	22
Nicaragua	0	0	0	4	4
Nigeria	0	0	0	1	1
Norway	2	1	3	25	31
Oman	0	0	0	3	3
Pakistan	0	0	2	3	5
Panama	0	0	0	3	3
Paraguay	0	0	0	5	5
Peru	0	0	1	7	8
Philippines	3	0	3	1	7
Poland	0	0	1	0	1
Russian Federation	0	0	0	7	7
Senegal	0	0	0	1	1

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Saint Lucia	0	0	0	4	4
Saudi Arabia, Kingdom of	0	0	0	11	11
St Kitts & Nevis	0	0	0	1	1
St Vincent & the Grenadines	0	0	0	3	3
Suriname	0	0	0	3	3
Swaziland	0	0	0	1	1
Switzerland	0	1	1	0	2
Chinese Taipei	0	0	0	38	38
Tanzania	0	0	0	1	1
Thailand	3	2	5	20	30
Trinidad &Tobago	0	0	0	1	1
Turkey	1	0	0	15	16
United States	34	24	75	35	168
Viet Nam	0	0	0	7	7
Total	**129**	**95**	**241**	**733**	**1198**

II. DETAILS BY YEAR OF CIRCULATION

1996

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Gasoline WT/DS2/AB/R	United States	- - -	Brazil Venezuela	European Communities Norway
Japan – Alcoholic Beverages II WT/DS8/AB/R, WT/DS10/AB/R WT/DS11/AB/R	Japan	United States	Canada European Communities Japan United States	- - -

1997

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Underwear WT/DS24/AB/R	Costa Rica	- - -	United States	India
Brazil – Desiccated Coconut WT/DS22/AB/R	Philippines	Brazil	Brazil Philippines	European Communities United States
US – Wool Shirts and Blouses WT/DS33/AB/R and Corr.1	India	- - -	United States	- - -
Canada – Periodicals WT/DS31/AB/R	Canada	United States	Canada United States	- - -
EC – Bananas III WT/DS27/AB/R	European Communities	Ecuador Guatemala Honduras Mexico United States	Ecuador European Communities Guatemala Honduras Mexico United States	Belize Cameroon Colombia Costa Rica Côte d'Ivoire Dominica Dominican Republic Ghana Grenada Jamaica Japan Nicaragua St Lucia St Vincent & the Grenadines Senegal Suriname Venezuela
India – Patents (US) WT/DS50/AB/R	India	- - -	United States	European Communities

1998

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Hormones WT/DS26/AB/R, WT/DS48/AB/R	European Communities	Canada United States	Canada European Communities United States	Australia New Zealand Norway
Argentina – Textiles and Apparel WT/DS56/AB/R and Corr.1	Argentina	- - -	United States	European Communities
EC – Computer Equipment WT/DS62/AB/R, WT/DS67/AB/R WT/DS68/AB/R	European Communities	- - -	United States	Japan
EC – Poultry WT/DS69/AB/R	Brazil	European Communities	Brazil European Communities	Thailand United States
US – Shrimp WT/DS58/AB/R	United States	- - -	India Malaysia Pakistan Thailand	Australia Ecuador European Communities Hong Kong, China Mexico Nigeria
Australia – Salmon WT/DS18/AB/R	Australia	Canada	Australia Canada	European Communities India Norway United States
Guatemala – Cement I WT/DS60/AB/R	Guatemala	- - -	Mexico	United States

1999

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Korea – Alcoholic Beverages WT/DS75/AB/R, WT/DS84/AB/R	Korea	- - -	European Communities United States	Mexico
Japan – Agricultural Products II WT/DS76/AB/R	Japan	United States	Japan United States	Brazil European Communities
Brazil – Aircraft WT/DS46/AB/R	Brazil	Canada	Brazil Canada	European Communities United States
Canada – Aircraft WT/DS70/AB/R	Canada	Brazil	Brazil Canada	European Communities United States
India – Quantitative Restrictions WT/DS90/AB/R	India	- - -	United States	- - -
Canada – Dairy WT/DS103/AB/R, WT/DS113/AB/R and Corr.1	Canada	- - -	New Zealand United States	- - -
Turkey –Textiles WT/DS34/AB/R	Turkey	- - -	India	Hong Kong, China Japan Philippines
Chile – Alcoholic Beverages WT/DS87/AB/R, WT/DS110/AB/R	Chile	- - -	European Communities	Mexico United States
Argentina – Footwear (EC) WT/DS121/AB/R	Argentina	European Communities	Argentina European Communities	Indonesia United States
Korea – Dairy WT/DS98/AB/R	Korea	European Communities	Korea European Communities	United States

2000

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – FSC WT/DS108/AB/R	United States	European Communities	European Communities United States	Canada Japan
US – Lead and Bismuth II WT/DS138/AB/R	United States	- - -	European Communities	Brazil Mexico
Canada – Autos WT/DS139/AB/R	Canada	European Communities Japan	Canada European Communities Japan	Korea United States
Brazil – Aircraft (Article 21.5 – Canada) WT/DS46/AB/RW	Brazil	- - -	Canada	European Communities United States
Canada – Aircraft (Article 21.5 – Brazil) WT/DS70/AB/RW	Brazil	- - -	Canada	European Communities United States
US – 1916 Act WT/DS136/AB/R, WT/DS162/AB/R	United States	European Communities Japan	European Communities Japan United States	European Communities [a] India Japan [b] Mexico
Canada – Term of Patent Protection WT/DS170/AB/R	Canada	- - -	United States	- - -
Korea – Various Measures on Beef WT/DS161/AB/R, WT/DS169/AB/R	Korea	- - -	Australia United States	Canada New Zealand
US – Certain EC Products WT/DS165/AB/R	European Communities	United States	European Communities United States	Dominica Ecuador India Jamaica Japan St Lucia
US – Wheat Gluten WT/DS166/AB/R	United States	European Communities	European Communities United States	Australia Canada New Zealand

[a] In complaint brought by Japan.
[b] In complaint brought by the European Communities.

2001

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Bed Linen WT/DS141/AB/R	European Communities	India	European Communities India	Egypt Japan United States
EC – Asbestos WT/DS135/AB/R	Canada	European Communities	Canada European Communities	Brazil United States
Thailand – H-Beams WT/DS122/AB/R	Thailand	- - -	Poland	European Communities Japan United States
US – Lamb WT/DS177/AB/R, WT/DS178/AB/R	United States	Australia New Zealand	Australia New Zealand United States	European Communities
US – Hot-Rolled Steel WT/DS184/AB/R	United States	Japan	Japan United States	Brazil Canada Chile European Communities Korea
US – Cotton Yarn WT/DS192/AB/R	United States	- - -	Pakistan	European Communities India
US – Shrimp (Article 21.5 – Malaysia) WT/DS58/AB/RW	Malaysia	- - -	United States	Australia European Communities Hong Kong, China India Japan Mexico Thailand
Mexico – Corn Syrup (Article 21.5 – US) WT/DS132/AB/RW	Mexico	- - -	United States	European Communities
Canada – Dairy (Article 21.5 – New Zealand and US) WT/DS103/AB/RW, WT/DS113/AB/RW	Canada	- - -	New Zealand United States	European Communities

2002

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Section 211 Appropriations Act WT/DS176/AB/R	European Communities	United States	European Communities United States	- - -
US – FSC (Article 21.5 – EC) WT/DS108/AB/RW	United States	European Communities	European Communities United States	Australia Canada India Japan
US – Line Pipe WT/DS202/AB/R	United States	Korea	Korea United States	Australia Canada European Communities Japan Mexico
India – Autos [c] WT/DS146/AB/R, WT/DS175/AB/R	India	- - -	European Communities United States	Korea
Chile – Price Band System WT/DS207/AB/R and Corr.1	Chile	- - -	Argentina	Australia Brazil Colombia Ecuador European Communities Paraguay United States Venezuela
EC – Sardines WT/DS231/AB/R	European Communities	- - -	Peru	Canada Chile Ecuador United States Venezuela
US – Carbon Steel WT/DS213/AB/R and Corr.1	United States	European Communities	European Communities United States	Japan Norway
US – Countervailing Measures on Certain EC Products WT/DS212/AB/R	United States	- - -	European Communities	Brazil India Mexico
Canada – Dairy (Article 21.5 – New Zealand and US II) WT/DS103/AB/RW2, WT/DS113/AB/RW2	Canada	- - -	New Zealand United States	Argentina Australia European Communities

[c] India withdrew its appeal the day before the oral hearing was scheduled to proceed.

2003

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Offset Act (Byrd Amendment) WT/DS217/AB/R, WT/DS234/AB/R	United States	- - -	Australia Brazil Canada Chile European Communities India Indonesia Japan Korea Mexico Thailand	Argentina Costa Rica Hong Kong, China Israel Norway
EC – Bed Linen (Article 21.5 – India) WT/DS141/AB/RW	India	- - -	European Communities	Japan Korea United States
EC – Tube or Pipe Fittings WT/DS219/AB/R	Brazil	- - -	European Communities	Chile Japan Mexico United States
US – Steel Safeguards WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R	United States	Brazil China European Communities Japan Korea New Zealand Norway Switzerland	Brazil China European Communities Japan Korea New Zealand Norway Switzerland United States	Canada Cuba Mexico Chinese Taipei Thailand Turkey Venezuela
Japan – Apples WT/DS245/AB/R	Japan	United States	Japan United States	Australia Brazil European Communities New Zealand Chinese Taipei
US – Corrosion-Resistant Steel Sunset Review WT/DS244/AB/R	Japan	- - -	United States	Brazil Chile European Communities India Korea Norway

2004

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Softwood Lumber IV WT/DS257/AB/R	United States	Canada	Canada United States	European Communities India Japan
EC – Tariff Preferences WT/DS246/AB/R	European Communities	- - -	India	Bolivia Brazil Colombia Costa Rica Cuba Ecuador El Salvador Guatemala Honduras Mauritius Nicaragua Pakistan Panama Paraguay Peru United States Venezuela
US – Softwood Lumber V WT/DS264/AB/R	United States	Canada	Canada United States	European Communities India Japan
Canada – Wheat Exports and Grain Imports WT/DS276/AB/R	United States	Canada	Canada United States	Australia China European Communities Mexico Chinese Taipei
US – Oil Country Tubular Goods Sunset Reviews WT/DS268/AB/R	United States	Argentina	Argentina United States	European Communities Japan Korea Mexico Chinese Taipei

2005

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Upland Cotton WT/DS267/AB/R	United States	Brazil	Brazil United States	Argentina Australia Benin Canada Chad China European Communities India New Zealand Pakistan Paraguay Chinese Taipei Venezuela
US – Gambling WT/DS285/AB/R and Corr.1	United States	Antigua & Barbuda	Antigua & Barbuda United States	Canada European Communities Japan Mexico Chinese Taipei
EC – Export Subsidies on Sugar WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R	European Communities	Australia Brazil Thailand	Australia Brazil European Communities Thailand	Barbados Belize Canada China Colombia Côte d'Ivoire Cuba Fiji Guyana India Jamaica Kenya Madagascar Malawi Mauritius New Zealand Paraguay St Kitts & Nevis Swaziland Tanzania Trinidad & Tobago United States

2005 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Dominican Republic – Import and Sale of Cigarettes WT/DS302/AB/R	Dominican Republic	Honduras	Dominican Republic Honduras	China El Salvador European Communities Guatemala United States
US – Countervailing Duty Investigation on DRAMS WT/DS296/AB/R	United States	Korea	Korea United States	China European Communities Japan Chinese Taipei
EC – Chicken Cuts WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1	European Communities	Brazil Thailand	Brazil European Communities Thailand	China United States
Mexico – Anti-Dumping Measures on Rice WT/DS295/AB/R	Mexico	- - -	United States	China European Communities
US – Anti-Dumping Measures on Oil Country Tubular Goods WT/DS282/AB/R	Mexico	United States	Mexico United States	Argentina Canada China European Communities Japan Chinese Taipei
US – Softwood Lumber IV (Article 21.5 – Canada) WT/DS257/AB/RW	United States	Canada	Canada United States	China European Communities

2006

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – FSC (Article 21.5 – EC II) WT/DS108/AB/RW2	United States	European Communities	European Communities United States	Australia Brazil China
Mexico – Taxes on Soft Drinks WT/DS308/AB/R	Mexico	- - -	United States	Canada China European Communities Guatemala Japan
US – Softwood Lumber VI (Article 21.5 – Canada) WT/DS277/AB/RW and Corr.1	Canada	- - -	United States	China European Communities
US – Zeroing (EC) WT/DS294/AB/R and Corr.1	European Communities	United States	United States European Communities	Argentina Brazil China Hong Kong, China India Japan Korea Mexico Norway Chinese Taipei
US – Softwood Lumber V (Article 21.5 – Canada) WT/DS264/AB/RW	Canada	- - -	United States	China European Communities India Japan New Zealand Thailand
EC – Selected Customs Matters WT/DS315/AB/R	United States	European Communities	European Communities United States	Argentina Australia Brazil China Hong Kong, China India Japan Korea Chinese Taipei

2007

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Zeroing (Japan) WT/DS322/AB/R	Japan	United States	United States Japan	Argentina China European Communities [d] Hong Kong, China India Korea Mexico New Zealand Norway Thailand
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) WT/DS268/AB/RW	United States	Argentina	Argentina United States	China European Communities Japan Korea Mexico
Chile – Price Band System (Article 21.5 – Argentina) WT/DS207/AB/RW	Chile	Argentina	Argentina Chile	Australia Brazil Canada China Colombia European Communities Peru Thailand United States
Japan – DRAMs (Korea) WT/DS336/AB/R and Corr.1	Japan	Korea	Korea Japan	European Communities United States
Brazil – Retreaded Tyres WT/DS332/AB/R	European Communities	- - -	Brazil	Argentina Australia China Cuba Guatemala Japan Korea Mexico Paraguay Chinese Taipei Thailand United States

[d] By virtue of the Treaty of Lisbon, as of 1 December 2009, "European Union" replaced and succeeded "European Communities". For disputes that began before the entry into force of the Treaty, the WTO dispute settlement reports refer to "European Communities".

2008

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Stainless Steel (Mexico) WT/DS344/AB/R	Mexico	- - -	United States	Chile China European Communities Japan Thailand
US – Upland Cotton (Article 21.5 – Brazil) WT/DS267/AB/RW	United States	Brazil	Brazil United States	Argentina Australia Canada Chad China European Communities India Japan New Zealand Thailand
US – Shrimp (Thailand) WT/DS343/AB/R	Thailand	United States	United States Thailand	Brazil Chile China European Communities India Japan Korea Mexico Viet Nam
US – Customs Bond Directive WT/DS345/AB/R	India	United States	United States India	Brazil China European Communities Japan Thailand

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Continued Suspension WT/DS320/AB/R	European Communities	United States	United States European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei
Canada – Continued Suspension WT/DS321/AB/R	European Communities	Canada	Canada European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei
India – Additional Import Duties WT/DS360/AB/R	United States	India	India United States	Australia Chile European Communities Japan Viet Nam
EC – Bananas III (Article 21.5 – Ecuador II) WT/DS27/AB/RW2/ECU and Corr.1	European Communities	Ecuador	Ecuador European Communities	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ghana Jamaica Japan Nicaragua Panama St Lucia St Vincent & the Grenadines Suriname United States

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Bananas III (Article 21.5 – US) WT/DS27/AB/RW/USA and Corr.1	European Communities	- - -	United States	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ecuador Jamaica Japan Mexico Nicaragua Panama St Lucia St Vincent & the Grenadines Suriname
China – Auto Parts (EC) WT/DS339/AB/R	China	- - -	European Communities	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (US) WT/DS340/AB/R	China	- - -	United States	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (Canada) WT/DS342/AB/R	China	- - -	Canada	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand

2009

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Continued Zeroing WT/DS350/AB/R	European Communities	United States	European Communities United States	Brazil China Egypt India Japan Korea Mexico Norway Chinese Taipei Thailand
US – Zeroing (EC) *(Article 21.5 – EC)* WT/DS294/AB/RW and Corr.1	European Communities	United States	European Communities United States	India Japan Korea Mexico Norway Chinese Taipei Thailand
US – Zeroing (Japan) *(Article 21.5 – Japan)* WT/DS322/AB/RW	United States	- - -	Japan	China European Communities Hong Kong, China Korea Mexico Norway Chinese Taipei Thailand
China – Publications and Audiovisual Products WT/DS363/AB/R	China	United States	China United States	Australia European Communities Japan Korea Chinese Taipei

2010

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Australia – Apples WT/DS367/AB/R	Australia	New Zealand	New Zealand Australia	Chile European Union Japan Pakistan Chinese Taipei United States

2011

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Anti-Dumping and Countervailing Duties (China) WT/DS379/AB/R	China	- - -	United States	Argentina Australia Bahrain Brazil Canada European Union India Japan Kuwait Mexico Norway Saudi Arabia Chinese Taipei Turkey
EC and certain member States – Large Civil Aircraft WT/DS316/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
Thailand – Cigarettes (Philippines) WT/DS371/AB/R	Thailand	- - -	Philippines	Australia China European Union India Chinese Taipei United States

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Fasteners (China) WT/DS397/AB/R	European Union	China	China European Union	Brazil Canada Chile Colombia India Japan Norway Chinese Taipei Thailand Turkey United States
US – Tyres (China) WT/DS399/AB/R	China	- - -	United States	European Union Japan Chinese Taipei Turkey Viet Nam
Philippines – Distilled Spirits (European Union) WT/DS396/AB/R	Philippines	European Union	European Union Philippines	Australia China India Mexico Chinese Taipei Thailand
Philippines – Distilled Spirits (United States) WT/DS403/AB/R	Philippines	- - -	United States	Australia China Colombia India Mexico Chinese Taipei Thailand

2012

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Raw Materials (United States) WT/DS394/AB/R	China	United States	China United States	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (European Union) WT/DS395/AB/R	China	European Union	China European Union	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (Mexico) WT/DS398/AB/R	China	Mexico	China Mexico	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Large Civil Aircraft (2nd complaint) WT/DS353/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
US – Clove Cigarettes WT/DS406/AB/R	United States	- - -	Indonesia	Brazil Colombia Dominican Republic European Union Guatemala Mexico Norway Turkey
US – Tuna II (Mexico) WT/DS381/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil Canada China Ecuador Guatemala Japan Korea New Zealand Chinese Taipei Thailand Turkey Venezuela
US – COOL (Canada) WT/DS384/AB/R	United States	Canada	Canada United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – COOL (Mexico) WT/DS386/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei
China – GOES WT/DS414/AB/R	China	- - -	United States	Argentina European Union Honduras India Japan Korea Saudi Arabia Viet Nam

2013

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Canada – Certain Measures Affecting the Renewable Energy Generation Sector WT/DS412/AB/R	Canada	Japan	Japan Canada	Australia Brazil China El Salvador European Union Honduras India Korea Mexico Norway Saudi Arabia Chinese Taipei United States
Canada – Measures Relating to the Feed-in Tariff Program WT/DS426/AB/R	Canada	European Union	European Union Canada	Australia Brazil China El Salvador India Japan Korea Mexico Norway Saudi Arabia Chinese Taipei Turkey United States

2014

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products WT/DS400/AB/R	Canada Norway	European Union	Canada Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Russia United States
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products WT/DS401/AB/R	Canada Norway	European Union	Canada Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Namibia Russia United States
United States — Countervailing and Anti-dumping Measures on Certain Products from China WT/DS437/AB/R	China	United States	China United States	Australia Canada European Union India Japan Russia Turkey Viet Nam
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS431/AB/R	United States	China	United States China	Argentina Australia Brazil Canada Chinese Taipei Colombia European Union India Indonesia Korea Japan Norway Oman Peru Russia Saudi Arabia Turkey Viet Nam

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS432/AB/R	China		European Union	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia Japan Korea Norway Oman Peru Russia Saudi Arabia Turkey United States Viet Nam
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS433/AB/R	China		Japan	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia Korea Norway Oman Peru Russia
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India WT/DS436/AB/R	India	United States	India United States	Australia Canada China European Union Saudi Arabia Turkey

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
United States — Countervailing Duty Measures on Certain Products from China WT/DS449/AB/R and Corr.1	China	United States	China United States	Australia Brazil Canada European Union India Japan Korea Norway Russia Saudi Arabia Turkey Viet Nam

ANNEX 10

APPELLATE BODY SECRETARIAT PARTICIPATION IN
THE WTO TECHNICAL ASSISTANCE AND TRAINING PLAN IN 2014

Course / Seminar	Location	Dates
Regional Trade Policy Course (Basic Principles Module)	Bridgetown, Barbados	6-8 May 2014
Regional Trade Policy Course (Dispute Settlement Module)	Gaborone, Botswana	9-11 July 2014
National Seminar on trade remedies, services and dispute settlement	Cape Town, South Africa	11-15 August 2014
Regional Trade Policy Course (Dispute Settlement Module)	Istanbul, Turkey	15-19 September 2014
National Seminar on technical barriers to trade	Rio de Janeiro, Brazil	18-19 September 2014

ANNEX 11

APPELLATE BODY SECRETARIAT PARTICIPATION IN BRIEFINGS, CONFERENCES, AND MOOT COURT COMPETITIONS IN 2014

Activity	Location	Dates
6th GNLU International Moot Court Competition	Gujarat, India	8-10 February 2014
European Law Students' Association (ELSA) Moot Court Competition	Barcelona, Spain	4-10 February 2014
ELSA Moot Court Competition	Kuala Lumpur, Malaysia	28 February-4 March 2014
ELSA Moot Court Competition	Washington, DC, USA	5-8 March 2014
ELSA Moot Court Competition	Warsaw, Poland	26-30 March 2014
ELSA Moot Court Competition	Johannesburg, South Africa	31 March-3 April 2014
ELSA Moot Court Competition	Geneva, Switzerland	17 May 2014
Master in International Economic Law and Policy (IELPO) Moot Court Competition	Barcelona, Spain	20 June 2014
Master of International Law and Economics (MILE) Moot Court	Berne, Switzerland	23-24 June 2014
Society of International Economic Law (SIEL) Biennial Conference	Berne, Switzerland	10-12 July 2014

ANNEX 12

WTO DISPUTE SETTLEMENT REPORTS AND ARBITRATION AWARDS: 1995–2014

Short title	Full case title and citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Argentina – Hides and Leather (Article 21.3(c))	Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU*, WT/DS155/10, 31 August 2001, DSR 2001:XII, p. 6013
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R / WT/DS444/R / WT/DS445/R / and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Argentina – Preserved Peaches	Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, adopted 15 April 2003, DSR 2003:III, p. 1037
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Australia – Automotive Leather II	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, DSR 1999:III, p. 951
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, p. 1189
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
Australia – Salmon	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407

Short title	Full case title and citation
Australia – Salmon (Article 21.3(c))	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, p. 267
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, p. 4067
Brazil – Aircraft (Article 21.5 – Canada)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS46/AB/RW, DSR 2000:IX, p. 4093
Brazil – Aircraft (Article 21.5 – Canada II)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, p. 5481
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000, DSR 2002:I, p. 19
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Brazil – Desiccated Coconut	Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, p. 189
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
Brazil – Retreaded Tyres (Article 21.3(c))	Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU*, WT/DS332/16, 29 August 2008, DSR 2008:XX, p. 8581
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, p. 1443
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
Canada – Aircraft (Article 21.5 – Brazil)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS70/AB/RW, DSR 2000:IX, p. 4315
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, p. 849
Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)	Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS222/ARB, 17 February 2003, DSR 2003:III, p. 1187
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985

Short title	Full case title and citation
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
Canada – Autos (Article 21.3(c))	Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, p. 5079
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, p. 2097
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, p. 6829
Canada – Dairy (Article 21.5 – New Zealand and US)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by Appellate Body Report WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, p. 6865
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, p. 213
Canada – Dairy (Article 21.5 – New Zealand and US II)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by Appellate Body Report WT/DS103/AB/RW2, WT/DS113/AB/RW2, DSR 2003:I, p. 255
Canada – Patent Term	Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, p. 5093
Canada – Patent Term	Panel Report, *Canada – Term of Patent Protection*, WT/DS170/R, adopted 12 October 2000, upheld by Appellate Body Report WT/DS170/AB/R, DSR 2000:XI, p. 5121
Canada – Patent Term (Article 21.3(c))	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001, DSR 2001:V, p. 2031
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Canada – Periodicals	Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, p. 481
Canada – Pharmaceutical Patents	Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, p. 2289
Canada – Pharmaceutical Patents (Article 21.3(c))	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, p. 3
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013

Short title	Full case title and citation
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R / WT/DS426/R / and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, p. 281
Chile – Alcoholic Beverages	Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, p. 303
Chile – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, p. 2583
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
Chile – Price Band System (Article 21.3(c))	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, p. 1237
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
Chile – Price Band System (Article 21.5 – Argentina)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW, DSR 2007:II, p. 613
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369

Short title	Full case title and citation
China – GOES (Article 21.3(c))	Award of the Arbitrator, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS414/12, 3 May 2013
China – HP-SSST (Japan)/ China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R / WT/DS460/R / and Add.1, circulated to WTO Members 13 February 2015 [adoption/appeal pending]
China – Intellectual Property Rights	Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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Short title	Full case title and citation
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