WORLD TRADE ORGANIZATION

WTO Analytical Index:

Supplement Covering New Developments in WTO Law and Practice

October 2011 – August 2013

DISCLAIMER

This publication does not constitute an official or authoritative interpretation of the covered agreements, of any cited dispute settlement reports, awards and decisions, or of the legal significance of any of the other decisions, recommendations and other documents referred to in this publication.

FOREWORD

The *WTO Analytical Index: Guide to WTO Law and Practice* is an edited compendium of key materials from the entire work of the WTO as an organization, presented on an article-by-article basis. Its coverage includes panel and Appellate Body reports, arbitral decisions and awards, and selected decisions and other significant activities of WTO Committees, Councils, and other WTO bodies. The Analytical Index is distinctive because it is the only legal research tool that provides an integrated view of all of the WTO's work, including the work of the Members in these bodies. The Third Edition of the *WTO Analytical Index* covers developments in WTO law and practice from 1 January 1995 to 30 September 2011. It can be purchased as a book, and is also available in HTML format on the WTO website free of charge.

The *Analytical Index Supplement Covering New Developments in WTO Law and Practice* covers developments in WTO law and practice after 30 September 2011. It is updated in electronic form on an on-going basis to reflect new jurisprudence and other significant developments. It serves as a complement to the Third Edition of the *Analytical Index*, and it should be read in conjunction with the Third Edition. It also serves as a useful, self-contained guide for readers interested in the most recent developments in WTO law and practice.

The Supplement is divided into two parts. The first part, "New Dispute Settlement Reports, Awards, and Decisions", covers jurisprudence circulated after 30 September 2011, including new Appellate Body reports, panel reports and preliminary rulings, and arbitral awards. Summaries and extracts of new jurisprudence are presented on an article-by-article basis, under issue-specific subheadings. The second part, "Other Developments in WTO Law and Practice", contains summaries and extracts of selected decisions and other significant activities of WTO Committees, Councils, and other WTO bodies. This material is organized under topical headings.

I congratulate Legal Affairs Division lawyers Graham Cook and János Volkai who were the key contributors to this Supplement.

We hope that the *Analytical Index Supplement Covering New Developments in WTO Law and Practice* will be a valuable and user-friendly resource for WTO Members, as well as academics, students, and practitioners.

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EDITORIAL CONVENTIONS

This Supplement uses the same editorial conventions followed in the Third Edition of the WTO *Analytical Index*, which are as follows:

- Where there are multiple cases addressing a provision, they are presented in chronological order.

- Dispute settlement reports, awards and decisions are referred to by their standard short titles.

- Extracts are introduced by short explanatory sentences, generally setting out the context for the particular extract.

- Extracts are generally kept to a minimum, given that the full text of all materials cited in this work can be accessed on-line through the WTO website.

- Original footnotes within extracts are retained when they refer to prior dispute settlement reports, awards and decisions. Other original footnotes within extracts are generally omitted. Original footnotes are identified as "*(footnote original)*".

- No emphasis is added to any of the extracts. Thus, wherever there is any emphasis in an extract, it is found in the original.

- Within quoted material, ellipses (" … ") are used to indicate where text within a sentence, a paragraph or larger section has been omitted. Ellipses are not used at the beginning or ending of passages reproduced in quotations. Square brackets [ ] are used to indicate required editorial changes, which have been kept to a minimum.

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I. NEW DISPUTE SETTLEMENT REPORTS, AWARDS, AND DECISIONS

A. TABLE OF CASES AND DECISIONS COVERED IN THIS *ANALYTICAL INDEX SUPPLEMENT*

The Third Edition of the *WTO Analytical Index* is updated to 30 September 2011. This *Supplement* contains summaries and selected extracts of key findings from decisions circulated between October 2011 and July 2013, including the following Appellate Body reports, panel reports and preliminary rulings, and arbitration awards:

Circulated	Type	Short Title
2013.08.02	Panel Report	*China – Broiler Products*
2013.06.28	Preliminary Ruling	*India – Agricultural Products*
2013.06.07	Preliminary Ruling	*US – Countervailing and Anti-Dumping Measures (China)*
2013.05.06	Appellate Body Report	*Canada – Renewable Energy / Feed-In Tariff Program*
2013.05.03	Award of the Arbitrator	*China – GOES (Article 21.3(c))*
2013.02.26	Panel Report	*China – X-Ray Equipment*
2013.02.21	Preliminary Ruling	*US – Countervailing Measures (China)*
2012.12.19	Panel Report	*Canada – Renewable Energy / Feed-In Tariff Program*
2012.12.04	Award of the Arbitrator	*US – COOL (Article 21.3(c))*
2012.10.18	Appellate Body Report	*China – GOES*
2012.07.16	Panel Report	*China – Electronic Payment Services*
2012.06.08	Panel Report	*US – Shrimp and Sawblades*
2012.06.29	Appellate Body Report	*US – COOL*
2012.06.15	Panel Report	*China – GOES*
2012.05.23	Preliminary Ruling	*Canada – Renewable Energy / Feed-In Tariff Program*
2012.05.16	Appellate Body Report	*US – Tuna II (Mexico)*
2012.04.04	Appellate Body Report	*US – Clove Cigarettes*
2012.03.12	Appellate Body Report	*US – Large Civil Aircraft (2nd complaint)*
2012.01.31	Panel Report	*Dominican Republic – Safeguard Measures*
2012.01.30	Appellate Body Report	*China – Raw Materials*
2011.12.21	Appellate Body Report	*Philippines – Distilled Spirits*
2011.11.18	Panel Report	*US – COOL*
2011.10.28	Panel Report	*EU – Footwear (China)*

B. WTO AGREEMENT

1. Article IX: Decision-Making

(a) Article IX:2 (multilateral interpretations)

(i) General

1. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement, which, when interpreted in the context of Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, requires a minimum of six months between the publication and the entry into force of a technical regulation.[1] In reaching this conclusion, the Appellate Body found that in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, Paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement. However, the Appellate Body agreed with the Panel that Paragraph 5.2 of the Doha Ministerial Decision constitutes a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.

(ii) Requirement that there be a "recommendation by the Council overseeing the functioning of that Agreement"

2. In *US – Clove Cigarettes*, the Appellate Body found that paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement. The Appellate Body stated:

> "We do not agree with the Panel to the extent that it suggested that the absence of a recommendation from the Council for Trade in Goods "is insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision is not an authoritative interpretation under Article IX:2 of the *WTO Agreement*". While Article IX:2 of the *WTO Agreement* confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, this authority must be exercised within the defined parameters of Article IX:2. It seems to us that the view expressed by the Panel does not respect a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. In our view, to characterize the requirement to act on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement as a "formal requirement" neither permits a panel to read that requirement out of a treaty provision, nor to dilute its effectiveness.
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> Although the Panel's reasoning may be read as suggesting that the Ministerial Conference could dispense with a specific requirement established by Article IX:2 of the *WTO Agreement*, the terms of Article IX:2 do not suggest that compliance with this requirement is dispensable. In this connection, we recall that, pursuant to Article IX:2 of the *WTO Agreement*, the Ministerial Conference or the General Council "*shall*" exercise their authority to adopt an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* "on the basis of a recommendation" by the Council overseeing the functioning of that Agreement. We consider that the recommendation from the relevant Council is an essential element of

[1] Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

> Article IX:2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the *WTO Agreement*. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement must* be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement.
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> We note that, before the Panel, Indonesia relied on paragraph 12 of the Doha Ministerial Declaration and on the preamble of the Doha Ministerial Decision, and argued that the interpretation of Article 2.12 of the *TBT Agreement* was reached on the basis of discussions carried out within the General Council and the WTO subsidiary bodies. Whereas the content of paragraph 5.2 of the Doha Ministerial Decision might very well have been based on discussions within the Committee on Technical Barriers to Trade, we are not persuaded that this is sufficient to establish that the Ministerial Conference exercised its authority to adopt an interpretation of the *TBT Agreement* on the basis of a *recommendation* from the Council for Trade in Goods. Accordingly, we find that, in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the *TBT Agreement*, paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*."[2][3]

(iii) Relationship between Article IX:2 and Article 31(3)(a) of the Vienna Convention

3. In *US – Clove Cigarettes*, the Appellate Body found that although paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement, it nonetheless constitutes a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention. In reaching this finding, the Appellate Body identified certain differences between the two:

> "In the light of our finding that paragraph 5.2 of the Doha Ministerial Decision does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the *WTO Agreement*, we address whether, as the Panel found, paragraph 5.2 "could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the [*Vienna Convention*], on the interpretation of 'reasonable interval' [in] Article 2.12 of the *TBT Agreement*".
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> We note that, in response to questioning at the oral hearing, the United States argued that a decision by the Ministerial Conference that does not conform with the specific decision-making procedures established by Article IX:2 of the *WTO Agreement* cannot constitute a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the *Vienna Convention*. We observe that multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement*, on the one hand, and subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the other hand, serve different functions and have different legal effects under WTO law. Multilateral

[2] (*footnote original*) In reaching this finding, we are not saying that the Ministerial Conference failed to comply with a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. Rather, we are saying that the absence of a recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the *TBT Agreement* supports a conclusion that paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*.

[3] Appellate Body Report, *US – Clove Cigarettes*, paras. 253-255.

interpretations under Article IX:2 of the *WTO Agreement* provide a means by which Members—acting through the highest organs of the WTO—may adopt binding interpretations that clarify WTO law for all Members. Such interpretations are binding on all Members, including in respect of all disputes in which these interpretations are relevant.

On the other hand, Article 31(3)(a) of the *Vienna Convention* is a rule of treaty interpretation, pursuant to which a treaty interpreter uses a subsequent agreement between the parties on the interpretation of a treaty provision as an interpretative tool to determine the meaning of that treaty provision. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are required to apply the customary rules of interpretation of public international law—including the rule embodied in Article 31(3)(a) of the *Vienna Convention*—to clarify the existing provisions of the covered agreements. Interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute.[4] Article IX:2 of the *WTO Agreement* does not preclude panels and the Appellate Body from having recourse to a customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.

We also recall that, in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body stated that "multilateral interpretations are meant to clarify the meaning of existing obligations"[5], and that "multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are *most akin* to subsequent agreements within the meaning of Article 31(3)(a) of the *Vienna Convention*".[6] Thus, given the specific function of multilateral interpretations adopted pursuant to Article IX:2, and the fact that these interpretations are adopted by Members sitting in the form of the highest organs of the WTO, such interpretations are most akin to, but *not exhaustive of*, subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*.

We consider, therefore, that a decision adopted by Members, *other than* a decision adopted pursuant to Article IX:2 of the *WTO Agreement*, may constitute a

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[4] (*footnote original*) In *US – Stainless Steel (Mexico)*, the Appellate Body stated:

> It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.
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> …
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> Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.

(Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 158 and 160 (footnotes omitted))

[5] (*footnote original*) Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 383.

[6] (*footnote original*) Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390. (emphasis added)

"subsequent agreement" on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the *Vienna Convention*."[7]

[7] Appellate Body Report, *US – Clove Cigarettes*, paras. 256-260.

C. GATT 1994

1. Article I: General Most-Favoured Nation Treatment

(a) Article I:1 (general obligation)

(i) General

4. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which required that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfied the conditions for individual treatment in that provision, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The Panel also found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation was inconsistent with Article I:1 of the GATT 1994.[8]

5. In *Dominican Republic – Safeguards*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX of the GATT 1994 or the Agreement on Safeguards.[9] The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures resulted in a suspension of obligations incurred by the Dominican Republic under Article I:1 of the GATT 1994.[10]

6. In *US – Tuna II (Mexico)*, the Panel, having found no violation of Article 2.1 of the TBT Agreement, exercised judicial economy in respect of the complainant's claim under Article I:1 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 and Article I:1 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claim under Article I:1.[11]

(ii) Relationship between Article I:1 and the Anti-Dumping Agreement

7. The Panel in *EU – Footwear (China)* considered the relationship between Article I:1 and the Anti-Dumping Agreement. In the course of its analysis, the Panel explained that:

> "Turning to the facts of this case, it is clear to us that rules and formalities applied in anti-dumping investigations, including Article 9(5) of the Basic AD Regulation, fall within the scope of the "rules and formalities in connection with importation" referred to in Article I:1. It is also clear, based on our conclusions above, that Article 9(5) affects imports from certain countries, establishing criteria for the determination whether the export prices of producers or exporters subject to anti-dumping investigations in the European Union will be taken into consideration, individual margins of dumping calculated, and individual duties imposed upon importation of the relevant product to the European Union. We agree with China that the automatic grant of IT to imports from market economy countries is an "advantage" within the

[8] Panel Report, *EU – Footwear (China)*, paras. 7.98-7.106.
[9] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.
[10] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.61-7.73.
[11] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.

> meaning of Article I:1.[12] In our view, individual treatment ensures that producers and exporters receiving such treatment will not be subject to a duty higher than their own dumping margin, as would be the case for some producers or exporters subject to a country-wide duty imposed on the basis of a margin calculated on average export prices. Moreover, Article 9(5) of the Basic AD Regulation lists the WTO Members, including China, whose producers are not automatically accorded the right to individual dumping margins and anti-dumping duties, but must fulfil the conditions of that provision in order to benefit from that right. Thus, the application of Article 9(5) of the Basic AD Regulation will, in some instances, result in import of the same product from different WTO members being treated differently in anti-dumping investigations by the European Union. This to us establishes that the advantage of automatic IT is conditioned on the origin of the products. We therefore consider that Article 9(5) of the Basic AD Regulation violates the MFN obligation set forth in Article I:1 of the GATT 1994.
>
> …
>
> [W]hile it is clear that the AD Agreement elaborates on the requirements of Article VI of the GATT 1994 for imposition of an anti-dumping measure,[13] in our view, this does not mean that a violation of GATT 1994, in particular of Article I:1, can only be found after a violation of the AD Agreement has been established. Not only do we consider it possible that a Member might act inconsistently with a provision of Article VI of the GATT 1994 itself, and in addition violate Article I:1, but it is also possible that in certain circumstances a Member might act inconsistently

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[12] (*footnote original*) We recall that the scope of Article I:1 of the GATT 1994 has been interpreted broadly by previous WTO panels as well as GATT panels. The panel in *EC – Tariff Preferences* concluded that

> "the term 'unconditionally' in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of 'unconditionally' under Article I.1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, 'not limited by or subject to any conditions'."

Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* ("*EC – Tariff Preferences*"), WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009, para. 7.59. The GATT panel in *US – MFN Footwear* concluded that rules and formalities applicable to countervailing duties were rules and formalities imposed in connection with importation, and that "automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1." GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil ("US – MFN Footwear")*, DS18/R, adopted 19 June 1992, BISD 39S/128, para. 6.9. See also *EC – Bananas III (US)*, where the panel referred to the report of the GATT panel in *US – MFN Footwear* in order to support its conclusion that "the licensing procedures applied by the EU to traditional ACP banana imports, when compared to the licensing procedures imposed on third-countries … can be considered as an 'advantage' which the EC does not accord to third-country and non-traditional ACP imports." Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States* ("*EC – Bananas III (US)*"), WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943, para. 7.221. The Appellate Body in *EC – Bananas III* upheld the panel's findings, stating that "the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members," after also referring to the broad definition given to the term "advantage" in Article I:1 by the GATT panel in *US – MFN Footwear*. Appellate Body Report, *EC – Bananas III*, para. 206.

[13] (*footnote original*) We recall that the AD Agreement is formally titled "Agreement on Implementation of Article VI of the GATT 1994".

with Article I:1 in the application of its anti-dumping regulations to different Members, without a specific violation of the AD Agreement."[14]

2. Article II: Schedules of Concessions

(a) Article II:1(b) (ordinary customs duties / other duties or charges)

(i) General

8. In *Dominican Republic – Safeguards*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX of the GATT 1994 or the Agreement on Safeguards.[15] The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures resulted in a suspension of obligations incurred by the Dominican Republic under Article II:1(b) of the GATT 1994.[16]

(ii) "other duties or charges"

9. The Panel in *Dominican Republic – Safeguards* interpreted the terms "other duties or charges" by reference to the meaning of "ordinary customs duties":

> "The use of the expression "*all other* duties or charges of any kind imposed on or in connection with the importation" in Article II:1(b), second sentence, suggests that the prohibition covers any duty or charge of any kind on or in connection with the importation that is not an ordinary customs duty.[17] In other words, the category of *other duties or charges* under Article II:1(b), second sentence, is a residual one covering all duties or charges on or in connection with the importation that are not ordinary customs duties[18] and which are not expressly provided for in Article II:2 of the GATT 1994.
>
> It is therefore necessary to consider whether the impugned measures may be categorized as "ordinary customs duties" within the meaning of Article II:1 of the GATT 1994 or whether on the contrary, and as the complainants affirm, they are "other duties or charges".
>
> The expression "ordinary customs duties" appears in the Spanish text as "*derechos de aduana propiamente dichos*" and in French as "*droits de douane proprement dits*". Applying the interpretative rule of Article 33 of the Vienna Convention, it must be presumed that the terms of the agreement have the same meaning in each authentic text (Spanish, English and French). In addition, if a comparison of the various authentic texts reveals a difference in meaning, the meaning that best reconciles the texts, bearing in mind the object and purpose of the agreement, should in principle be adopted.

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[14] Panel Report, *EU – Footwear (China)*, paras. 7.100, 7.103.

[15] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.

[16] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.74-7.88.

[17] (*footnote original*) Save for certain exceptions, such as duties or charges applied or mandatorily required to be applied on the date of the agreement. See in this connection the provisions of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

[18] (*footnote original*) Complainants, reply to Panel question No. 181; Dominican Republic, reply to Panel question No. 181.

In Spanish, the word "*propiamente*" used in "*propiamente dichos*" is related to the word "*propiedad*" [property], in the sense of "*atributo o cualidad esencial*" [essential attribute or quality] of something.[19] Hence, a "*derecho de aduana propiamente dicho*" would be a duty that possesses the essential attributes or qualities of customs duties. "*Proprement*" in the French expression "*proprement dits*" relates to the strict meaning in which an expression is used.[20] In other words, while a Member may impose various duties at the border, the expressions customs duty "*propiamente dicho*" and customs duty "*proprement dit*" emphasize that the scope of the provision is limited to customs duties in the strict sense of the term (*stricto sensu*).

The expression used in the text in English suggests a slightly different shade of meaning. "Ordinary" is defined as "Belonging to or occurring in regular custom or practice; normal, customary, usual". The contrary is "Extraordinary".[21] In Spanish, "*Ordinario*" is defined as "*Común, regular y que sucede habitualmente*" [Common, regular and usually occurring]. The contrary would be "*extraordinario*" [extraordinary] or "*inusual*" [unusual].[22] In French, "*Ordinaire*" is defined as "*Conforme à l'ordre normal, habituel des choses*" [in conformity with the normal, usual order of things] or "*courant, habituel, normal, usuel*" [current, customary, normal, usual]. The contrary would be "*anormal*" [abnormal], "*exceptionnel*" [exceptional] or "*extraordinaire*" [extraordinary].[23]

In its report in *Chile – Price Band System*, the Appellate Body made it clear that what determines whether "a duty imposed on an import at the border" constitutes an ordinary customs duty is not the form which that duty takes.[24] Nor is the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers.[25] The Appellate Body also explained that a Member may periodically change the rate at which it applies an "ordinary customs duty", provided it remains below the rate bound in the Member's schedule.[26] This change in the applied rate of duty could be made, for example, through an act of the Member's legislature or executive at any time. However, one essential feature of "ordinary customs duties" is that any change in them is discontinuous and unrelated to an underlying scheme or formula.[27] The Appellate Body noted that the price band system impugned in that case contained an inherent variability and had the effect of impeding the transmission of international price developments to Chile's market in the way in which *ordinary customs duties* normally would, also generating in its application a lack of transparency and predictability with respect to market access conditions.[28]

All in all, using a meaning that seeks to reconcile the texts of the GATT 1994 in the various official languages, we could conclude that the expression "ordinary customs

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[19] (*footnote original*) *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), p. 1252.

[20] (*footnote original*) *Le Nouveau Petit Robert* (Dictionnaires Le Robert, 2000), pp. 2022-2023.

[21] (*footnote original*) *Shorter Oxford English Dictionary*, 6th Ed. (Oxford University Press, 2007), vol. 2, p. 2021.

[22] (*footnote original*) *Diccionario de la Lengua Española*, 22nd Ed. (Real Academia Española, 2001), pp. 695, 878 and 1105.

[23] (*footnote original*) *Le Nouveau Petit Robert* (Dictionnaires Le Robert, 2000), pp. 1732-1733.

[24] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, paragraph 216.

[25] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, paragraphs 271-278.

[26] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, paragraph 232 (in which it quotes the Appellate Body Report, *Argentina – Textiles and Apparel*, footnote 56 to paragraph 46).

[27] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, paragraphs 232-233.

[28] (*footnote original*) Appellate Body Report, *Chile – Price Band System*, paragraphs 246-251.

> duties" in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute "customs duties" in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs. This would be compatible with the object and purpose of the GATT 1994 which, as the Appellate Body said in *Chile – Price Band System*, seeks to ensure that the application of customs duties gives rise to transparent and predictable market access conditions and does not impede the transmission of international price developments to the domestic market of the importing country. To reach a conclusion in this respect, the Panel must consider the design and structure of the measures concerned."[29]

3. Article III: National Treatment on Internal Taxation and Regulation

(a) General

10. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body stated that:

> "The title of Article III is "National Treatment on Internal Taxation and Regulation". The national treatment principle enshrined in Article III has been a cornerstone of the multilateral trading system since its inception. This general principle, which is articulated in the first paragraph of Article III, postulates that internal measures "should not be applied … so as to afford protection to domestic production".[30] Other paragraphs of Article III "constitute specific expressions" of this "overarching, 'general principle'".[31]"[32]

(b) Article III:2, first sentence (internal taxes/charges and like products)

(i) General

11. In *Philippines – Distilled Spirits*, the Appellate Body examined certain findings by the Panel concerning an excise tax on distilled spirits, whereby a low flat tax was applied by the Philippines to spirits made from certain designated raw materials, while significantly higher tax rates were applied to spirits made from non-designated materials. The Appellate Body upheld the Panel's finding that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994.[33] The Appellate Body upheld the Panel's finding that each type of imported distilled spirit at issue (brandy, rum, vodka, whisky, and tequila) made from non-designated raw materials, was "like" the same type of distilled spirit made from designated raw materials. In the course of its analysis, the Appellate Body considered the interpretation and application of Article III:2, first sentence, with regard to products' physical characteristics, consumer tastes and habits, tariff classification, and regulatory regimes of other Members. However, the Appellate Body reversed the Panel's finding that *all* imported distilled spirits made from non-designated raw materials were, irrespective of their type, "like" *all* domestic distilled spirits made from designated raw materials, within the meaning of Article III:2, first sentence, of the GATT 1994.[34]

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[29] Panel Report, *Dominican Republic – Safeguards*, paras. 7.79-7.85.

[30] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, p. 111.

[31] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 93.

[32] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.55.

[33] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 112-174.

[34] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 175-183.

(ii) "like products"

12. In *Philippines – Distilled Spirits*, the Appellate Body provided guidance on a number of issues pertaining to the meaning of "like products" in Article III:2, first sentence. These are reviewed below.

Physical properties

13. In *Philippines – Distilled Spirits*, the Appellate Body disagreed with the argument that the narrow scope of the category of "like products" in Article III:2, first sentence means that any significant physical difference will necessarily be considered sufficient to disqualify a product from being considered "like" another product:

> "While in the determination of "likeness" a panel may logically start from the physical characteristics of the products, none of the criteria that a panel considers necessarily has an overarching role in the determination of "likeness" under Article III:2 of the GATT 1994. A panel examines these criteria in order to make a determination about the nature and extent of a competitive relationship between and among the products.[35]
>
> We understand that products that have very similar physical characteristics may not be "like", within the meaning of Article III:2, if their competitiveness or substitutability is low, while products that present certain physical differences may still be considered "like" if such physical differences have a limited impact on the competitive relationship between and among the products.
>
> In this respect, we do not consider, as the Philippines argues, that the Panel committed an error of interpretation when it found that "likeness under the first sentence of Article III:2 is not limited to products that are identical". This statement by the Panel may provide only a partial view of what is entailed in a determination of "likeness" under Article III:2 of the GATT 1994. However, it is consistent with the notion that, while physical characteristics are one of the relevant criteria in the determination of "likeness" under Article III:2, even products that present certain differences may still be considered "like" if the nature and extent of their competitive relationship justifies such a determination.
>
> For the reasons explained above, we disagree with the Philippines' arguments that the narrow scope of the category of "like products" means that any significant physical difference will necessarily be considered sufficient to disqualify a product from being considered "like" another product and that, in this case, "the simple fact that sugar-based spirits in the Philippines are physically different from their non-sugar-based counterparts should have been viewed by the Panel as disqualifying these products from being considered physically 'like'".[36]

Different input materials

14. In *Philippines – Distilled Spirits*, the Appellate Body offered the following observations on the use of different input materials in the production of the products alleged to be "like":

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[35] (*footnote original*) In *EC – Asbestos* the Appellate Body found that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products". (Appellate Body Report, *EC – Asbestos*, para. 99)

[36] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 119-122.

> "We consider that, in spite of differences in the raw materials used to make the products, if these differences do not affect the final products, these products can still be found to be "like" within the meaning of Article III:2 of the GATT 1994.[37] Article III:2, first sentence, refers to "like products", not to their raw material base. If differences in raw materials leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences would not necessarily negate a finding of "likeness" under Article III:2. As we have explained above, the determination of what are "like products" under Article III:2 is not focused exclusively on the physical characteristics of the products, but is concerned with the nature and the extent of the competitive relationship between and among the products. We consider, therefore, that as long as the differences among the products, including a difference in the raw material base, leave fundamentally unchanged the competitive relationship among the final products, the existence of these differences does not prevent a finding of "likeness" if, by considering all factors, the panel is able to come to the conclusion that the competitive relationship among the products is such as to justify a finding of "likeness" under Article III:2."[38]

Traditional likeness criteria

15. In *Philippines – Distilled Spirits*, the Appellate Body discussed the traditional criteria used to determine "likeness":

> "We observe that the criteria to establish "likeness" under Article III:2, first sentence, of the GATT 1994 are not exhaustive and are not set forth in Article III:2, nor in any other provision of the covered agreements. Rather, these criteria are tools available to panels for organizing and assessing the evidence relating to the competitive relationship between and among the products in order to establish "likeness" under Article III:2, first sentence. While distinct, these criteria are not mutually exclusive.[39] Certain evidence, such as that relating to the perceptibility of differences, may well fall under more than one criterion.[40],[41]

Close to being perfectly substitutable

16. In *Philippines – Distilled Spirits*, the Appellate Body distinguished the scope of "like products" in the first and second sentences of Article III:2 by reference to the degree of competition that exists:

> "We observe that both the analysis of "likeness" under Article III:2, first sentence, of the GATT 1994, and the analysis of direct competitiveness and substitutability under Article III:2, second sentence, require consideration of the competitive relationship between imported and domestic products. However, "likeness" is a narrower category than "directly competitive and substitutable". Thus, the degree of

[37] (*footnote original*) The panel in *Japan – Alcoholic Beverages II* found that "the term 'like products' [in Article III:2] suggests that for two products to fall under this category they must share, apart from commonality of end-uses, *essentially* the same physical characteristics" (Panel Report, *Japan – Alcoholic Beverages II*, para. 6.22 (emphasis added)). The GATT panel in *Japan – Alcoholic Beverages I* found that the fact that vodka and shochu were made of *similar* raw materials was an *indication* of the fact that they were "like products". (GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.7)

[38] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 125.

[39] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 111.

[40] (*footnote original*) For instance, in *EC – Asbestos*, the Appellate Body considered health risks under a "physical characteristics" criterion as well as under the criterion of "consumers' tastes and habits". (Appellate Body Report, *EC – Asbestos*, paras. 114 and 120).

[41] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 131.

> competition and substitutability that is required under Article III:2, first sentence, must be higher than that under Article III:2, second sentence. On this point, we recall that, in *Canada – Periodicals*, the Appellate Body considered that a relationship of "imperfect substitutability" would still be consistent with the notion of "directly competitive or substitutable products", under the second sentence of Article III:2 of the GATT 1994, and that "[a] case of perfect substitutability would fall within Article III:2, first sentence".[42] In *Korea – Alcoholic Beverages*, the Appellate Body observed that "'like products' are a subset of directly competitive or substitutable products", so that "perfectly substitutable products fall within Article III:2, first sentence", while "imperfectly substitutable products can be assessed under Article III:2, second sentence".[43]
>
> We do not understand the statements by the Appellate Body in *Canada – Periodicals* and in *Korea – Alcoholic Beverages* to mean that *only* products that are perfectly substitutable can fall within the scope of Article III:2, first sentence. This would be too narrow an interpretation and would reduce the scope of the first sentence essentially to *identical products*. Rather, we consider that, under the first sentence, products that are close to being perfectly substitutable can be "like products", whereas products that compete to a lesser degree would fall within the scope of the second sentence."[44]

Relevance of different distribution channels

17. In *Philippines – Distilled Spirits*, the Appellate Body rejected the argument that different channels of distribution showed that the products at issue were not "like", and stated:

> "In our view, the fact that domestic and imported distilled spirits in the Philippines do not share all channels of distribution does not establish that the degree of substitutability is such that they are not "like products" within the meaning of Article III:2, first sentence, of the GATT 1994. In particular, the fact that one channel of distribution is used only for domestic spirits (*sari-sari* stores) is not sufficient to establish that the products are not "like".[45][46]

Other Member's markets

18. In *Philippines – Distilled Spirits*, the Appellate Body considered that two products may be "like" in the context of the market of one Member, but not in the context of another Member's market:

> "The determination of "likeness" under Article III:2, first sentence, of the GATT 1994 should be made on a case-by-case basis. If two spirits are considered to be "like products" in a given market, this does not necessarily mean that they would

[42] (*footnote original*) Appellate Body Report, *Canada – Periodicals*, p. 28, DSR 1997:I, 449, at 473.

[43] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118. See also Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, at 464-465.

[44] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 148-149.

[45] (*footnote original*) The panel in *Korea – Taxes on Alcoholic Beverages* found that "[c]onsiderable evidence of overlap in channels of distribution and points of sale … is supportive of a finding that the identified imported and domestic products are directly competitive or substitutable". (Panel Report, *Korea – Taxes on Alcoholic Beverages*, para. 10.86) Similarly, the panel in *Chile – Alcoholic Beverages* found that "the *consistent* practice of putting these products on adjoining shelf space in similar outlets is *one* piece of evidence supporting a finding of substitutability", but that "if the products were regularly presented separately, it would be *one* piece of evidence that perhaps consumers did not group them together in their perceptions". (Panel Report, *Chile – Alcoholic Beverages*, paras. 7.57 and 7.59 (original emphasis))

[46] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 153.

> be considered "like products" in another market. It is thus conceivable that brandy and whisky made from designated raw materials and those made from non-designated raw materials may be considered as "like products" by consumers in the Philippine market, but that they may not be considered as "like products" by consumers in another market. As we have explained above, we consider that, in order to establish whether two products are "like" within the meaning of Article III:2 of the GATT 1994, a panel needs to examine the nature and the extent of the competitive relationship between and among products, which will depend on the market where these products compete."[47]

Relevance of tariff heading

19. In *Philippines – Distilled Spirits*, the Appellate Body disagreed with the Panel's treatment of tariff headings in its likeness analysis:

> "[W]e disagree with the Panel's finding that, the fact that all distilled spirits at issue in this dispute, irrespective of the raw materials from which they are made, fall under HS heading 2208, provides an indication of similarity. We recall that, in Japan – Alcoholic Beverages II, the Appellate Body stated that tariff classification can be a helpful sign of similarity only if it is sufficiently detailed.[48] As already noted above, we do not consider that HS heading 2208, which groups together all distilled spirits, as well as other liquors and unflavoured neutral spirits for human consumption or for industrial purposes, constitutes a sufficiently detailed tariff classification to support a finding that all distilled spirits at issue in this dispute are "like" within the meaning of Article III:2, first sentence, of the GATT 1994."[49]

(c) Article III:2, second sentence (internal taxes/charges and directly competitive or substitutable products)

(i) General

20. In *Philippines – Distilled Spirits*, the Appellate Body upheld the Panel's finding (made in the context of the co-complaint by the United States) that the measure at issue was inconsistent with Article III:2, second sentence, of the GATT 1994.[50] The Appellate Body upheld the Panel's finding that all imported and domestic distilled spirits at issue were "directly competitive or substitutable" within the meaning of Article III:2, second sentence. The Appellate Body also upheld the Panel's finding that dissimilar taxation of imported distilled spirits, and of directly competitive or substitutable domestic distilled spirits, was applied "so as to afford protection" to Philippine production of distilled spirits.

(ii) "directly competitive or substitutable"

21. In *Philippines – Distilled Spirits*, the Appellate Body provided guidance on a number of issues pertaining to the meaning of "directly competitive or substitutable" products in Article III:2, second sentence. These are reviewed below.

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[47] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 168.

[48] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21, DSR 1996:1, 97, at 114.

[49] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 182.

[50] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 194-260.

General standard

22. In *Philippines – Distilled Spirits*, the Appellate Body began its analysis by articulating the general standard for determining whether products are "directly competitive or substitutable" products within the meaning of Article III:2, second sentence:

> "We consider that the standard articulated by the Panel appropriately framed the analysis as one aimed at determining whether competition between imported and domestic distilled spirits in the Philippines is *sufficiently direct* so that these products could be properly characterized as "directly competitive or substitutable". In so doing, the Panel followed the guidance provided by the Appellate Body in *Korea – Alcoholic Beverages*, in which the Appellate Body held that imported and domestic products are "directly competitive or substitutable" when they are "in competition" in the marketplace.[51] The Appellate Body held further that the term "directly" suggests "a degree of proximity in the competitive relationship between the domestic and the imported products."[52] The requisite degree of competition is met where the imported and domestic products are characterized by a high, but imperfect, degree of substitutability.[53] As the Appellate Body found, this will be the case where the imported and domestic products are "interchangeable" or offer "alternative ways of satisfying a particular need or taste".[54],[55]

Quantitative analyses of substitutability

23. In *Philippines – Distilled Spirits*, the Appellate Body saw no error in the Panel's approach to quantitative evidence / analyses of substitutability:

> "In our view, the Panel's analysis sufficiently demonstrates that it appropriately assessed the degree of competition between imported and domestic distilled spirits in the Philippine market. We note, in this respect, that the Panel expressly derived, from its statement that the "question before us … is not so much what the 'degree of competition' between the products at issue is, but what is the 'nature' or 'quality' of their 'competitive relationship'", the conclusion that it "*should not place too much emphasis on quantitative analyses*". Thus, the Panel's reference to the "degree of competition" in the statement challenged by the Philippines related exclusively to a *quantitative* assessment of the competitive relationship between domestic and imported distilled spirits in the marketplace. In de-emphasizing the role played by quantitative analyses of substitutability, the Panel followed the guidance provided by the Appellate Body in previous cases. In *Korea – Alcoholic Beverages*, the Appellate Body expressly found that a particular degree of competition need not be shown in quantitative terms[56], and cautioned panels against placing undue reliance on "quantitative analyses of the competitive relationship", because cross-price elasticity is not "the decisive criterion" in determining whether two products are directly competitive or substitutable.[57],[58]

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[51] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114.

[52] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 116.

[53] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118; Appellate Body Report, *Canada – Periodicals*, p. 28, DSR 1997:I, 449, at 473. See also Appellate Body Report, *US – Cotton Yarn*, footnote 68 to para. 97.

[54] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 115.

[55] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 205.

[56] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 130 and 131.

[57] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 134. (emphasis omitted)

Relevance of price

24. In *Philippines – Distilled Spirits*, the Appellate Body considered that price is very relevant to a determination of whether two products are directly competitive or substitutable:

> "We consider that price is very relevant in assessing whether imported and domestic products stand in a sufficiently direct competitive relationship in a given market. This is because evidence of price competition indicates that the imported product exercises competitive constraints on the domestic product, and *vice versa*. In this respect, we agree with the Philippines that evidence of major price differentials could demonstrate that the imported and domestic products are in completely separate markets. However, in this case, the Panel made a factual finding that there is overlap in the prices of imported and domestic distilled spirits in the Philippines, and that such overlap is not "exceptional" but rather occurs for both high- and low-priced products. The Philippines does not challenge this factual finding on appeal, but rather argues that existing price overlaps do not show a sufficiently direct degree of competition. In our view, such instances of price overlap both for high- and low-priced distilled spirits sufficiently support the Panel's conclusion that "the market is not segmented and that in some cases imported and domestic products compete with respect to price.""[59]

Frequency and nature of consumers' purchasing decisions

25. In *Philippines – Distilled Spirits*, the Appellate Body rejected the view that identity in the nature of frequency of consumer's purchasing behaviour is required to reach a finding that products are directly competitive or substitutable:

> "We do not agree with the Philippines that Article III:2, second sentence, of the GATT 1994 requires *identity* in the "nature and frequency" of the consumer's purchasing behaviour. If that were the case, the competitive relationship between the imported and domestic products in a given market would only be assessed with reference to *current* consumer preferences. However, as the Appellate Body expressly held in *Korea – Alcoholic Beverages*, "the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another."[60] Therefore, requiring identity in frequency and nature of consumers' purchase decisions, as suggested by the Philippines, would not sufficiently account for *latent* demand for imported distilled spirits in the Philippine market."[61]

Treatment of different market segments

26. In *Philippines – Distilled Spirits*, the Appellate Body rejected the argument that competition must be assessed in relation to the market segment that is most representative of the market as a whole:

> "Moreover, the Philippines argues that the Panel incorrectly found direct competition on the basis of a "narrow segment" of the population having "access" to imported

[58] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 207.
[59] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 215.
[60] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114. (original emphasis)
[61] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 218.

> distilled spirits. We are not persuaded. To begin with, we note that the Panel did not accept that the Philippine market is divided into two distinct segments in terms of purchasing power, but rather, is distributed "along a continuum of income brackets". In the passage challenged by the Philippines, the Panel engaged with the Philippines' argument concerning segmentation in the Philippines' distilled spirits market simply on an *arguendo* basis. It reasoned that, even assuming that the Philippine market were segmented, at least one segment of the market has "access" to both domestic and imported distilled spirits. In our view, it was reasonable for the Panel to draw, from the Philippines' argument that imported distilled spirits are only available to a "narrow segment" of its population, the inference that there is actual competition between imported and domestic distilled spirits at least in the segment of the market that the Philippines admitted has access to both imported and domestic distilled spirits. Moreover, we note that the Panel buttressed this conclusion with statements from domestic Philippine companies that their products face competition from imported distilled spirits, and that their marketing strategies convey an image of their products as drinks that compete with imported distilled spirits.
>
> More importantly, we do not agree with the Philippines that Article III:2, second sentence, requires that competition be assessed in relation to the market segment that is most representative of the "market as a whole". To the contrary, the Panel was correct in concluding that Article III of the GATT 1994 "does not protect just *some* instances or *most* instances, but rather, it protects *all* instances of direct competition." This reading is consistent with the Appellate Body's finding that the object and purpose of the GATT 1994, as reflected in Article III, is "requiring equality of competitive relationships and protecting expectations of equal competitive relationships".[62] Moreover, current demand for imported spirits in the Philippine market is a function of actual retail prices, which could be distorted by the excise tax system and other related effects, such as higher distribution costs, and lower volumes and economies of scale.[63],[64]

27. In *US – Clove Cigarettes*, the Appellate Body applied this same reasoning in the context of its analysis of "like products" under Article 2.1 of the TBT Agreement:

> "We consider that, in order to determine whether products are like under Article 2.1 of the *TBT Agreement*, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like. In *Philippines – Distilled Spirits*, the Appellate Body considered that the standard of "directly competitive or substitutable" relating to Article III:2, second sentence, of the GATT 1994 is satisfied even if competition does not take place in the whole market but is limited to a segment of the market. The Appellate Body found that "it was reasonable for the [p]anel to draw, from the Philippines' argument that imported distilled spirits are only available to a 'narrow segment' of its population, the inference that there is actual competition between imported and domestic distilled spirits at least in the segment of the market that the Philippines admitted has access to both imported and domestic distilled spirits".[65] In that same dispute, the Appellate Body found that Article III:2, second sentence, does not require that competition be assessed in relation to the

[62] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120.

[63] (*footnote original*) See Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 122 and 123. See also Panel Report, *Chile – Alcoholic Beverages*, para. 7.78.

[64] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 220-221.

[65] (*footnote original*) Appellate Body Reports, *Philippines – Distilled Spirits*, para. 220.

market segment that is most representative of the "market as a whole", and that Article III of the GATT 1994 "does not protect just *some* instances or *most* instances, but rather, it protects *all* instances of direct competition".[66]

Although the Appellate Body's finding in *Philippines – Distilled Spirits* concerned the second sentence of Article III:2 of the GATT 1994, we consider this interpretation of "directly competitive or substitutable products" to be relevant to the concept of "likeness" in Article III:4 of the GATT 1994 and 2.1 of the *TBT Agreement*, since likeness under these provisions is determined on the basis of the competitive relationship between and among the products.[67] In our view, the notion that actual competition does not need to take place in the whole market, but may be limited to a segment of the market, is separate from the question of the degree of competition that is required to satisfy the standards of "directly competitive or substitutable products" and "like products".

The Panel's consideration of consumer tastes and habits was too limited. At the same time, the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes. The Panel found that, from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke. We understand this as a finding that young and potential young smokers perceive clove and menthol cigarettes as sufficiently substitutable. This, in turn, is sufficient to support the Panel's finding that those products are like within the meaning of Article 2.1 of the *TBT Agreement*, even if the degree of substitutability is not the same for all adult smokers."[68]

Potential competition

28. In *Philippines – Distilled Spirits*, the Appellate Body found no error in the Panel's analysis of potential competition, and in particular the Panel's finding that actual competition indicated potential competition:

"We have also agreed with the Panel that such price overlaps support the Panel's finding that "in some cases imported and domestic products compete with respect to price." In our view, such instances of *actual* competition are also highly probative in relation to *potential* competition, particularly in this case where imported distilled spirits are subject to excise taxes that are 10 to 40 times higher than those applicable to domestic distilled spirits. Therefore, the excise tax system could have the effect of "creating and even freezing preferences for domestic goods" in the Philippines.[69] For this reason, instances of *current* substitution are likely to *underestimate* latent demand for imported spirits as a result of distortive effects introduced by the excise tax at issue. This is particularly the case for "experience goods" such as distilled

[66] (*footnote original*) Appellate Body Reports, *Philippines – Distilled Spirits*, para. 221 (referring to Panel Report, *Chile – Alcoholic Beverages*, para. 7.43). (original emphasis)

[67] (*footnote original*) In *EC – Asbestos*, the Appellate Body, while not defining the precise scope of the concept of "like products" in Article III:4, found that Article III:4 applies to products that are in a competitive relationship and that "the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence". (Appellate Body Report, *EC – Asbestos*, para. 99)

[68] Appellate Body Report, *US – Clove Cigarettes*, paras. 142-144.

[69] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 120 (quoting Panel Report, *Japan – Alcoholic Beverages II*, para. 6.28).

> spirits, which consumers "tend to purchase because they are familiar with them and with which consumers experiment only reluctantly".[70]
>
> In addition, we do not agree with the Philippines that an analysis of potential competition under Article III:2, second sentence, is limited to an assessment of whether competition would otherwise occur if the challenged taxation were not in place. In our view, such a "but for" test reflects an overly restrictive interpretation of the term "directly competitive or substitutable" products, one which assumes that internal taxation is the *only* factor restricting potential substitutability. On the contrary, as noted by the Appellate Body, "consumer demand may be influenced by measures other than internal taxation", such as "earlier protectionist taxation, previous import prohibitions or quantitative restrictions".[71]"[72]

(iii) "so as to afford protection to domestic production"

29. In *Philippines – Distilled Spirits*, the Appellate Body found no error in the Panel's finding that the measure at issue operated "so as to afford protection to domestic production". In the course of its analysis, the Appellate Body stated:

> "We recall that, in *Japan – Alcoholic Beverages II*, the Appellate Body stated that the question of whether dissimilar taxation affords protection is not one of intent, but rather of application of the measure at issue. This requires a "comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products".[73] The Appellate Body observed that, "[a]lthough it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure."[74] The Appellate Body further stated that dissimilar taxation must be more than *de minimis*, and that in certain cases "[t]he very magnitude of the dissimilar taxation … may be evidence of such a protective application."[75] In *Korea – Alcoholic Beverages*, the Appellate Body added that the protective application of dissimilar taxation can only be determined "on a case-by-case basis, taking account of all relevant facts".[76]
>
> …
>
> We agree with the Philippines that, read in isolation, the portion of the Panel's reasoning at which the Philippines' claim is directed was too cursory. Had the Panel found that the excise tax regime affords protection to domestic production solely by referring to the reasoning articulated by the Appellate Body in *Korea – Alcoholic Beverages*, it would have fallen short of a comprehensive and objective analysis of the case at hand.
>
> However, the Panel's analysis of whether the measure at issue is applied so as to afford protection to Philippine production was not as limited as the Philippines

[70] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 123.
[71] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 123.
[72] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 226-227.
[73] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:1, 97, at 120. See also Appellate Body Report, *Korea – Alcoholic Beverages*, para. 149.
[74] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:1, 97, at 120.
[75] (*footnote original*) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:1, 97, at 120.
[76] (*footnote original*) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 137.

suggests. Indeed, the Panel reviewed "the design, architecture and structure" of the measure in some detail and observed that, while "*[a]ll* designated raw materials are grown in the Philippines and *all* domestic distilled spirits are produced from designated raw materials", the vast majority of imported distilled spirits "are *not* made from designated raw materials". It therefore concluded that, *de facto*, the application of the measure resulted in all domestic spirits enjoying the lower flat tax rate, while the vast majority of imported spirits are subject to higher taxes. The Panel stressed further that the more burdensome tax treatment applied to imported spirits can be quantified in the order of "10 to 40 times that applicable to all domestic spirits", thus making the difference in taxation "nominally large". In our view, these findings by the Panel, taken as a whole, constitute an adequate analysis of the specific facts of this dispute, as they relate to the European Union's and the United States' claims under Article III:2, second sentence, of the GATT 1994.

Having made the findings above, the Panel went on to dismiss the Philippines' argument regarding the lack of protective application on the basis of market segmentation. We agree with the Panel that the assessment of whether the excise tax could affect the competitive relationship between domestic and imported distilled spirits in the Philippine market pertains to the prong of analysis directed at determining whether the products are "directly competitive or substitutable". Having addressed—and rejected—the Philippines' arguments concerning pre-tax price differentials when determining whether the products at issue are "directly competitive or substitutable" in the Philippine market, it was not necessary for the Panel to revisit this argument in its assessment of whether the dissimilar taxation of such products afforded protection to domestic production. Moreover, the passage of the Appellate Body report in *Korea – Alcoholic Beverages* quoted by the Panel explained that a finding that a tax measure affords protection to domestic production does not depend upon showing "some identifiable trade effect". Thus, the question of whether or not the excise tax negatively impacts trade in imported distilled spirits is not determinative of the question of whether the measure affords protection to domestic production."[77]

(d) Article III:4 (laws/regulations/requirements and like products)

(i) General

30. In *US – Tuna II (Mexico)*, the Panel, having found no violation of Article 2.1 of the TBT Agreement, exercised judicial economy in respect of the complainant's claim under Article III:4 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 and Article III:4 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claim under Article III:4.[78]

31. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel concluded that Canada's feed-in tariff program met the requirements of Paragraph 1(a) of the Illustrative List in the Annex to the TRIMS Agreement, which has the effect of deeming those measures inconsistent with Article III:4 of the GATT 1994.[79]

(ii) Relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement

[77] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 250, 254-256.
[78] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.
[79] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.155-7.167.

32. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body discussed the relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement. See paragraph 220 below.

(iii) "treatment no less favourable"

33. In *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*, the Appellate Body interpreted Article 2.1 of the TBT Agreement taking into account the jurisprudence developed under Article III:4 of the GATT 1994. In *US – COOL*, the Appellate Body recalled that:

> "The Appellate Body recognized in *US – Clove Cigarettes* and *US – Tuna II (Mexico)* that relevant guidance for interpreting the term "treatment no less favourable" in Article 2.1 may be found in the jurisprudence relating to Article III:4 of the GATT 1994.[80],[81]

(e) Article III:8(a) (laws, regulations or requirements governing procurement and procurement by governmental agencies)

(i) General

34. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body interpreted the scope of the derogation in Article III:8(a) of the GATT 1994. Following a detailed analysis[82], the Appellate Body summarized its interpretation:

> "In sum, we consider that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994. The provision exempts from the national treatment obligation certain measures containing rules for the process by which government purchases products. Under Article III:8(a), the entity procuring products for the government is a "governmental agency". We have found above that a "governmental agency" is an entity performing functions of government and acting for or on behalf of government. Furthermore, we have found that the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III. This means that the product of foreign origin must be in a competitive relationship with the product purchased.[83] Furthermore, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions. On the contrary, Article III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm's-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm's length."[84]

35. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found that the measure at issue did not fall within the scope of the derogation in Article III:8(a) of the GATT 1994.[85] The Appellate Body explained:

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[80] *(footnote original)* Appellate Body Report, *US – Clove Cigarettes*, paras. 100 and 176-180; Appellate Body Report, *US – Tuna II (Mexico)*, paras.214, 215, and 236-239.

[81] (*footnote original*) Appellate Body Report, *US – COOL*, para. 269.

[82] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.54-5.74.

[83] (*footnote original*) Whether the derogation in Article III:8(a) can extend also to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement is a matter we do not decide in this case. (See *supra*, para. 5.63)

[84] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.74.

[85] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.75-5.79.

> "We have found above that the conditions for derogation under Article III:8(a) must be understood in relation to the obligations stipulated in the other paragraphs of Article III. This means that the product of foreign origin allegedly being discriminated against must be in a competitive relationship with the product purchased. In the case before us, the product being procured is electricity, whereas the product discriminated against for reason of its origin is generation equipment. These two products are not in a competitive relationship. None of the participants has suggested otherwise, much less offered evidence to substantiate such proposition. Accordingly, the discrimination relating to generation equipment contained in the FIT Programme and Contracts is not covered by the derogation of Article III:8(a) of the GATT 1994.[86] We therefore reverse the Panel's findings, in paragraphs 7.127, 7.128, and 7.152 of the Panel Reports, that the Minimum Required Domestic Content Levels of the FIT Programme and related FIT and microFIT Contracts are laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a) of the GATT 1994. Instead, we find that the Minimum Required Domestic Content Levels cannot be characterized as "laws, regulations or requirements governing the procurement by governmental agencies" of electricity within the meaning of Article III:8(a) of the GATT 1994."[87]

(ii) "governing"

36. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "governing":

> "We note that the word "governing" links the words "laws, regulations or requirements" to the word "procurement" and the remainder of the paragraph. In the context of Article III:8(a), the word "governing", along with the word "procurement" and the other parts of the paragraph, define the subject matter of the "laws, regulations or requirements". The word "governing" is defined as "constitut[ing] a law or rule for".[88] Article III:8(a) thus requires an articulated connection between the laws, regulations, or requirements and the procurement, in the sense that the act of procurement is undertaken within a binding structure of laws, regulations, or requirements."[89]

(iii) "procurement"

37. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "procurement":

> "The term "procurement" may refer generally to "[t]he action of obtaining something; acquisition", or it may refer more specifically to "the action or process of obtaining equipment and supplies".[90] In a more technical sense, procurement usually refers to formal procedures used by governments to acquire goods or services.[91] In Article III:8(a), the word "procurement" is related to the words "products purchased".

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[86] *(footnote original)* We recall that we do not address in this case rules for determining the origin of products purchased. It has not been alleged in this case that the Minimum Required Domestic Content Levels are rules of origin.

[87] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.79.

[88] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/80304>.

[89] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.58.

[90] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/151913>.

[91] (*footnote original*) Such procedures typically express principles, such as efficiency or transparency. See e.g. the 2011 Model Law on Public Procurement prepared by the United Nations Commission on International Trade Law (UNCITRAL).

> In this respect, the Panel found that the term "procurement" in Article III:8(a) should be given the "same essential meaning" as the word "purchased" and *vice versa*. However, in our view, the concepts of "procurement" and "purchase" are not to be equated. As we see it, "procurement" is the operative word in Article III:8(a) describing the process and conduct of the governmental agency. The word "purchased" is used to describe the type of transaction used to put into effect that procurement. Not every procurement needs to be effectuated by way of a purchase, and not every purchase is part of a process of government procurement. The use of the word "purchased" in the same provision suggests reading the word "procurement" as referring to the process of obtaining products, rather than as referring to an acquisition itself, because, if procurement was understood to refer simply to any acquisition, it would not add any meaning to Article III:8(a) in addition to what is already expressed by the word "purchased". We therefore understand the word "procurement" to refer to the process pursuant to which a government acquires products. The precise range of contractual arrangements that are encompassed by the concept of "purchase" is not a matter we need to decide in this case."[92]

(iv) "government agencies"

38. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "government agency":

> "Article III:8 further specifies what is procured and by whom. The subject matter of the procurement is a "product", and it is being procured by a "governmental agency". The term "agency" is defined as "[a] business, body, or organization providing a particular service, or negotiating transactions on behalf of a person or group".[93] The word "agency" is used in connection with the word "governmental" and, accordingly, Article III:8(a) refers to entities acting for or on behalf of government. The Appellate Body has held that the meaning of "government" is derived, in part, from the functions that it performs and, in part, from the authority under which it performs those functions.[94] We therefore consider that the question of whether an entity is a "governmental agency", in the sense of Article III:8(a), is determined by the competences conferred on the entity concerned and by whether that entity acts for or on behalf of government.
>
> We consider that Articles XVII:1 and XVII:2 of the GATT 1994 provide relevant context for the interpretation of the term "governmental agency" in Article III:8(a). Article XVII:1 stipulates obligations for state trading enterprises and Article XVII:2 sets out a derogation from those obligations for certain government procurement transactions. In contrast to Article III:8(a), the provisions of Article XVII relate to "state trading enterprises" and not to "governmental agencies". According to Article XVII:1, this includes state enterprises and enterprises that are conferred exclusive or special privileges from the state. It follows that the GATT 1994 recognizes that there is a public and a private realm, and that government entities may act in one, the other, or both. Governments may limit the actions of entities to the public realm or give entities competences to act in the private realm. In our view, the term "governmental agencies" refers to those entities acting for or on behalf of government in the public realm within the competences that have been conferred on them to discharge governmental functions. This further confirms our understanding

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[92] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.59.

[93] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/3851>.

[94] (*footnote original*) Appellate Body Reports, *Canada – Dairy*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

that a "governmental agency" is an entity acting for or on behalf of government and performing governmental functions within the competences conferred on it."[95]

(v) "products purchased"

39. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "products purchased":

> "We turn next to the term "products purchased" within the meaning of Article III:8(a). A "product" in the sense of this provision is something that is capable of being traded. The term "product" is also found in other provisions of Article III of the GATT 1994 that provide relevant context. Paragraphs 2 and 4, in particular, focus on the treatment accorded to "products". Article III:4 prohibits discrimination against imported products, that is, it prohibits a Member from treating imported products less favourably than like products of national origin. In the context of Article III:2, the national treatment obligation applies also to the treatment of imported products that are directly competitive to or substitutable with domestic products.
>
> We have found above that Article III:8(a) stipulates conditions under which derogation from the obligations in Article III takes place. The derogation in Article III:8(a) becomes relevant only if there is discriminatory treatment of foreign products that are covered by the obligations in Article III, and this discriminatory treatment results from laws, regulations, or requirements governing procurement by governmental agencies of products purchased. Both the obligations in Article III and the derogation in Article III:8(a) refer to discriminatory treatment of products. Because Article III:8(a) is a derogation from the obligations contained in other paragraphs of Article III, we consider that the same discriminatory treatment must be considered both with respect to the obligations of Article III and with respect to the derogation of Article III:8(a). Accordingly, the scope of the terms "products purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination. The coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to "like" products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can be described as products that are in a competitive relationship. What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product. In its rebuttal of Canada's claim under Article III:8(a), the European Union acknowledges that the cover of Article III:8(a) may also extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement. Whether the derogation in Article III:8(a) can extend also to discrimination of the kind referred to by the European Union is a matter we do not decide in this case.[96],[97]

(vi) "for governmental purposes"

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[95] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.60-5.61.

[96] (*footnote original*) We do not address in this case rules for determining the origin of products purchased. It has not been alleged in this case that the Minimum Required Domestic Content Levels are rules of origin.

[97] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.62-5.63.

40. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "for governmental purposes":

> "The word "purpose" may refer to "an object in view; a determined intention or aim" or it may refer to "the end to which an object or action is directed".[98] In Article III:8(a), the word "purpose" is used in conjunction with the word "governmental". Accordingly, the term "governmental purposes" may refer either to the intentions or aims of a government, or it may refer to government as the end to which the product purchased is directed. We note that in Article III:8(a) the word "governmental" is used once in connection with "purposes", and again in connection with the word "agencies". The reference to "governmental agencies" defines the identity of the entity carrying out the procurement. Yet, because governmental agencies by their very nature pursue governmental aims or objectives, the additional reference to "governmental" in relation to "purposes" must go beyond simply requiring some governmental aim or objective with respect to purchases by governmental agencies.
>
> We further note that the French version of Article III:8(a) refers to "*les besoins des pouvoirs publics*" and the Spanish version of the provision refers to "*las necesidades de los poderes públicos*". The term "purposes" thus corresponds to the terms "*besoins*" and "*necesidades*", respectively, in the French and the Spanish texts. Both the French and the Spanish terms correspond closely to the English term "needs".[99] As such, the French and the Spanish text can be read harmoniously[100] with an interpretation of the word "purposes" in English as referring to purchases of products directed at the government or purchased for the needs of the government in the discharge of its functions. By contrast, the words "*besoins*" or "*necesidades*" cannot be read harmoniously with the definition of the term "purpose" as "objectives" or "aims" of the government, because neither the word "*besoins*" in French, not the word "*necesidades*" in Spanish encompass the notion of an aim or objective.[101]
>
> Article XVII:2 of the GATT 1994 provides relevant context for the interpretation of the words "governmental purposes" in Article III:8(a). The provision refers to "imports of products for immediate or ultimate consumption in governmental use". By referring to immediate and ultimate consumption in governmental use, Article XVII:2 identifies instances in which a product may be said to be purchased for governmental purposes. An obvious example is where a governmental agency purchases a good, uses it to discharge its governmental functions, and the good is totally consumed in the process. None of the participants disputes that this would constitute an example of a good purchased for governmental purposes. We also note that Article XVII:2 is phrased more narrowly than Article III:8(a), as the former provision refers to "immediate or ultimate consumption in governmental use". This in turn suggests that, where products purchased are consumed in governmental use, Article III:8(a) does not require that this be "immediate or ultimate". Therefore, we

[98] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/154972>.

[99] (*footnote original*) *The Oxford Spanish Dictionary*, B. Galimberti and R. Russell (eds.) (Oxford University Press, 1994), p. 523; *Le Nouveau Petit Robert*, P. Varrod (ed.) (Dictionnaires Le Robert, 1993), pp. 246-247.

[100] (*footnote original*) Article 33 of the Vienna Convention reflects the principle that the treaty text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. For the covered agreements, Article XVI of the WTO Agreement provides that the English, French, and Spanish language each are authentic. Consequently, the terms of Article III:8(a) of the GATT 1994 are presumed to have the same meaning in each authentic text.

[101] (*footnote original*) *Diccionario de la Lengua Española*, 22nd edn (Real Academia Española, 2001), p. 1065.

> are of the view that the phrase "products purchased for governmental purposes" in Article III:8(a) refers to what is consumed by government or what is provided by government to recipients in the discharge of its public functions. The scope of these functions is to be determined on a case by case basis.[102] Finally, we recall that Article III:8(a) refers to purchases "*for* governmental purposes". The word "for" relates the term "products purchased" to "governmental purposes", and thus indicates that the products purchased must be intended to be directed at the government or be used for governmental purposes. Thus, Article III:8(a) requires that there be a rational relationship between the product and the governmental function being discharged."[103]

(vii) "not with a view to commercial resale"

41. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "not with a view to commercial resale":

> "We turn next to the analysis of the last element of the text of Article III:8(a), namely, the phrase "and not with a view to commercial resale or with a view to use in the production of goods for commercial sale". In the context of Article III:8(a), the words "with a view to commercial resale" relate back to the "products purchased" and thus attach to the same textual element as the clause "for governmental purposes". Both the terms "for governmental purposes" and "not with a view to commercial resale" further qualify and limit the scope of "products purchased". These two requirements are linked by the words "and not", which suggests that the requirement of purchases not being made with a view to commercial resale must be met in addition to the requirement of purchases being made for governmental purposes. Accordingly, a purchase that does not fulfil the requirement of being made "for governmental purposes" will not be covered by Article III:8(a) regardless of whether it complies with the requirement of being made "not with a view to commercial resale". These are cumulative requirements. We therefore disagree with the Panel's proposition that where a government purchase of goods is made "with a view to commercial resale", it is for that reason also not a purchase "for governmental purposes".
>
> Turning then to the meaning of the words "commercial resale", we note that the term "resale" is defined as the "sale of something previously bought".[104] In the context of Article III:8(a), the word "resale" refers to the term "products purchased". Accordingly, the product not to be "resold" on a commercial basis is the product "purchased for governmental purposes". As we see it, "commercial resale" is a resale of a product at arm's length between a willing seller and a willing buyer. Much of the debate in this case has focused on whether procurement "with a view to commercial resale" must involve profit. Canada, in particular, has argued that procurement "with a view to commercial resale" is procurement "with the aim to resell for profit". Japan and the European Union reject the proposition that profit, or an intent to profit, is a required element. Although the Panel ultimately found the existence of profit in this case, it seemed unpersuaded by Canada's argument that a profit element is required for a resale to be "commercial". The Panel observed, in this regard, that "it is a fact that loss-making sales can be, and often are, a part of ordinary commercial activity."

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[102] (*footnote original*) At the oral hearing an example was discussed, in which a public hospital purchases pharmaceuticals and provides them to patients. Both Canada and the European Union accepted that this could qualify as a purchase "for governmental purposes".

[103] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.66-5.68.

[104] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/163370>.

> As we see it, whether a transaction constitutes a "commercial resale" must be assessed having regard to the entire transaction. In doing so, the assessment must look at the transaction from the seller's perspective and at whether the transaction is oriented at generating a profit for the seller. We see profit-orientation generally as an indication that a resale is at arm's length. Profit-orientation indicates that the seller is acting in a self-interested manner. Yet, as the Panel noted, there are circumstances where a seller enters into a transaction out of his or her own interest without making a profit. There are different circumstances in which a seller may offer a product at a price that does not allow him or her to make a profit, or sometimes even fully to recoup cost. In such circumstances, it may be useful to look at the seller's long-term strategy. This is because loss-making sales could not be sustained indefinitely and a rational seller would be expected to be profit-oriented in the long term, though we accept that strategies can vary widely and thus do not see this as applying axiomatically. The transaction must also be assessed from the perspective of the buyer. A commercial resale would be one in which the buyer seeks to maximize his or her own interest. It is an assessment of the relationship between the seller and the buyer in the transaction in question that allows a judgement to be made whether a transaction is made at arm's length."[105]

(viii) ""not … with a view to use in the production of goods for commercial sale"

42. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered the meaning of the term "not … with a view to use in the production of goods for commercial sale":

> "Finally, we turn to the clause "not … with a view to use in the production of goods for commercial sale" in Article III:8(a). Where the provision uses the same words as in the phrase "not with a view to commercial resale", we consider that these words have the same meaning in both clauses. Furthermore, while the penultimate clause of Article III:8(a) refers to commercial "resale", the last clause refers simply to "sale". To us, this is due to the fact that the penultimate clause addresses the sale of the product previously bought by the governmental agency and the last clause addresses the sale of a product that is different from the product previously bought by the government. However, we consider that both clauses refer essentially to the same type of sales transactions.
>
> The provision further refers to "use in the production of goods". The word "use" is defined as "[t]he act of putting something to work, or employing or applying a thing, for any (*esp.* a beneficial or productive) purpose".[106] The relevant purpose in the sense of the provision is then specified by the words "in the production of goods". The preposition "in" expresses a relation of inclusion and thus suggests that the product has a role in the production of goods. Finally, we note that the clause "not with a view to commercial resale" and the clause "with a view to use in the production of goods for commercial sale" are connected with the word "or", which suggests that the provision covers only products that are neither purchased with a view to commercial resale, nor purchased with a view to use in the production of goods for commercial sale."[107]

(ix) Whether Article III:8(a) of the GATT 1994 is applicable to measures falling within the scope of Articles 2.1 and 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto

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[105] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.69-5.71.
[106] (*footnote original*) Oxford English Dictionary online, <http://www.oed.com/view/Entry/220635>.
[107] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.72-5.73.

43. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body confirmed that a measure falling within the scope of Article III:8(a) of the GATT 1994 cannot violate Article 2.1 of the TRIMs Agreement[108], and rejected the argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.[109] See paragraphs 110 and 113 below.

4. Article VI: Anti-Dumping and Countervailing Duties

(a) Articles VI:1 and VI:2 (anti-dumping duties)

44. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article VI:1 of the GATT 1994 with respect to: (i) the analogue country selection procedure, and the selection of Brazil as the analogue country in the original investigation[110]; (ii) the PCN system used and the adjustment for leather quality made by the Commission in the original investigation[111]; or (iii) the procedures for, and selection of, a sample of the domestic industry for purposes of examining injury in the original investigation.[112]

45. In *China – GOES*, the Panel exercised judicial economy over a claim that China acted inconsistently with Article VI:2 of the GATT 1994 with respect to the amount of the anti-dumping duty levied by MOFCOM on the "all other" unknown exporters, having found inconsistencies with both substantive and procedural provisions of the Anti-Dumping Agreement.[113]

5. Article X: Publication and Administration of Trade Regulations

(a) Article X.3(a) (uniform, impartial and reasonable administration)

(i) General

46. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which required that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement and Article I:1 of the GATT 1994. Like the panel in *EC – Fasteners (China)*, the Panel then exercised judicial economy with respect to a claim that Article 9(5) was administered in a manner inconsistent with Article X:3(a) of the GATT 1994.[114]

47. In *US – COOL*, the Panel found, based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, that the Vilsack letter was not "appropriate", and thus did not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a) of the GATT 1994. However, the Panel rejected Mexico's claim that shifts in the USDA guidance on the labelling requirements under the COOL measure violated Article X:3(a).[115]

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[108] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.20.
[109] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.
[110] Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.
[111] Panel Report, *EU – Footwear (China)*, paras. 7.276-7.287.
[112] Panel Report, *EU – Footwear (China)*, paras. 7.353-7.391.
[113] Panel Report, *China – GOES*, paras. 7.431-7.432.
[114] Panel Report, *EU – Footwear (China)*, para. 7.10.
[115] Panel Reports, *US – COOL*, paras. 7.809-7.887.

(ii) "administer"

48. The Panel in *US – COOL* found that, despite the absence of any specific instance of application, the context in which the letter at issue was issued by Secretary Vilsack to industry in general showed a sufficient basis for the letter to constitute an act of administering the COOL measure. In the course of its analysis, the Panel stated:

> "The term "administer" in Article X:3(a) refers to "putting into practical effect or applying" a legal instrument of the kind described in Article X:1.[116] We also recall the panel's observation in *Argentina – Hides and Leather* regarding the proper scope of Article X:3(a) that the relevant question is "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".[117],[118]

(iii) "reasonable"

49. In *US – COOL*, the Panel considered the meaning of the term "reasonable" in the context of Article X:3(a):

> " The term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".[119] We assess the parties' claims of not reasonable administration in light of these definitions.
>
> In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.[120],[121]

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[116] (*footnote original*) Appellate Body Report, *EC – Selected Customs Matters*, para. 224. See also Canada's second written submission, para. 108, footnote 164. In *EC – Selected Customs Matters*, the Appellate Body clarified that "the term 'administer' may include administrative processes", which can be understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision" (Appellate Body Report, *EC – Selected Customs Matters*, para. 224).

[117] (*footnote original*) Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

[118] Panel Reports, *US – COOL*, para. 7.821.

[119] (*footnote original*) Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385 referring to the *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2482 (2002).

[120] (*footnote original*) In *Argentina – Hides and Leather*, for example, the panel considered access to confidential information by a competitor in the market to be a relevant factor in determining reasonableness of the administrative action in that dispute (para. 11.86). We further recall the Appellate Body's analysis in *Brazil – Retreaded Tyres* that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence" (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226; Panel Report, *Thailand – Cigarettes*, para. 7.291). In *Thailand – Cigarettes (Philippines)*, the Philippines claimed that the appointment of dual function officials as directors of a company under administrative proceedings constituted unreasonable administration because the officials were in a position where they could gather and reveal confidential information on Philippines industries' direct competitors. The panel found that Thailand did not act inconsistently with Article X:3(a). However, the overall delays in the administrative proceedings shown throughout the course of the review process of customs valuation were considered by the panel "*not* appropriate or proportionate" considered against the nature of the circumstances concerned, and therefore, the administration was considered to be "unreasonable" (Panel Report, *Thailand – Cigarettes*, para. 7.969). In

50. The Panel in *US – COOL* concluded that the Vilsack letter did not administer the COOL measure in a "reasonable" manner:

> "Although, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect "certain minimum standards for transparency and procedural fairness" as regards its actions. As the Appellate Body observed, Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.[122]
>
> This responsibility, in our view, applies to all types of actions falling within the broad scope of the term "administer" under Article X:3(a). We consider that the Vilsack letter did not meet these minimum standards of procedural fairness in relation to the implementation of the 2009 Final Rule by both allowing the 2009 Final Rule (AMS) to enter into force and, at the same time, suggesting industry compliance with stricter labelling requirements than those contained in the 2009 Final Rule (AMS).
>
> Based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, we consider that the Vilsack letter was not "appropriate", and thus does not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a)."[123]

(iv) "uniform"

51. In *US – COOL*, the Panel considered the meaning of the term "uniform" in the context of Article X:3(a):

> "The term "uniform" is defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".[124] We find guidance for the meaning of "uniform" under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in *Argentina – Hides and Leather* stated that "uniform administration" requires that Members ensure that their laws are applied consistently and predictably.[125] Additionally, in *US – Stainless Steel*, the panel noted that, "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated".[126] Based on the dictionary meaning and guidance provided by previous panels, we will assess whether Mexico has established that the concerned shifts in the

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Dominican Republic – Import and Sale of Cigarettes, the Panel found that the Dominican Republic had administered the provisions governing the Selective Consumption Tax in a manner that was "unreasonable" and therefore inconsistent with Article X:3(a) of GATT 1994 (paras. 7.365-7.394).

[121] Panel Reports, *US – COOL*, paras. 7.850-7.851.

[122] (*footnote original*) Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure ... " (Appellate Body Report, *US – Shrimp*, para. 182) (emphasis added).

[123] Panel Reports, *US – COOL*, paras. 7.861-7.863.

[124] (*footnote original*) *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. II, p. 3440 (2007); Panel Report, *EC- Selected Customs Matters*, para. 7.124.

[125] (*footnote original*) Panel Report, *Argentina – Hides and Leather*, para. 11.83. The panel found that the measures at issue were inconsistent with Argentina's obligations under Article X:3(a) of GATT 1994.

[126] (*footnote original*) Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

> guidance provided by USDA constitute a non-uniform administration of the COOL measure."[127]

6. Article XI: General Elimination of Quantitative Restrictions

(a) Article XI:1 (general obligation)

(i) "prohibitions or restrictions"

52. See below under Article XI:2(a).

(b) Article XI:2(a) (to prevent/relieve critical shortages)

(i) General

53. In *China – Raw Materials*, the Appellate Body upheld the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage".[128] The Appellate Body found that an export prohibition or restriction applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions to bridge a passing need. The Appellate Body agreed with the Panel that such a restriction must be of a limited duration and not indefinite. Moreover, the Appellate Body found that the term "critical shortages" refers to those deficiencies in quantity that are crucial and of decisive importance, or that reach a vitally important or decisive stage. On the basis of these findings, the Appellate Body upheld the Panel's conclusion that China did not demonstrate that its export quota on refractory-grade bauxite was "temporarily applied" to either prevent or relieve a "critical shortage".

(ii) "prohibitions or restrictions"

54. In *China – Raw Materials*, the Appellate Body addressed the terms "prohibitions or restrictions" used in both Article XI:2(a) and Article XI:1:

> "Article XI:2 refers to the general obligation to eliminate quantitative restrictions set out in Article XI:1 and stipulates that the provisions of Article XI:1 "shall not extend" to the items listed in Article XI:2. Article XI:2 must therefore be read together with Article XI:1. Both Article XI:1 and Article XI:2(a) of the GATT 1994 refer to "prohibitions or restrictions". The term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity".[129] The second component of the phrase "[e]xport prohibitions or restrictions" is the noun "restriction", which is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation"[130], and thus refers generally to something that has a limiting effect.
>
> In addition, we note that Article XI of the GATT 1994 is entitled "General Elimination of *Quantitative* Restrictions". The Panel found that this title suggests that Article XI governs the elimination of "quantitative restrictions" generally. We have previously referred to the title of a provision when interpreting the requirements

[127] Panel Reports, *US – COOL*, para. 7.876.

[128] Appellate Body Reports, *China – Raw Materials*, paras. 308-344.

[129] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363.

[130] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553.

> within the provision.[131] In the present case, we consider that the use of the word "quantitative" in the title of the provision informs the interpretation of the words "restriction" and "prohibition" in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.
>
> Turning to the phrase "[e]xport prohibitions or restrictions" in Article XI:2(a), we note that the words "prohibition" and "restriction" in that subparagraph are both qualified by the word "export". Thus, Article XI:2(a) covers any measure prohibiting or restricting the exportation of certain goods. Accordingly, we understand the words "prohibitions or restrictions" to refer to the same types of measures in both paragraph 1 and subparagraph 2(a), with the difference that subparagraph 2(a) is limited to prohibitions or restrictions on exportation, while paragraph 1 also covers measures relating to importation. We further note that "duties, taxes, or other charges" are excluded from the scope of Article XI:1. Thus, by virtue of the link between Article XI:1 and Article XI:2, the term "restrictions" in Article XI:2(a) also excludes "duties, taxes, or other charges". Hence, if a restriction does not fall within the scope of Article XI:1, then Article XI:2 will also not apply to it."[132]

(iii) "temporarily applied"

55. In *China – Raw Materials*, the Appellate Body addressed the terms "temporarily applied" in Article XI:2(a):

> "First, we note that the term "temporarily" in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term "applied". The word "temporary" is defined as "[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need".[133] Thus, when employed in connection with the word "applied", it describes a measure applied for a limited time, a measure taken to bridge a "passing need". As we see it, the definitional element of "supply[ing] a passing need" suggests that Article XI:2(a) refers to measures that are applied in the interim.
>
> ...
>
> We note that the Panel found that the word "temporarily" suggests "a fixed time-limit for the application of a measure", and also expressed the view that a "restriction or ban applied under Article XI:2(a) must be of a limited duration and not indefinite". We have set out above our interpretation of the term "temporarily" as employed in Article XI:2(a). In our view, a measure applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied for a limited time. Accordingly, we agree with the Panel that a restriction or prohibition in the sense of Article XI:2(a) must be of a limited duration and not indefinite.
>
> The Panel further interpreted the term "limited time" to refer to a "fixed time-limit" for the application of the measure. To the extent that the Panel was referring to a time-limit fixed in advance, we disagree that "temporary" must always connote a

[131] (*footnote original*) See Appellate Body Report, *US – Softwood Lumber IV*, para. 93; and Appellate Body Report, *US – Carbon Steel*, para. 67.

[132] Appellate Body Reports, *China – Raw Materials*, paras. 319-321.

[133] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3204.

> time-limit fixed in advance. Instead, we consider that Article XI:2(a) describes measures applied for a limited duration, adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance."[134]

(iv) "prevent or relieve"

56. In *China – Raw Materials*, the Appellate Body addressed the terms "prevent or relieve" in Article XI:2(a):

> "Article XI:2(a) allows Members to apply prohibitions or restrictions temporarily in order to "prevent or relieve" such critical shortages. The word "prevent" is defined as "[p]rovide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening".[135] The word "relieve" means "[r]aise out of some trouble, difficulty or danger; bring or provide aid or assistance to".[136] We therefore read Article XI:2(a) as providing a basis for measures adopted to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage."[137]

(v) "critical shortage"

57. In *China – Raw Materials*, the Appellate Body addressed the terms "critical shortage" in Article XI:2(a):

> "Turning next to consider the meaning of the term "critical shortage", we note that the noun "shortage" is defined as "[d]eficiency in quantity; an amount lacking"[138] and is qualified by the adjective "critical", which, in turn, is defined as "[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense".[139] The term "crisis" describes "[a] turning-point, a vitally important or decisive stage; a time of trouble, danger or suspense in politics, commerce, etc."[140] Taken together, "critical shortage" thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.
>
> We consider that context lends further support to this reading of the term "critical shortage". In particular, the words "general or local short supply" in Article XX(j) of the GATT 1994 provide relevant context for the interpretation of the term "critical shortage" in Article XI:2(a). We note that the term "in short supply" is defined as "available only in limited quantity, scarce".[141] Thus, its meaning is similar to that of a

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[134] Appellate Body Reports, *China – Raw Materials*, paras. 323, 330-331.

[135] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2341.

[136] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2522.

[137] Appellate Body Reports, *China – Raw Materials*, para. 327.

[138] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813.

[139] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 562.

[140] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 561.

[141] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3115.

> "shortage", which is defined as "[d]eficiency in quantity; an amount lacking".[142] Contrary to Article XI:2(a), however, Article XX(j) does not include the word "critical", or another adjective further qualifying the short supply. We must give meaning to this difference in the wording of these provisions. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)."[143]

(vi) "foodstuffs or other products essential to the exporting Member"

58. In *China – Raw Materials*, the Appellate Body addressed the terms "products essential to the exporting Member" in Article XI:2(a):

> "For Article XI:2(a) to apply, the shortage, in turn, must relate to "foodstuffs or other products essential to the exporting Member". Foodstuff is defined as "an item of food, a substance used as food".[144] The term "essential" is defined as "[a]bsolutely indispensable or necessary".[145] Accordingly, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word "foodstuffs", Article XI:2(a) provides a measure of what might be considered a product "essential to the exporting Member" but it does not limit the scope of other essential products to only foodstuffs."[146]

(vii) Relationship between Article XI:2(a) and Article XX(g)

59. In *China – Raw Materials*, the Appellate Body considered the relationship between Article XI:2(a) and Article XX(g):

> "As we see it, the Panel considered Article XX(g) as relevant context in its interpretation of Article XI:2(a). It noted that Article XX(g) "incorporates additional protections in its chapeau to ensure that the application of a measure does not result in arbitrary or unjustifiable discrimination or amount to a disguised restriction on international trade". The Panel considered that the existence of these further requirements under Article XX(g) lent support to its interpretation that an exception pursuant to Article XI:2(a) must be of a limited duration and not indefinite, because otherwise Members could resort indistinguishably to either Article XI:2(a) or to Article XX(g). We do not understand the Panel to have found that these two provisions are mutually exclusive. Rather, the Panel sought to confirm the result of its interpretation, and stated that the interpretation proffered by China would be inconsistent with the principle of effective treaty interpretation. We therefore see no merit in China's allegation that the Panel erroneously found that Article XI:2(a) and Article XX(g) are mutually exclusive. Nor do we agree that such a finding was a basis for the Panel's interpretation of the term "temporarily" in Article XI:2(a).
>
> In any event, we have some doubts as to the validity of the Panel's concern that, if Article XI:2(a) is not interpreted as confined to measures of limited duration, Members could "resort indistinguishably to either Article XI:2(a) or to Article XX(g) to address the problem of an exhaustible natural resource". Members can resort to

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[142] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813.

[143] Appellate Body Reports, *China – Raw Materials*, paras. 324-325.

[144] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 1008.

[145] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 865.

[146] Appellate Body Reports, *China – Raw Materials*, para. 326.

> Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions *shall not extend to* the items listed under subparagraphs (a) to (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists.
>
> ...
>
> We do not agree with China that [...] the Panel presumed that a shortage of an exhaustible non-renewable resource cannot be "critical" within the meaning of Article XI:2(a). The Panel noted instead, correctly in our view, that the reach of Article XI:2(a) is not the same as that of Article XX(g), adding that these provisions are "intended to address different situations and thus must mean different things". Articles XI:2(a) and XX(g) have different functions and contain different obligations. Article XI:2(a) addresses measures taken to prevent or relieve "critical shortages" of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources. We do not exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource. It would seem that Article XI:2(a) measures could be imposed, for example, if a natural disaster caused a "critical shortage" of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product. Moreover, because the reach of Article XI:2(a) is different from that of Article XX(g), an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g)."[147]

7. Article XIX: Emergency Action on Imports of Particular Products

(a) Article XIX:1(a) (conditions for safeguards)

(i) General

60. In *Dominican Republic – Safeguard Measures*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards.[148] The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures: (i) resulted in a suspension of obligations incurred by the Dominican Republic under Articles I:1 and II:1(a) of the GATT 1994; (ii) were taken by the Dominican Republic with the objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports; (iii) were the result of a procedure based, *inter alia*, on the provisions and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards; and (iv) were notified by the Dominican Republic as safeguard measures to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards.

61. In *Dominican Republic – Safeguard Measures*, the Panel found the following violations of Article XIX:1(a): (i) the report published by the competent authorities failed to provide an explanation

[147] Appellate Body Reports, *China – Raw Materials*, paras. 333-334, 337.
[148] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.

of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994[149]; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that is inconsistent with Article 4.1(c) of the Agreement on Safeguards[150]; (iii) the determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry[151]; and (iv) the imposition of a safeguard measure on the basis of a determination of the existence of "serious injury" that is inconsistent with Article 4.1(a) of the Agreement on Safeguards.[152]

(b) Article XIX:2 (notice and consultation requirements)

(i) General

62. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article XIX:2 of the GATT 1994 by failing to properly notify the definitive safeguard measure.[153] The Panel also rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article XIX:2 by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.[154]

8. Article XX: General Exceptions

(a) Whether Article XX of the GATT 1994 is available to justify violations of the other covered agreements

63. In *China – Raw Materials*, the Appellate Body found that the Panel did not err in finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol.[155] The Appellate Body therefore upheld the Panel's conclusion that China could not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994, and the Panel's conclusion that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994.

(b) Article XX(g) (exhaustible natural resources)

(i) "relating to the conservation of exhaustible natural resources"

64. In *China – Raw Materials*, the Appellate Body stated that:

> "In order to fall within the ambit of subparagraph (g) of Article XX, a measure must "relat[e] to the conservation of exhaustible natural resources". The term "relat[e] to" is defined as "hav[ing] some connection with, be[ing] connected to".[156] The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be "a close and genuine relationship of ends and means".[157]

[149] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.
[150] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.
[151] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.
[152] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.
[153] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.415-7.438.
[154] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.
[155] Appellate Body Reports, *China – Raw Materials*, paras. 270-307.
[156] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2519.
[157] *(footnote original)* Appellate Body Report, *US – Shrimp*, para. 136.

> The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".[158]"[159]

(ii) "made effective" in conjunction with

65. In *China – Raw Materials*, the Appellate Body found that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 so as to require that the purpose of the challenged measure must be to ensure the effectiveness of restrictions on domestic production and consumption.[160] Contrary to the Panel's findings, the Appellate Body saw nothing in the text of Article XX(g) to suggest that, in addition to being "made effective in conjunction with restrictions on domestic production or consumption", a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel had found. The Appellate Body explained:

> "Article XX(g) further requires that conservation measures be "made effective in conjunction with restrictions on domestic production or consumption". The word "effective" as relating to a legal instrument is defined as "in operation at a given time".[161] We consider that the term "made effective", when used in connection with a legal instrument, describes measures brought into operation, adopted, or applied. The Spanish and French equivalents of "made effective"—namely "*se apliquen*" and "*sont appliquées*"—confirm this understanding of "made effective". The term "in conjunction" is defined as "together, jointly, (with)".[162] Accordingly, the trade restriction must operate jointly with the restrictions on domestic production or consumption. Article XX(g) thus permits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource. By its terms, Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.
>
> The Appellate Body addressed Article XX(g) in *US – Gasoline*.[163] The Appellate Body noted Venezuela's and Brazil's argument that, to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" both conservation of exhaustible natural resources and making effective certain restrictions on domestic production or consumption. The Appellate Body, however, found that:
>
> > … "made effective" when used in connection with a measure—a governmental act or regulation—may be seen to refer to such measure being "operative", as "in force", or as having "come into effect." Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with." Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause "if such measures are made

[158] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 496.

[159] Appellate Body Reports, *China – Raw Materials*, para, 355.

[160] Appellate Body Reports, *China – Raw Materials*, paras. 345-361.

[161] *(footnote original) Black's Law Dictionary*, 9th edn, B.A. Garner (ed.) (West Group, 2009), p. 592.

[162] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 492.

[163] *(footnote original)* Appellate Body Report, *US – Gasoline*, pp. 19-22, DSR 1996:I, 3, at 18-20.

> effective in conjunction with restrictions on domestic production or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.[164]

Accordingly, in assessing whether the baseline establishment rules at issue in *US – Gasoline* were "made effective in conjunction with" restrictions on domestic production or consumption, the Appellate Body relied on the fact that those rules were promulgated or brought into effect "together with" restrictions on domestic production or consumption of natural resources. However, even though Brazil and Venezuela had presented arguments suggesting that it was necessary that the purpose of the baseline establishment rules be to ensure the effectiveness of restrictions on domestic production, the Appellate Body did *not* consider this to be necessary. In particular, the Appellate Body did not consider that, in order to be justified under Article XX(g), measures "relating to the conservation of exhaustible natural resources" must be primarily aimed at rendering effective restrictions on domestic production or consumption. Instead, the Appellate Body read the terms "in conjunction with", "quite plainly", as "together with" or "jointly with"[165], and found no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption.

As noted above, the Panel in the present case appears to have considered that, in order to prove that a measure is "made effective in conjunction with" restrictions on domestic production or consumption in the sense of Article XX(g), it must be established, first, that the measure is applied jointly with restrictions on domestic production or consumption, and, second, that the purpose of the challenged measure is to make effective restrictions on domestic production or consumption. In particular, the Panel's use of the words "not only … but, in addition", as well as the reference at the end of the sentence to the GATT panel report in *Canada – Herring and Salmon*, indicate that the Panel did in fact consider that two separate conditions have to be met for a measure to be considered "made effective in conjunction with" in the sense of Article XX(g).

As explained above, we see nothing in the text of Article XX(g) to suggest that, in addition to being "made effective in conjunction with restrictions on domestic production or consumption", a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel found. Instead, we have found above that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource."[166]

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[164] *(footnote original)* Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at 19.
[165] *(footnote original)* Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at 19.
[166] Appellate Body Reports, *China – Raw Materials*, paras. 356-360.

9. Article XXIII: Nullification or Impairment

(a) Article XXIII:1(b) (non-violation nullification or impairment)

66. In *US – COOL*, the Panel did not consider it necessary to rule on a non-violation claim under Article XXIII:1(b) of the GATT 1994, having already reached findings of violation under Articles 2.1 and 2.2 of the TBT Agreement, and Article X:3(a) of the GATT 1994.[167]

[167] Panel Report, *US – COOL*, paras. 7.900-7.907.

D. TBT AGREEMENT

1. Preamble

67. In *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*, the Appellate Body relied on the Preamble to the TBT Agreement as relevant context when interpreting Articles 2.1 and 2.2 of that Agreement.[168] Among other things, in *US – Clove Cigarettes*, the Appellate Body stated that:

> "The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, 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."[169]

2. Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

(a) Article 2.1 (non-discrimination)

(i) General

68. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding, for different reasons, that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the TBT Agreement.[170] The Appellate Body began by interpreting the concept of "like products" in Article 2.1, disagreeing with the Panel that "like products" in Article 2.1 of the TBT Agreement should be interpreted based on the regulatory purpose of the technical regulation at issue. The Appellate Body considered that the determination of whether products are "like" within the meaning of Article 2.1 of the TBT Agreement is a determination about the competitive relationship between the products, based on an analysis of the traditional "likeness" criteria, namely, physical characteristics, end-uses, consumer tastes and habits, and tariff classification. However, based on this interpretation of the concept of "like products", the Appellate Body nonetheless agreed with the Panel that clove cigarettes and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement. The Appellate Body found that the Panel did not err in its approach to the product scope, or the temporal scope, of its analysis of "less favourable treatment". The Appellate Body found that the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflected discrimination against the group of like products imported from Indonesia.

69. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the US "dolphin-safe" labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement, and found, instead, that the US measure was inconsistent with Article 2.1.[171] The Appellate Body concluded that the Panel erred in its interpretation of the terms "treatment no less favourable". The Appellate Body reasoned, first, that by excluding most Mexican tuna products from access to the "dolphin-safe" label while granting access to most US tuna products and tuna products from other countries, the measure modified the conditions of competition in the US market to the detriment of

[168] Appellate Body Report, *US – Clove Cigarettes*, paras. 89-96, 100, 106, 120, 172-173; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 212-213, 219, 313, 316; Appellate Body Reports, *US – COOL*, paras. 370, 373, 445.

[169] Appellate Body Report, *US – Clove Cigarettes*, para. 96.

[170] Appellate Body Report, *US – Clove Cigarettes*, paras. 104-233.

[171] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 200-300.

Mexican tuna products. Next, the Appellate Body scrutinized whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the detrimental impact from the measure stemmed exclusively from a legitimate regulatory distinction. The Appellate Body found that the measure at issue was not even-handed in the manner in which it addressed the risks to dolphins arising from different fishing techniques in different areas of the ocean.

70. In *US – COOL*, the Appellate Body upheld, for different reasons, the Panel's finding that the COOL measure violated Article 2.1 of the TBT Agreement by according "less favourable treatment "to imported Canadian cattle and hogs than to like domestic cattle and hogs.[172] The Appellate Body agreed with the Panel that the COOL measure had a detrimental impact on imported livestock because its recordkeeping and verification requirements create an incentive for processors to use exclusively domestic livestock, and a disincentive against using like imported livestock. The Appellate Body found, however, that the Panel's analysis was incomplete because the Panel did not go on to consider whether this *de facto* detrimental impact stemmed exclusively from a legitimate regulatory distinction, in which case it would not violate Article 2.1. In its own analysis, the Appellate Body found that the COOL measure lacked even-handedness because its recordkeeping and verification requirements imposed a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labelling requirements for meat sold at the retail level.

(ii) "like products"

71. In *US – Clove Cigarettes*, the Appellate Body concluded that a determination of "like products" under Article 2.1 of the *TBT Agreement*, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. In the course of its analysis, the Appellate Body stated:

> "[W]e do not consider that the concept of "like products" in Article 2.1 of the *TBT Agreement* lends itself to distinctions between products that are based on the regulatory objectives of a measure. As we see it, the concept of "like products" serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products. If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a "marketplace" that would include some like products, but not others. As we consider further below in respect of the United States' appeal of the Panel's less favourable treatment finding, distinctions among products that have been found to be like are better drawn when considering, subsequently, whether less favourable treatment has been accorded, rather than in determining likeness, because the latter approach would alter the scope and result of the less favourable treatment comparison.
>
> Nevertheless, in concluding that the determination of likeness should not be based on the regulatory purposes of technical regulations, we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like. In this respect, we recall that, in *EC – Asbestos*, the Appellate Body found that regulatory concerns and considerations may play a role in applying certain of the "likeness" criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994.

[172] Appellate Body Reports, *US – COOL*, paras. 254-350.

> In *EC – Asbestos*, the Appellate Body found that, in examining whether products are like, panels must evaluate all relevant evidence, including evidence relating to the health risks associated with a product, which was the underlying concern of the challenged measure in that dispute. The Appellate Body found that such evidence would not be examined as a separate criterion but, rather, under the traditional "likeness" criteria. In particular, the Appellate Body stated that a product's health risks are relevant to the determination of the competitive relationship between products, and addressed health risks as part of the products' physical characteristics and of the tastes and habits of consumers.[173] In respect of physical characteristics, the Appellate Body considered that a panel should examine fully the physical properties of products, in particular, those physical properties that are likely to influence the competitive relationship between products in the marketplace. These include those physical properties that make a product toxic or otherwise dangerous to health.[174] In respect of consumer tastes and habits, the Appellate Body found that the health risks associated with a product could influence the preference of consumers.[175]
>
> Similarly, we consider that the regulatory concerns underlying a measure, such as the health risks associated with a given product, may be relevant to an analysis of the "likeness" criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the *TBT Agreement*, to the extent they have an impact on the competitive relationship between and among the products concerned.
>
> The interpretation of the concept of "likeness" in Article 2.1 has to be based on the text of that provision as read in the context of the *TBT Agreement* and of Article III:4 of the GATT 1994, which also contains a similarly worded national treatment obligation that applies to laws, regulations, and requirements including technical regulations. In the light of this context and of the object and purpose of the *TBT Agreement*, as expressed in its preamble, we consider that the determination of likeness under Article 2.1 of the *TBT Agreement*, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness."[176]

(iii) "treatment no less favourable"

72. In *US – Clove Cigarettes*, the Appellate Body provided guidance on the terms "treatment no less favourable" in Article 2.1. In the course of its analysis, the Appellate Body stated:

> "[T]he object and purpose of the *TBT Agreement* is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand,

[173] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 113.

[174] (*footnote original*) The Appellate Body noted that a characteristic of chrysotile asbestos fibres was that the microscopic particles and filaments of these fibres were carcinogenic for humans when inhaled. Thus, the Appellate Body concluded that the carcinogenicity, or toxicity, constituted a defining aspect of the physical properties of chrysotile asbestos fibres as opposed to polyvinyl alcohol, cellulose, and glass (PCG) fibres, which did not present the same health risk. (Appellate Body Report, *EC – Asbestos*, para. 114)

[175] (*footnote original*) The Appellate Body found that the health risks associated with chrysotile asbestos fibres influenced the behaviour of both manufacturers (who incorporate fibres into another product) and ultimate consumers. The Appellate Body noted that a manufacturer cannot ignore the preferences of the ultimate consumers of a product and, if the risks posed by a particular product are sufficiently great, the ultimate consumers may simply cease to buy that product. (Appellate Body Report, *EC – Asbestos*, para. 122)

[176] Appellate Body Report, *US – Clove Cigarettes*, paras. 116-120.

> Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.
>
> Accordingly, the context and object and purpose of the *TBT Agreement* weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.
>
> …
>
> Although we are mindful that the meaning of the term "treatment no less favourable" in Article 2.1 of the *TBT Agreement* is to be interpreted in the light of the specific context provided by the *TBT Agreement*, we nonetheless consider these previous findings by the Appellate Body in the context of Article III:4 of the GATT 1994 to be instructive in assessing the meaning of "treatment no less favourable", provided that the specific context in which the term appears in Article 2.1 of the *TBT Agreement* is taken into account. Similarly to Article III:4 of the GATT 1994, Article 2.1 of the *TBT Agreement* requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products. Article 2.1 prescribes such treatment specifically in respect of technical regulations. For this reason, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products.
>
> However, as noted earlier, the context and object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, for the aforementioned reasons, the "treatment no less favourable" requirement of Article 2.1 only prohibits *de jure* and *de facto* discrimination against the group of imported products.
>
> Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."[177]

73. In *US – Clove Cigarettes*, the Appellate Body addressed the question of which products are to be compared in the course of determining whether less favourable treatment exists:

> "Article 2.1 provides that "products imported from the territory of *any* Member" shall be accorded treatment no less favourable than that accorded to "like products of

[177] Appellate Body Report, *US – Clove Cigarettes*, paras. 174-175, 180-182.

national origin and like products originating in any other country". The text of Article 2.1 thus calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.

In determining what are the "like products of national origin and like products originating in any other country", a panel must seek to establish, based on the nature and extent of the competitive relationship between the products in the market of the regulating Member, the products of domestic (and other) origin(s) that are like the products imported from the complaining Member. In determining what the like products at issue are, a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member in its panel request. Rather, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.

To be clear, a panel's duty under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member does not absolve the complainant from making a *prima facie* case of violation of Article 2.1. Ordinarily, in discharging that burden, the complaining Member will identify the imported and domestic products that are allegedly like and whose treatment needs to be compared for purposes of establishing a violation of Article 2.1. The products identified by the complaining Member are the starting point in a panel's likeness analysis. However, Article 2.1 requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.[178]

Once the imported and domestic like products have been properly identified, Article 2.1 requires a panel dealing with a national treatment claim to compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products. As noted by the Appellate Body in the context of Article III:4 of the GATT 1994:

> [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.[179] (original emphasis)

[178] (*footnote original*) See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.

[179] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 100.

> In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products. In determining what the scope of like imported and domestic products is, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess, based on the nature and extent of their competitive relationship, what are the domestic products that are like the products imported from the complaining Member. Once the universe of imported and domestic like products has been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products. The "treatment no less favourable" standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products."[180]

74. In *US – Tuna II (Mexico)*, the Appellate Body provided guidance on the terms "treatment no less favourable" in Article 2.1. In the course of its analysis, the Appellate Body stated:

> "Article 2.1 of the *TBT Agreement* applies "in respect of technical regulations". A technical regulation is defined in Annex 1.1 as a "[d]ocument which lays down product characteristics or their related processes and production methods … with which compliance is mandatory". As such, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. Article 2.1 should not be read therefore to mean that any distinctions, in particular ones that are based exclusively on particular product characteristics or on particular processes and production methods, would *per se* constitute "less favourable treatment" within the meaning of Article 2.1.[181]
>
> …
>
> Regarding the context provided by other covered agreements, we further note that the expression "treatment no less favourable" can be found in Article III:4 of the GATT 1994. In the context of that provision, the Appellate Body has indicated that whether or not imported products are treated "less favourably" than like domestic products should be assessed "by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.[182] We consider these previous findings by the Appellate Body to be instructive in assessing the meaning of the expression "treatment no less favourable", provided that the specific context in
>
> As the Appellate Body has previously explained, when assessing claims brought under Article 2.1 of the *TBT Agreement*, a panel should therefore seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products or like products originating in any other country.[183] The

[180] Appellate Body Report, *US – Clove Cigarettes*, paras. 190-194.

[181] (*footnote original*) Appellate Body Report, *US – Clove Cigarettes*, para. 169.

[182] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (original emphasis) In *Thailand – Cigarettes (Philippines)*, the Appellate Body further clarified that there must be in every case a "genuine relationship" between the measure at issue itself "and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134)

[183] (*footnote original*) Appellate Body Report, *US – Clove Cigarettes*, para. 180. See also para. 215.

existence of such a detrimental effect is not sufficient to demonstrate less favourable treatment under Article 2.1.[184] Instead, in *US – Clove Cigarettes*, the Appellate Body held that a "panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products."[185],,,[186]

75. In *US – Tuna II (Mexico)*, the parties disagreed as to whether any detrimental impact on Mexican tuna products resulted from the measure itself, rather than from the actions of private parties. The Appellate Body stated:

> "In assessing whether there is a genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products, the relevant question is whether governmental action "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[187] In *Korea – Various Measures on Beef*, the Appellate Body reasoned that:
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> > … the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.[188] (original emphasis)
>
> The relevant question is thus whether the *governmental* intervention "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[189] In this regard, we recall that it is the measure at issue that establishes the requirements under which a product can be labelled "dolphin-safe" in the United States. As noted by the Panel:
>
> > … access to the label is controlled by compliance with the terms of the measures. Therefore, to the extent that access to the label is an advantage on the marketplace, this advantage is provided by the measures themselves. The exact value of the advantage provided by access to the label on the marketplace will depend on the commercial value attributed to it by operators on the market, including retailers and final consumers.

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[184] (*footnote original*) Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215.

[185] (*footnote original*) Appellate Body Report, *US – Clove Cigarettes*, para. 182. See also para. 215. The Appellate Body also stated that a panel must examine, in particular, whether the technical regulation is even-handed. (*Ibid*., para. 182)

[186] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 211, 214-215.

[187] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

[188] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

[189] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

Moreover, while the Panel agreed with the United States that "US consumers' decisions whether to purchase dolphin-safe tuna products are the result of their own choices rather than of the measures", it noted that:

> … it is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna. An advantage is therefore afforded to products eligible for the label by the measures, in the form of access to the label.

These findings by the Panel suggest that it is the governmental action in the form of adoption and application of the US "dolphin-safe" labelling provisions that has modified the conditions of competition in the market to the detriment of Mexican tuna products, and that the detrimental impact in this case hence flows from the measure at issue. Moreover, it is well established that WTO rules protect competitive opportunities, not trade flows.[190] It follows that, even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a "dolphin-safe" label in the US market. The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.[191],[192]

76. In *US – COOL*, the Appellate Body stated, along the same lines, that:

"In the context of both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.[193] In each case, the relevant question is whether it is the governmental measure at issue that "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory".[194] While a measure may not require certain treatment of imports, it may nevertheless create incentives for market participants to behave in certain ways, and thereby treat imported products less favourably.[195] However, changes in the competitive conditions in a marketplace that are "*not* imposed directly or indirectly by law or governmental regulation, but [are] rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits", cannot be the basis for a finding that a measure treats imported products less favourably than domestic like products.[196] In every case, it is *the effect of the measure on the*

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[190] (*footnote original*) Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 469 (referring to Appellate Body Report, *EC – Bananas III*, para. 252, in turn referring to GATT Panel Report, *US – Superfund*, para. 5.1.9).

[191] (*footnote original*) See Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

[192] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 236-239.

[193] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, footnote 457 to para. 214 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134). See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

[194] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

[195] (*footnote original*) Appellate Body Reports, *China – Auto Parts*, paras. 195 and 196; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 212.

[196](*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 149. (original emphasis) See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 236.

> *competitive opportunities in the market* that is relevant to an assessment of whether a challenged measure has a detrimental impact on imported products.
>
> …
>
> We further emphasize that, while detrimental effects caused *solely* by the decisions of private actors cannot support a finding of inconsistency with Article 2.1, the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not "independent" of that measure. As the Appellate Body noted, the "intervention of some element of private choice does not relieve [a Member] of responsibility … for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product", and thus does not preclude a finding that the measure provides less favourable treatment.[197] "[198]

(b) Article 2.2 (more trade-restrictive than necessary)

(i) General

77. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that Mexico had demonstrated that the US "dolphin-safe" labelling provisions were more trade restrictive than necessary to fulfil the United States' legitimate objectives, and therefore inconsistent with Article 2.2.[199] The Appellate Body reasoned that the Panel had conducted a flawed analysis and comparison between the challenged measure and the alternative measure proposed by Mexico and also noted that the latter would not make an equivalent contribution to the United States' objectives as the US measure in all ocean areas. On this basis, the Appellate Body reversed the Panel's finding that the measure was inconsistent with Article 2.2. Mexico filed a conditional other appeal in the event that the Appellate Body reversed the Panel's finding that the measure at issue was inconsistent with Article 2.2. The Appellate Body addressed Mexico's other appeal and rejected both grounds of appeal, namely, Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective, and Mexico's claim that the Panel erred in proceeding to examine whether there was a less trade-restrictive alternative measure after it had found that the measure at issue could, at best, only partially fulfil the United States' objectives.

78. In *US – COOL*, the Appellate Body reversed the Panel's finding that the COOL measure violated Article 2.2 of the TBT Agreement because it did not fulfil its legitimate objective of providing consumers with information on origin, but was unable to complete the legal analysis and determine whether the COOL measure was more trade restrictive than necessary to meet its objective.[200] The Appellate Body disagreed that a measure could be consistent with Article 2.2 only if it fulfilled its objective completely or exceeded some minimum level of fulfilment, and considered that the Panel seemed to have ignored its own findings, which demonstrated that the COOL measure did contribute, at least to some extent, to achieving its objective.

(ii) "For this purpose"

79. In *US – Tuna II (Mexico)*, the Appellate Body addressed the terms "For this purpose" in the second sentence of Article 2.2. In the course of its analysis, the Appellate Body stated:

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[197] (*footnote original*) Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.
[198] Appellate Body Reports, *US – COOL*, paras. 270, 291.
[199] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 301-342.
[200] Appellate Body Reports, *US – COOL*, paras. 351-491.

> "Both the first and second sentence of Article 2.2 refer to the notion of "necessity". These sentences are linked by the terms "[f]or this purpose", which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence."[201]

80. Along the same lines, in *US – COOL* the Appellate Body stated that:

> "The first two sentences of Article 2.2 establish certain obligations with which WTO Members must comply when preparing, adopting, and applying technical regulations. In accordance with the first sentence, they must ensure that such preparation, adoption, and application is not done "with a view to or with the effect of creating unnecessary obstacles to international trade"; and, in accordance with the second sentence, they must ensure that their technical regulations are "not … more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". The words "[f]or this purpose" linking the first and second sentences suggest that the second sentence informs the scope and meaning of the obligation contained in the first sentence.[202]"[203]

(iii) "more trade-restrictive than necessary"

81. In *US – Tuna II (Mexico)*, the Appellate Body provided guidance on the terms "more trade-restrictive than necessary" in Article 2.2. In the course of its analysis, the Appellate Body stated:

> " We turn next to the terms "unnecessary obstacles to international trade" in the first sentence and "not … more trade-restrictive than necessary" in the second sentence of Article 2.2 of the *TBT Agreement*. Both the first and second sentence of Article 2.2 refer to the notion of "necessity". These sentences are linked by the terms "[f]or this purpose", which suggests that the second sentence qualifies the terms of the first sentence and elaborates on the scope and meaning of the obligation contained in that sentence. The Appellate Body has previously noted that the word "necessary" refers to a range of degrees of necessity, depending on the connection in which it is used.[204] In the context of Article 2.2, the assessment of "necessity" involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create. We consider, therefore, that all these factors provide the basis for the determination of what is to be considered "necessary" in the sense of Article 2.2 in a particular case.[205]
>
> What has to be assessed for "necessity" is the trade-restrictiveness of the measure at issue. We recall that the Appellate Body has understood the word "restriction" as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word "restriction" refers generally to something that has a

[201] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

[202] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.

[203] Appellate Body Reports, *US – COOL*, para. 369.

[204] (*footnote original*) The Appellate Body further noted that: "[a]t one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to.'" (Appellate Body Report, *Korea – Various Measures on Beef*, para. 161)

[205] (*footnote original*) Similarly, in the context of Article XX of the GATT 1994 and Article XIV of the GATS, "necessity" is determined on the basis of "weighing and balancing" a number of factors. (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; Appellate Body Report, *US – Gambling*, paras. 306-308)

limiting effect.[206] As used in Article 2.2 in conjunction with the word "trade", the term means something having a limiting effect on trade. We recall that Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to "unnecessary obstacles" to trade and thus allows for some trade-restrictiveness; more specifically, Article 2.2 stipulates that technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.

The use of the comparative "more … than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis of the above-mentioned factors. In most cases, this would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available *and* less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.[207] The Appellate Body has clarified that a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary."[208]

82. In *US – COOL*, the Appellate Body reiterated that:

"The Appellate Body considered that the use of the comparative "more … than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis of the above-mentioned factors. In most cases[209], this will involve a comparison of the trade-restrictiveness of, and the degree of achievement of the objective by, the measure at issue, with that of possible alternative measures[210] that may be reasonably available *and* that are less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create.[211]"[212]

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[206] (*footnote original*) The Appellate Body addressed this question in the context of Article XI:2(a) of the GATT 1994 in Appellate Body Reports, *China – Raw Materials*, para. 319.

[207] (*footnote original*) Similarly, the Appellate Body has held that in order to establish "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, a comparison of a measure found to be inconsistent and reasonably available less trade-restrictive alternatives should be undertaken. (See, for instance, Appellate Body Report, *Korea – Various Measures on Beef*, para. 166)

[208] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 318-320.

[209] (*footnote original*) The Appellate Body observed that there are "at least two instances" when such a comparison might not be required, namely, when the measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate objective. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322)

[210] (*footnote original*) The Appellate Body explained that the comparison with reasonably available alternative measures is a "conceptual tool" to be used for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 320)

[211] (*footnote original*) The Appellate Body drew an analogy with the analysis of "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, in which a measure found to be inconsistent with a relevant obligation is to be compared with reasonably available less trade-restrictive alternative measures. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 645 to para. 320 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166))

[212] Appellate Body Reports, *US – COOL*, para. 376.

(iv) "to fulfil"

83. In *US – Tuna II (Mexico)*, the Appellate Body provided guidance on the terms "to fulfil" in Article 2.2. In the course of its analysis, the Appellate Body stated:

> "[W]e consider the meaning of the word "fulfil" in the context of the phrase "fulfil a legitimate objective" in Article 2.2 of the *TBT Agreement*. We note, first, that the word "fulfil" is defined as "provide fully with what is wished for".[213] Read in isolation, the word "fulfil" appears to describe complete achievement of something. But, in Article 2.2, it is used in the phrase "to fulfil a legitimate objective" and, as described above, the word "objective" means "a target, goal, or aim". As we see it, it is inherent in the notion of an "objective" that such a "goal, or aim" may be something that is pursued and achieved to a greater or lesser degree. Accordingly, we consider that the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective."[214]

84. Along the same lines, in *US – COOL* the Appellate Body stated that:

> "We turn next to the phrase "fulfil a legitimate objective" in Article 2.2 of the *TBT Agreement.* The Appellate Body in *US – Tuna II (Mexico)* found that, while, read in isolation, the word "fulfil" could be understood to signify the *complete* achievement of something, as used in Article 2.2 this term is concerned with the *degree* of contribution that the technical regulation makes towards the achievement of the legitimate objective.[215] The Appellate Body found relevant contextual support for this reading in the sixth recital of the preamble of the *TBT Agreement*, which provides that, subject to certain qualifications, a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate".[216] The degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something that is revealed through the measure itself. In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective.[217] Thus, a panel adjudicating a claim under Article 2.2 must seek to ascertain—from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application—to what degree, if at all[218], the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member.[219]"[220]

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[213] *(footnote original) Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1053.

[214] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 315.

[215] *(footnote original)* Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.

[216] *(footnote original)* Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.

[217] *(footnote original)* Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.

[218] *(footnote original)* This may involve an assessment of whether the measure at issue is capable of achieving the legitimate objective. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 640 to para. 317)

[219] *(footnote original)* The Appellate Body explained that, as is the case when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, "a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue." (Appellate Body Report, *US – Tuna II (Mexico)*, para. 317 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 252))

[220] Appellate Body Reports, *US – COOL*, para. 373.

85. In *US – COOL* the Appellate Body found that the Panel erred in its finding that the COOL measure was inconsistent with Article 2.2 because it did not adequately "fulfil" its objective. In the course of its analysis, the Appellate Body stated:

> "[A]s we have explained above, in preparing, adopting, and applying a measure in order to pursue a legitimate objective, a Member articulates, either implicitly or explicitly, the level at which it seeks to pursue that particular objective. Neither Article 2.2 in particular, nor the *TBT Agreement* in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective.[221] Rather, what a panel *is* required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member.[222]
>
> …
>
> Many of the issues relating to the proper approach to be adopted and applied in determining whether a measure "fulfils" its objective were dealt with by the Appellate Body in *US – Tuna II (Mexico)*. There, the Appellate Body clarified that an analysis under Article 2.2 involves an assessment of a number of factors, and that one such factor is whether a technical regulation "fulfils" an objective. The Appellate Body explained that this factor is concerned with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective, and that a panel must seek to ascertain to what degree, or if at all[223], the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. The Appellate Body did not find or imply that, in order for a measure to comply with Article 2.2, it must meet some minimum threshold of fulfilment. Rather, the contribution that the challenged measure makes to the achievement of its objective must be determined objectively, and then evaluated along with the other factors mentioned in Article 2.2, that is: (i) the trade-restrictiveness of the measure; and (ii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures will then also need to be undertaken.[224] Through such an analysis, a panel will be able to judge the "necessity" of the trade-restrictiveness of the measure at issue, that is, to discern whether the technical regulation at issue restricts international trade beyond what is necessary to achieve the degree of contribution that it makes to the achievement of a legitimate objective.

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[221] (*footnote original*) We have noted above that the sixth recital of the preamble of the *TBT Agreement* provides that a Member shall not be prevented from taking measures necessary to achieve a legitimate objective "at the levels it considers appropriate". (See *supra*, para. 0) This does not, however, require a separate assessment of a *desired* level of fulfilment.

[222] Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.

[223] (*footnote original*) This may involve an assessment of whether the measure at issue is capable of achieving the legitimate objective.

[224] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. The Appellate Body identified "at least two instances where a comparison of the challenged measure and possible alternative measures may not be required", namely, when the measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate objective. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322)

…

> We have stated above that a panel's assessment of whether a measure fulfils its objective is concerned primarily with the actual contribution made by the measure towards achieving its objective. Thus, a panel's assessment should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective. Because the Panel seems to have considered it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment to be consistent with Article 2.2, it erred in its interpretation of Article 2.2. Moreover, because the Panel ignored its own findings, which demonstrate that the labels under the COOL measure did contribute towards the objective of providing consumer information on origin, it also erred in its analysis under Article 2.2. For these reasons, we *find* that the Panel erred, in paragraph 7.719 of the Panel Reports, in finding that "the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers", and we *reverse* the Panel's ultimate finding, in paragraph 7.720 of the Panel Reports, that, for this reason, the COOL measure is inconsistent with Article 2.2 of the *TBT Agreement*."[225]

(v) "a legitimate objective"

86. In *US – Tuna II (Mexico)*, the Appellate Body provided guidance on the concept of a "legitimate objective" for the purposes of Article 2.2. In the course of its analysis, the Appellate Body stated:

> "Considering, first, the meaning of the term "legitimate objective" in the sense of Article 2.2 of the *TBT Agreement*, we note that the word "objective" describes a "thing aimed at or sought; a target, a goal, an aim".[226] The word "legitimate", in turn, is defined as "lawful; justifiable; proper".[227] Taken together, this suggests that a "legitimate objective" is an aim or target that is lawful, justifiable, or proper. Furthermore, the use of the words "*inter alia*" in Article 2.2 suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives. We consider that those objectives expressly listed provide a reference point for which other objectives may be considered to be legitimate in the sense of Article 2.2. In addition, we note that the sixth and seventh recitals of the preamble of the *TBT Agreement* specifically recognize several objectives, which to a large extent overlap with the objectives listed in Article 2.2. Furthermore, we consider that objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the *TBT Agreement*.
>
> Accordingly, in adjudicating a claim under Article 2.2 of the *TBT Agreement*, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound

[225] Appellate Body Reports, *US – COOL*, paras. 390, 461, 468.

[226] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1970.

[227] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1577.

by a Member's characterization of the objectives it pursues through the measure, but must independently and objectively assess them.[228] Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above."[229]

87. Along the same lines, in *US – COOL* the Appellate Body stated that:

"We begin with the meaning of the different elements set out in the text of Article 2.2. First, a "legitimate objective" refers to an aim or target that is lawful, justifiable, or proper.[230] Article 2.2 lists specific examples of such "legitimate objectives", namely: national security requirements; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment. The use of the words "*inter alia*" in Article 2.2 introducing that list, however, signifies that the list of legitimate objectives is not a closed one. In addition, the objectives expressly listed provide a reference point for other objectives that may be considered to be legitimate in the sense of Article 2.2.[231] The sixth and seventh recitals of the preamble of the *TBT Agreement* refer to several objectives, which to a large extent overlap with the objectives listed in Article 2.2.[232] As the Appellate Body has also noted, objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2.[233]

A panel adjudicating a claim under Article 2.2 may face conflicting arguments by the parties as to the nature of the "objective" pursued by a responding party through its technical regulation. In identifying the objective pursued by a Member, a panel should take into account that Member's articulation of what objective(s) it pursues through its measure. However, a panel is not bound by a Member's characterizations of such objective(s).[234] Indeed, in order to make an objective and independent assessment of the objective that a Member seeks to achieve, the panel must take account of all the evidence put before it in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the technical regulation at issue.[235]

With respect to the determination of the "legitimacy" of the objective, we note first that a panel's finding that the objective is among those listed in Article 2.2 will end the inquiry into its legitimacy. If, however, the objective does not fall among those specifically listed, a panel must make a determination of legitimacy. It may be guided by considerations that we have set out above, including whether the identified objective is reflected in other provisions of the covered agreements."[236]

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[228] (*footnote original*) See Appellate Body Report, *US – Gambling*, para. 304.

[229] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 313-314,

[230] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 313 (referring to *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 1577; and Vol. 2, p. 1970).

[231] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

[232] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

[233](*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 313.

[234] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 314 (referring to Appellate Body Report, *US – Gambling*, para. 304).

[235] (*footnote original*) Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

[236] Appellate Body Reports, *US – COOL*, paras. 369-372.

(vi) "risks non-fulfilment would create"

88. In *US – Tuna II (Mexico)*, the Appellate Body considered the instruction in Article 2.2 to consider the "risks non-fulfilment would create". In the course of its analysis, the Appellate Body stated:

> " Article 2.2 of the *TBT Agreement* further stipulates that the risks non-fulfilment of the objective would create shall be taken into account, and that, in assessing such risks, relevant elements of consideration are "*inter alia*: available scientific and technical information, related processing technology or intended end-uses of products". As we see it, the obligation to consider "the risks non-fulfilment would create" suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. This suggests a further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is "necessary" or, alternatively, whether a possible alternative measure, which is less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and would be reasonably available.[237]"[238]

(vii) Burden of proof

89. With respect to the burden of proof under Article 2.2, in *US – COOL* the Appellate Body explained that:

> "In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's *prima facie* case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective.[239]"[240]

(c) Article 2.4 (international standards)

(i) General

90. Claims under Article 2.4 were rejected by the Panel in *US – COOL*, and by the Appellate Body in *US – Tuna II (Mexico)*.[241]

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[237] (*footnote original*) See also Appellate Body Report, *US – Gambling*, para. 307.
[238] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 321.
[239] Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.
[240] Appellate Body Reports, *US – COOL*, para. 379.
[241] (*footnote original*) Panel Report, *US – COOL*, paras. 7.721-7.737; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

(ii) "relevant international standard"

91. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.[242] In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement, the definition of "international body or system" in Annex 1.4 to the TBT Agreement, as well as the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). The Appellate Body also relied on the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement, which it considered a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. The Appellate Body concluded that the Panel erred in finding that the AIDCP, to which new parties can accede only by invitation, is "open to the relevant body of every country and is therefore an international standardizing organization" for purposes of Article 2.4 of the TBT Agreement.

(iii) "ineffective or inappropriate"

92. In *US – COOL*, the Panel found that Mexico failed to establish that the COOL measure violated Article 2.4 of the TBT Agreement.[243] Specifically, after assuming that CODX-STAN 1-1985 was a "relevant international standard" within the meaning of Article 2.4, the Panel found that this standard would be an ineffective and inappropriate means for the fulfilment of the specific objective pursued by the United States through the COOL measure. The Panel stated that:

> "The panel in *EC – Sardines* established that "in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued".[244] In that dispute, the Appellate Body found that, in that case, a consideration of the *appropriateness* of the standard and a consideration of the *effectiveness* of the standard were interrelated due to the nature of the objectives of the regulation under examination.[245]
>
> We recall our findings above that the objective pursued by the United States through the COOL measure is providing consumer information on origin. We also recall that the exact information on origin that the United States wants to provide to consumers through the COOL measure is the countries where the animal from which the meat is derived was born, raised and slaughtered.
>
> Turning to the matter of *effectiveness* and *appropriateness*, CODEX-STAN 1-1985 would be *effective* if it had the capacity to accomplish the objective, and it would be *appropriate* if it were suitable for the fulfilment of the objective.
>
> We consider that in this case a consideration of the *effectiveness* and a consideration of the *appropriateness* of CODEX-STAN 1-1985 are interrelated, due to the nature of the objective of the COOL measure.

[242] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.
[243] Panel Reports, *US – COOL*, paras. 7.721-7.737.
[244] (*footnote original*) Panel Report, *EC – Sardines*, para. 7.116.
[245] (*footnote original*) Appellate Body Report, *EC – Sardines*, para. 289.

> In our view CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered. The reason is that the standard confers origin *exclusively* to the country where the processing of food took place. In other words, it is based on the principle of substantial transformation. This means that no more than one country can claim origin under CODEX-STAN 1-1985; even when an animal is born and raised in a third country and then slaughtered in the United States, the origin would *exclusively* be the United States. Thus, the exact information that the United States wants to provide to consumers cannot be conveyed through CODEX-STAN 1-1985. For the same reasons, we find that CODEX-STAN 1-1985 is an inappropriate means for the fulfilment of this objective, as it is not specially suitable for providing this type of information to the consumer.
>
> Based on the above, we find that CODEX-STAN 1-1985 is *ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States."[246]

(d) Article 2.12 (reasonable period before entry into force)

(i) General

93. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement, which, when interpreted in the context of paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, requires a minimum of six months between the publication and the entry into force of a technical regulation.[247]

94. The Arbitrator in *US – COOL (Article 21.3(c))* rejected the US argument that an additional six-month period was required for the United States to comply with Article 2.12 of the TBT Agreement.[248] The Arbitrator considered that other WTO obligations, as well as other non-WTO international obligations, may have to be taken into account in the determination of the reasonable period of time under Article 21.3(c) of the DSU. However, the Arbitrator found that in this case, Article 2.12 of the TBT Agreement did not justify extending the reasonable period of time by six months. Taking into account the interpretative clarification provided by Paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the TBT Agreement establishes a rule that "normally" producers in exporting Members require a period of not less than six months to adapt their products or production methods to the requirements of an importing Member's technical regulation. The Arbitrator noted, however, that the "normal" period of six months may be reduced in situations where producers need less time or even no time at all to adapt to the technical regulation - which Canada and Mexico contended was the case here. Similarly, the six-month period may be reduced when it would be ineffective to fulfil the legitimate objectives pursued by the technical regulation - one of the objectives of the compliance measure here being prompt compliance.

(ii) "reasonable interval"

95. In *US – Clove Cigarettes*, the Appellate Body developed the following interpretation of the term "reasonable interval" in Article 2.12:

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[246] Panel Reports, *US – COOL*, paras. 7.730-7.735.
[247] Appellate Body Report, *US – Clove Cigarettes*, paras. 237-297.
[248] Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 101-121.

"The obligation imposed on Members by Article 2.12 to provide a "reasonable interval" between the publication and the entry into force of their technical regulations carefully balances the interests of, on the one hand, the exporting Member whose producers might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation. With regard to the former, Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Thus, Article 2.12 presumes that foreign producers in exporting Members, and particularly in developing country Members, require a minimum of at least six months to adapt to the requirements of an importing Member's technical regulation.

With regard to the interests of the importing Member, we recall that paragraph 5.2 of the Doha Ministerial Decision tempers the obligation to provide a "reasonable interval" of not less than six months between the publication and the entry into force of a technical regulation by stipulating that this obligation applies "except when this would be ineffective in fulfilling the legitimate objectives pursued" by the technical regulation. Thus, while Article 2.12 of the *TBT Agreement* imposes an obligation on importing Members to provide a "reasonable interval" of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval "would be ineffective to fulfil the legitimate objectives pursued" by the technical regulation.

…

We do not consider that the elements of a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* are to be drawn exclusively from either the terms of Article 2.12, on the one hand, or of paragraph 5.2 of the Doha Ministerial Decision, on the other hand. Article 2.12 imposes an obligation on importing Members to allow a "reasonable interval" between the publication and the entry into force of their technical regulations. We recall our finding above that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. Thus, it seems to us that the elements of a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* are to be drawn from a proper interpretation of Article 2.12, taking into account—pursuant to Article 31(3)(a) of the *Vienna Convention*—the interpretative clarification provided by the terms of paragraph 5.2 of the Doha Ministerial Decision.

We further recall our finding above that Article 2.12 of the *TBT Agreement*, properly interpreted in the light of paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Based on our interpretation of Article 2.12 of the *TBT Agreement*, we consider that a *prima facie* case of inconsistency with Article 2.12 is established where it is shown that an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue.

In accordance with the general rules on burden of proof reflected in *US – Wool Shirts and Blouses*, we consider that, under Article 2.12 of the *TBT Agreement*, it is for the complaining Member to establish that the responding Member has not allowed an

interval of not less than six months between the publication and the entry into force of the technical regulation at issue.[249] If the complaining Member establishes this *prima facie* case of inconsistency, it is for the responding Member to rebut the *prima facie* case of inconsistency with Article 2.12. We recall that, in *US – Wool Shirts and Blouses*, the Appellate Body stated that "precisely how much and precisely what kind of evidence" will be required to establish a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case".[250] We consider that, similarly, this reasoning applies with regard to the quantity and nature of evidence required to *rebut* a *prima facie* case of inconsistency.

The text of Article 2.12 of the *TBT Agreement* read in the light of paragraph 5.2 of the Doha Ministerial Decision provides an indication of the nature of evidence that is required to rebut a *prima facie* case of inconsistency with that provision. First, Article 2.12 of the *TBT Agreement* excludes from the obligation to provide a "reasonable interval" between the publication and the entry into force of technical regulations "those urgent circumstances" referred to in Article 2.10 of the *TBT Agreement*. Thus, where "urgent problems of safety, health, environmental protection or national security" arise for a Member that is implementing a technical regulation, a period of six months or more cannot be considered to be a "reasonable interval" within the meaning of Article 2.12. Second, Article 2.12 expressly states that the rationale for providing a "reasonable interval" between the publication and the entry into force of a technical regulation is "to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production" to the requirements of the importing Member's technical regulation. If these producers can adapt their products or production methods to the requirements of an importing Member's technical regulation in less than six months, a period of six months or more cannot be considered to be a "reasonable interval" within the meaning of Article 2.12. Third, paragraph 5.2 allows an importing Member to depart from the obligation to provide a "reasonable interval" of, "normally", not less than six months between the publication and entry into force of their technical regulation, if this interval would be "ineffective to fulfil the legitimate objectives pursued" by its technical regulation. Therefore, a period of "not less than six months" cannot be considered to be a "reasonable interval", within the meaning of Article 2.12, if this period would be ineffective to fulfil the legitimate objectives pursued by the technical regulation at issue.

Thus, in the light of the above, we consider that, in order to rebut a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, a responding Member that has allowed an interval of less than six months between the publication and entry into force of its technical regulation must submit evidence and argument sufficient to establish *either*: (i) that the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; *or* (iii) that a

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[249] (*footnote original)* In *US – Wool Shirts and Blouses*, the Appellate Body outlined the general rules on burden of proof by stating that:

> … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

(Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335)

[250] (*footnote original)* Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

> period of "not less than" six months would be ineffective to fulfil the legitimate objectives of its technical regulation."[251]

3. Article 12: Special and Differential Treatment of Developing Country Members

(a) Article 12.1 (general)

(i) General

96. In *US – COOL*, the Panel rejected Mexico's claim under Article 12.3 of the TBT Agreement.[252] Having rejected the claim under Article 12.3, the Panel rejected a consequential claim under Article 12.1.

(b) Article 12.3 (unnecessary obstacles to developing country exports)

(i) General

97. In *US – COOL*, the Panel rejected Mexico's claim under Article 12.3 of the TBT Agreement.[253] The Panel began its analysis by interpreting the requirements of Article 12.3, including among other things the meaning of "take account of". The Panel then found that Mexico failed to demonstrate that the United States failed to "take account of" Mexico's special development, financial and trade needs in the preparation and application of the COOL measure.

(ii) "with a view to "

98. In *US – COOL*, the Panel found that the clause at the end of Article 12.3 beginning with the terms "with a view to" is an objective, not a separate and additional legal obligation:

> "The dictionary defines the term "with a view to" as "with the aim or object of attaining, effecting, or accomplishing something". Therefore, in the context of Article 12.3, the term "with a view to" introduces an objective.
>
> The first part of Article 12.3 prescribes that "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". This language uses the word "shall" and lays down an obligation addressed to all Members.
>
> We read this first part of Article 12.3 as the operative part of that provision.
>
> ...
>
> In light of the above, we conclude that Article 12.3 of the TBT Agreement lays down only one of the two legal obligations argued by Mexico, namely the one spelt out in the operative part of that provision: "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". The second half of the sentence lays down the objective of this obligation, namely to "ensur[e] that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members".

[251] Appellate Body Report, *US – Clove Cigarettes*, paras. 274-275, 279-283.
[252] Panel Reports, *US – COOL*, paras. 7.737-7.804.
[253] Panel Reports, *US – COOL*, paras. 7.737-7.804.

In finding that Article 12.3 of the TBT Agreement lays down only one legal obligation that is limited to the operative part of that sentence, we are not suggesting that the final clause of the sentence starting with "with a view to" should be read out of Article 12.3 or rendered ineffective.

An assessment of a claim under Article 12.3 entails a review of whether the respondent's relevant action or inaction with regard to the operative part of Article 12.3 fulfils, or is carried out with, the objective of ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

This assessment, however, necessarily follows the review of whether the respondent has complied with the operative part of Article 12.3."[254]

(iii) "take account of"

99. The Panel in *US – COOL* considered the terms "take account of " in Article 12.3:

"As regards the meaning of "take account of", the first question is whether, in general, this term involves a requirement for a Member to merely consider specific needs, views or positions, or also to act upon, and in accordance with, them.

The dictionary defines "to take account of", as well as the similar term "to take into account" as: "to take into consideration as an existing element, to notice". This suggests that "to take account of" and "to take into account" mean to consider, but not necessarily to act in line with the specific need, view or position under consideration.

...

... in the context of Article 12.3 of the TBT Agreement, the term "take account of" entails that Members are obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members.

As to what such active and meaningful consideration means in practical terms, we do not read Article 12.3 of the TBT Agreement as prescribing any specific way. In particular, while not excluding it, Article 12.3 does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs. Further, we do not interpret the term "take account of" in Article 12.3 of the TBT Agreement as an explicit requirement for Members to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members. Indeed, the panel in *EC – Approval and Marketing of Biotech Products* held that "it is not sufficient, for the purposes of establishing a claim under Article 10.1 [of the SPS Agreement], to point to the absence in the EC approval legislation of a reference to the needs of developing country Members".[255]

Indeed, there are a variety of ways in which Members may take account of the special development, financial and trade needs of developing country Members. As explained above, this requires Members to accord active and meaningful consideration to such needs, entailing a positive obligation for the WTO Membership.

[254] Panel Reports, *US – COOL*, paras. 7.755-7.765.
[255] (*footnote original*) Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1623.

> We now turn to whether the United States has fulfilled its obligation in regard to the COOL measure."[256]

4. Annex 1: Terms and their Definitions for the Purpose of this Agreement

(a) Terms defined in ISO/IEC Guide 2

100. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") was a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.[257] In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). In the course of its analysis, the Appellate Body stated that:

> "The introductory clause of Annex 1 to the *TBT Agreement* also stipulates that: "[f]or the purpose of this Agreement, however, the following definitions shall apply". The use of the word "however" indicates that the definitions contained in Annex 1 to the *TBT Agreement* prevail to the extent that they depart from the definitions set out in the ISO/IEC Guide 2: 1991.[258] A panel must therefore carefully scrutinize to what extent the definitions in Annex 1 to the *TBT Agreement* depart from the definitions in the ISO/IEC Guide 2: 1991."[259]

(b) Annex 1.1: "technical regulation"

(i) General

101. In *US – COOL*, the Panel examined: (i) the US statutory provisions and implementing regulations setting out the United States' mandatory country of origin labelling regime for beef and pork ("COOL measure"); as well as (ii) a letter issued by the US Secretary of Agriculture Vilsack on the implementation of the COOL measure ("Vilsack letter"). The Panel found that the COOL measure was a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. The Panel found that the Vilsack letter was not a technical regulation within the meaning of Annex 1.1 on the grounds that compliance with this letter was not mandatory.[260]

102. In *US – Tuna II (Mexico)*, the Appellate Body found that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.[261] The Appellate Body found that a determination of whether a particular measure constitutes a technical regulation within the meaning of Annex 1.1 must be made in the light of the features of the measure and the circumstances of the case. The Appellate Body noted that the challenged measure was composed of legislative and regulatory acts of the US federal authorities and includes administrative provisions. The Appellate Body added that the measure set out a single and legally mandated definition of a "dolphin-safe" tuna product and disallowed the use of other labels on tuna products that use the terms "dolphin-safe", dolphins, porpoises and marine mammals and that did not satisfy this definition. In doing so, the US measure prescribed in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement was made.

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[256] Panel Reports, *US – COOL*, paras. 7.775-7.788.
[257] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.
[258] (*footnote original*) See Appellate Body Report, *EC – Sardines*, paras. 224 and 225.
[259] Appellate Body Report, *US – Tuna II (Mexico)*, para. 354.
[260] Panel Reports, *US – COOL*, paras. 7.146-7.217.
[261] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 178-199.

(ii) "with which compliance is mandatory"

103. Although the Panel in *US – COOL* ultimately found that the Vilsack letter was not mandatory, the Panel declined to reach this conclusion through a formalistic analysis:

> "On its face, the Vilsack letter is clearly not mandatory. Unlike the instruments composing the COOL measure, the Vilsack letter is not a piece of legislation or regulation legally binding in US law. In outlining action by industry, the Vilsack letter uses permissive, hortatory terms such as "might", "should" and "would"; it mentions the word "voluntary" at least four times; and it notes that it contains "suggestions for voluntary action". It is also not followed up by a classic legal enforcement mechanism.
>
> But the nature of compliance with the Vilsack letter is not a merely formalistic question. We agree with the complainants that this matter should not be decided purely on the basis of the language in the Vilsack letter, in particular the use of the word "voluntary". Adopting a formalistic interpretation of the phrase "with which compliance is mandatory" would allow Members to escape the coverage of large portions of the TBT Agreement merely by qualifying their own measures as non-mandatory, or compliance with such measures as voluntary. This would strip Annex 1.1 and ultimately large portions of the TBT Agreement of their *effet utile*."[262]

104. In *US – Tuna II (Mexico)*, the Appellate Body found that the Panel did not err in treating the measures at issue as "mandatory" for the purpose of Annex 1.1 of the TBT Agreement. In the course of its analysis, the Appellate Body stated:

> "[W]e consider that a panel's determination of whether a particular measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case.[263] In some cases, this may be a relatively straightforward exercise. In others, the task of the panel may be more complex. Certain features exhibited by a measure may be common to both technical regulations falling within the scope of Article 2 of the *TBT Agreement* and, for example, standards falling under Article 4 of that Agreement. Both types of measure could, for instance, contain conditions that must be met in order to use a label. In both cases, those conditions could be "compulsory" or "binding" and "enforceable". Such characteristics, taken alone, cannot therefore be dispositive of the proper legal characterization of the measure under the *TBT Agreement*. Instead, it will be necessary to consider additional characteristics of the measure in order to determine the disciplines to which it is subject under that Agreement.[264] This exercise may involve considering whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure."[265]

105. In *US – Tuna II (Mexico)*, the Appellate Body further clarified that:

> "The text of Annex 1.1 to the *TBT Agreement* does not use the words "market" or "territory". Nor does it indicate that a labelling requirement is "mandatory" *only* if

[262] Panel Reports, *US – COOL*, paras. 7.175-7.175.

[263] (*footnote original*) See Appellate Body Report, *EC – Asbestos*, para. 64; and Appellate Body Report, *EC – Sardines*, paras. 192 and 193.

[264] (*footnote original*) See Appellate Body Reports, *China – Auto Parts*, para. 171.

[265] Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.

> there is a requirement to use a particular label in order to place a product for sale on the market. To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1.
>
> …
>
> The measure at issue in *EC – Sardines* was a regulation setting out a number of prescriptions for the sale of "preserved sardines", including the requirement that they contain only one named species of sardines, to the exclusion of others. Under the facts of that case, it was possible to sell these other species of sardines on the EC market, provided that such sardines were not sold under the appellation "preserved sardines". The fact that the Appellate Body characterized the measure at issue in *EC – Sardines* as a "technical regulation" appears to support the notion that the mere fact that it is legally permissible to sell a product on the market without using a particular label is not determinative when examining whether a measure is a "technical regulation" within the meaning of Annex 1.1."[266]

(c) Annex 1.2: "standard"

106. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.[267] In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement.

(d) Annex 1.4: "international body or system"

107. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.[268] In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied, inter alia, on the definition of "international body or system" in Annex 1.4 to the TBT Agreement.

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[266] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 196 198.
[267] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.
[268] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

E. TRIMS AGREEMENT

1. Preamble

(a) "further provisions that may be necessary"

108. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.[269] In the course if its analysis, the Appellate Body found that the first recital to the Preamble did not contradict its interpretation:

> "The European Union emphasizes the language in the first paragraph of the preamble of the TRIMs Agreement, stating that "the object and purpose of the TRIMs Agreement was precisely to 'elaborate' 'further' or 'additional' provisions to the already existing ones." The European Union adds that the Panel's interpretation contradicts the TRIMs Agreement's object and purpose because, "[i]f Article 2.2 and the Illustrative List were to be read as merely stating the obvious i.e. that the types of measures listed in the annex discriminate against imported goods, with no other implications, they would largely be redundant."
>
> The first paragraph of the preamble of the TRIMs Agreement quotes the negotiating mandate of the Punta del Este Declaration, referring to the "trade restrictive and distorting effects of investment measures" and calling for negotiations to "elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade". The fourth paragraph recognizes that "certain investment measures can cause trade-restrictive and distorting effects".
>
> We do not find the European Union's reliance on the language of the Punta del Este negotiating mandate to be persuasive. Looking at the TRIMs Agreement as a whole, we consider that the "further" provisions that it contains mainly clarify the application of Articles III and XI of the GATT 1994 to a specific set of measures – namely, TRIMs. In doing so, however, there is little, if any, indication that the provisions of the TRIMs Agreement were intended to override rights recognized in the GATT, such as the right provided in Article III:8(a). On the contrary, several provisions of the TRIMs Agreement – particularly the initial clause of Article 2.1, and Articles 3 and 4 – would seem to reflect reiterative attempts to safeguard rights recognized in the GATT, rather than to override them."[270]

2. Article 1: Coverage

(a) "investment measures related to trade in goods"

109. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the FIT Programme, and the FIT and microFIT Contracts, to the extent they envisaged and imposed a "Minimum Required Domestic Content Level", constituted "investment measures related to trade in goods" within the meaning of Article 1 of the TRIMs Agreement.[271]

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[269] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.
[270] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.30-5.32.
[271] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.108-7.112.

3. Article 2: National Treatment and Quantitative Restrictions

(a) General

110. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that compliance with the relevant domestic content requirements was a "necessary condition and prerequisite" for electricity generators to participate in Canada's tariff program.[272] The Panel found that "mere participation" in that program was sufficient to confer an "advantage" on a beneficiary enterprise.[273] Thus, the Canadian program met the requirements in Paragraph 1(a) of the Illustrative List in the Annex to the TRIMS Agreement for the measure to be deemed inconsistent with Article III:4 of the GATT 1994, and therefore Article 2.1 of the TRIMS Agreement.[274]

(b) Whether Article III:8(a) of the GATT 1994 is applicable to measures falling within the scope of Articles 2.1 and 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto

111. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body confirmed that a measure falling within the scope of Article III:8(a) of the GATT 1994 cannot violate Article 2.1 of the TRIMs Agreement:

> "Article 2.1 of the TRIMs Agreement prohibits Members from applying a TRIM – that is, an investment measure related to trade in goods – "that is inconsistent with the provisions of Article III or Article XI of GATT 1994". The cross-reference in the latter part of Article 2.1 to Article III of the GATT 1994 is unqualified. We understand this to be a reference to Article III of the GATT 1994 in its entirety, including Article III:4. Thus, as the Panel explained, a measure that is inconsistent with Article III:4 of the GATT 1994 would also be a TRIM that is incompatible with Article 2.1 of the TRIMs Agreement. Importantly, the cross-reference to Article III also includes paragraph 8(a) of that provision. As we discuss in more detail in section 5.3 of these Reports, a measure that falls within the scope of paragraph 8(a) cannot violate Article III of the GATT 1994. This, in turn, means that a Member applying such a measure would not violate Article 2.1 of the TRIMs Agreement. We note, in this respect, that the relationship between Article 2.1 of the TRIMs Agreement and Article III of the GATT 1994 is not a point of contention between the participants."[275]

112. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.[276] The Appellate Body explained:

> "In our view, Article 2.2 provides further specification as to the type of measures that are inconsistent with Article 2.1. The operative part of Article 2.2 is the reference to the Illustrative List, which provides examples of measures that are inconsistent with the national treatment obligation. While Article 2.2 and the Illustrative List focus on the specific provisions where such obligation is reflected – that is, Article III:4 of the GATT 1994 – we do not believe it responds to the question of whether such measures are inconsistent with Article III of the GATT 1994 in its entirety. Where a measure falls within the scope of Article III:8(a), the measure is not inconsistent with Article III overall. Thus, we agree with the Panel that Article 2.2 and the Illustrative

[272] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.165.
[273] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.165.
[274] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.155-7.167.
[275] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.20.
[276] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

> List must be understood as clarifying to which TRIMs the general obligation in Article 2.1 applies.[277] Furthermore, we understand the absence of a reference to Article III:8(a) of the GATT 1994 in Article 2.2 of the TRIMs Agreement and in the Illustrative List as indicating that these provisions are neutral as to the applicability of the former provision. This results in a harmonious interpretation of Articles 2.1 and 2.2 of the TRIMs Agreement and Articles III:4 and III:8(a) of the GATT 1994. By contrast, the interpretation advocated by the European Union would result in different obligations for those TRIMs that fall within the Illustrative List and those that do not."[278]

(c) Relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement

113. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body discussed the relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement. See paragraph 220 below.

4. Article 3: Exceptions

114. In *China – Raw Materials*, the Appellate Body took Article 3 of the TRIMs Agreement into account in the context of finding that GATT Article XX exceptions cannot be invoked to justify violations of Paragraph 11.3 of China's Accession Protocol:

> "We note, as did the Panel, that WTO Members have, on occasion, "incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements". For example, Article 3 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*") explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994, stating that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". In the present case, we attach significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX."[279]

115. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.[280] In the course of its analysis, the Appellate Body discussed Article 3 of the TRIMs Agreement:

> "We find additional support for this interpretation in the initial clause of Article 2.1 and Article 3 of the TRIMs Agreement. The opening clause of Article 2.1 reads: "Without prejudice to other rights and obligations under GATT 1994". This language suggests that the provision is not intended to curtail other rights that Members have under the GATT 1994. The right to discriminate in government purchases – subject to the conditions and requirements of Article III:8(a) – is one such right recognized in the GATT 1994. Moreover, Article 3 of the TRIMs Agreement, entitled

[277] (*footnote original*) Panel Reports, para. 7.119: "Article 2.2 of the TRIMs Agreement does not impose any obligations on Members, but rather informs the interpretation of the prohibition set out in Article 2.1. In particular, Article 2.2 explains that the TRIMs described in the Illustrative List of the Annex to the TRIMs Agreement are to be considered inconsistent with Members' specific obligations under Articles III:4 and XI:1 of the GATT 1994."

[278] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.26.

[279] Appellate Body Reports, *China – Raw Materials*, para. 303.

[280] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

> "Exceptions", provides contextual support for our interpretation. It states that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." As the title and text of Article 3 indicate, this provision refers to "exceptions". The Panel and the participants have characterized Article III:8(a) as a "scope" provision. Even though Article III:8(a) is not one of the exceptions that "apply, as appropriate," to the TRIMs Agreement, Article 3 further suggests that the provisions of the TRIMs Agreement are not intended to constrain other rights that Members have under the GATT 1994."[281]

5. Illustrative List of TRIMs

(a) Whether Article III:8(a) of the GATT 1994 is applicable to measures falling within the scope of Articles 2.1 and 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto

116. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected the argument that Article III:8(a) of the GATT 1994 is not applicable to measures that fall within the scope of Article 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.[282]

117. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body confirmed that the Illustrative List is not a closed list of TRIMs that are inconsistent with Articles III:4 and XI:1 of the GATT 1994:

> "Article 2.2 refers to the obligation of national treatment provided for in paragraph 4 of Article III of the GATT 1994, as well as the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of the GATT 1994. Article 2.2 also refers to an illustrative list of TRIMs that is found in the Annex to the TRIMs Agreement. The term "illustrative" indicates that the examples in the list do not constitute a closed list. In other words, there can be other types of TRIMs that are inconsistent with the national treatment obligation in Article III:4 and the obligation of general elimination of quantitative restrictions in Article XI:1 of the GATT 1994. The use of the term "include" in paragraph 1 of the Illustrative List further supports this understanding.[283],[284]

(b) Meaning of "advantage" in Paragraph 1(a) of the Illustrative List

118. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body found that the term "advantage" in Paragraph 1(a) of the Illustrative List to the TRIMs Agreement does not mean the same thing as "benefit" in Article 1.1(b) of the SCM Agreement:

> "In *Canada – Aircraft* and in its later jurisprudence, the Appellate Body did not equate the notions of "benefit" and "advantage". The Appellate Body's interpretation of "benefit" in Article 1.1(b) of the SCM Agreement clearly suggests that, while benefit involves some form of advantage, the former has a more specific meaning under the SCM Agreement. "Benefit" is linked to the concepts of "financial contribution" and "income or price support", and its existence requires a comparison in the marketplace. The same cannot be said about an "advantage" within the meaning

[281] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.27.

[282] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

[283] (*footnote original*) Article 1(e) of the Agreement on Agriculture defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement". In *US – Upland Cotton*, the Appellate Body noted that the use of the word "including" in Article 1(e) of the Agreement on Agriculture suggests that the list of export subsidies in Article 9 is not exhaustive. (Appellate Body Report, *US – Upland Cotton*, para. 615)

[284] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.22.

> of the TRIMs Agreement. Paragraph 1 of the Illustrative List of the TRIMs Agreement simply refers to TRIMs that are necessary to obtain an advantage.[285] The concept of "advantage" in the TRIMs Agreement has to be interpreted in the context of this Agreement and, without entering into the merit of such an interpretation, it seems to us that "advantage" under the TRIMs Agreement may take other forms than a "financial contribution" or a "benefit" under the SCM Agreement. In any event, a finding of an "advantage" under the TRIMs Agreement does not require a comparison with a benefit benchmark in the relevant market, as required for a benefit analysis under the SCM Agreement.
>
> Thus, while we do not exclude that certain measures that provide an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement may also confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement, it is conceivable that a measure that confers an advantage within the meaning of paragraph 1 of the Illustrative List of the TRIMs Agreement be found not to confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement."[286]

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[285] (*footnote original*) The *chapeau* to paragraph 1 of the Illustrative List of the TRIMs Agreement states that:

> TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, …

[286] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.208-5.209.

F. ANTI-DUMPING AGREEMENT

1. Article 2: Determination of Dumping

(a) Article 2.1 (definition of dumping)

119. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Articles 2.1 and 2.4 with respect to the analogue country selection procedure, and the selection of Brazil as the analogue country in the original investigation.[287]

(b) Article 2.2 (constructed normal value)

(i) Article 2.2.1.1

Obligation to calculate costs based on producers' books and records

120. In *China – Broiler Products*, the Panel considered that Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, although the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. In the Panel's view, irrespective of whoever bears the initial burden of demonstrating that the producers' books and records meet those two criteria, an investigating authority must explain why it decided to deviate from the normal procedure outlined in Article 2.2.1.1:

> "In our view, the use of the term "normally" in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records. The Appellate Body observed in *US – Clove Cigarettes* that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule". According to the Appellate Body, "the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule"… [r]ather, the use of the term 'normally' ... indicates that the rule … admits of derogation under certain circumstances."[288] As using the respondents' books and records is the rule and declining to do so is a derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations.
>
> We recall that Article 17.6(i) of the Anti-Dumping Agreement indicates that the role of the Panel is to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If an evaluation is not evident on the record of the determination, it would be impossible for the Panel to complete its task. This understanding is bolstered by the Appellate Body's interpretation of the obligation in Article 11 of the DSU, which also applies to disputes under the Anti-Dumping Agreement, that in conducting an "objective assessment" of an investigating authority's determinations, a panel must review whether competent authorities have provided a reasoned and adequate explanation of how the evidence on the record supports their factual findings and how the factual

[287] Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.
[288] (*footnote original*) Appellate Body Report, *US – Clove Cigarettes*, para. 273.

> findings support their overall determination[289], in particular whether that reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence.[290]
>
> China argues that MOFCOM had no obligation to explain its decision, because Article 2.2.1 only obligated MOFCOM to use the respondents' books and records if they demonstrated to MOFCOM's satisfaction that they met the two criteria. China supports its view by pointing to the use of the passive voice in Article 2.2.1.1. According to China, this means that the provision does not impose a particular obligation on the *investigating authority*. The Panel finds the issue of who bears the burden before the investigating authority irrelevant to the matter at hand. Irrespective of whoever bore the initial burden of proof, an investigating authority is not excused from having to explain why it decided to deviate from the normal procedure outlined in Article 2.2.1.1 – i.e. using the respondent's books and records. If that decision results from an affirmative determination to reject the books or if it is because the respondent did not prove that its books satisfy the two criteria, those reasons must be set forth in the record of the investigation and/or the published determinations, so as to allow for review of that decision.
>
> In sum, the Panel is of the view that although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so."[291]

First sentence – Whether producers' books and records reasonably reflect costs

121. In *China – Broiler Products*, the United States, in arguing that their reported costs reasonably reflected the costs associated with the production and sale of the product under consideration, stated that the respondents put evidence on the record that their costs were calculated in a manner that is consistent with authoritative accounting texts, is the common form of allocating costs in the industry, and is considered appropriate under international accounting standards. In response, the Panel considered the fact that respondents in the broiler products investigation maintained their books and records consistently with US GAAP would not, in and of itself require MOFCOM to use them under Article 2.2.1.1:

> "We note the United States' argument that GAAP-consistency and reasonableness are like a Venn diagram of overlapping circles, such that GAAP-consistent records could also reasonably reflect a firm's costs. However, there will be places where the two do not overlap. The two conditions in the first sentence of Article 2.2.1.1 are cumulative.[292] The very existence of the second criterion – reasonable reflection of

[289] (*footnote original*) Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; see also Appellate Body Report, *US – Lamb*, para. 103.

[290] (*footnote original*) See, e.g. Appellate Body Report, *US – Tyres (China)*, para. 280.

[291] Panel Report, *China – Broiler Products*, paras. 7.161-7.164.

[292] (*footnote original*) Panel Report, *EC – Salmon (Norway)*, para. 7.483:
The first sentence of Article 2.2.1.1 establishes that the data sources to be privileged when calculating an investigated party's cost of production shall "normally" be the records kept by that party, provided that such records: (i) are consistent with GAAP of the exporting country; and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. When the records kept by an investigated party evidence these

> cost of production and sale – in Article 2.2.1.1 is an acknowledgment that there is more to determining whether to use the books and records of the exporters than whether the books are appropriate for accounting purposes. Therefore, the fact that the respondents in the broiler products investigation maintained their books and records consistently with US GAAP would not, in and of itself require MOFCOM to use them under Article 2.2.1.1."[293]

First sentence – Allocation of costs in the case of joint products

122. In *China – Broiler Products*, the Panel stated that neither of the two methodologies to allocate costs in the case of joint products that were discussed in that case – "value-based " and "weight-based " allocation methodologies" "is in principle inherently unreasonable":

> "Both parties and the respondents in the investigation agree that in the case of joint products, which arise at a split-off point, pre-split-off costs cannot be directly assigned on a product-specific basis and must be allocated. Of the two types of methodologies for doing so that were discussed in this case – one based on relative sales value ("value-based allocation") and one based on the weight of the products ("weight-based allocation"), the Panel is of the view that neither method is in principle inherently unreasonable. …"[294]

> In *China – Broiler Products*, China raised two main concerns regarding the value-based allocations that were reflected in the producers' books in the underlying investigation. First, China contended that the respondents were using incorrect values to determine the proportion of pre-split off costs to allocate to each product. Given that MOFCOM had concluded that the volume of domestic sales was too small to permit a proper comparison with export price, China maintained that using the same data, which had already been considered to be inappropriate for the purpose of determining normal value, to calculate cost of production would have inserted circularity into the determination. Second, respondents treated paws as by-products (rather than one of the main joint products), even though they had value in both the domestic and export markets. Consequently, in China's view, the respondents did not allocate any of the pre-split off costs to these products.[295] While the Panel was ultimately unable to conclude – based on the record of the investigation – that the concerns expressed by China were indeed the reasons why MOFCOM departed from the norm of using a respondent's books and records, it noted that the concerns raised by China "are concerns that an investigating authority may assess under 2.2.1.1 to determine whether the records kept by the exporter or producer reasonably reflect the costs associated with the production and sale of the product under consideration".[296]

Second sentence – All available evidence on the proper allocation of costs

123. After examining past Appellate Body decisions, the Panel in *China – Broiler Products* noted that the second sentence of Article 2.2.1.1 required consideration of three questions: (i) whether an

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> characteristics, an investigating authority will "normally" be required to use them in the calculation of cost of production. In our view, the fact that GAAP-consistent records, which reasonably reflect costs "associated with the production and sale" of the like product, must "normally" be used to calculate cost of production, implies that the test for determining whether a cost can be used in the calculation of "cost of production" is whether it is "associated with the production and sale" of the like product.

[293] Panel Report, *China – Broiler Products*, para. 7.166.
[294] Panel Report, *China – Broiler Products*, para. 7.167.
[295] Panel Report, *China – Broiler Products*, paras. 7.168-7.169.
[296] Panel Report, *China – Broiler Products*, para. 7.172.

investigating authority did more than simply receive evidence and take note of evidence; (ii) whether, when presented with more than one potential allocation methodology, an investigating authority "reflected on" and "weighed the merits of" the various allocation methodologies; and (iii) if so, whether there is evidence of its considerations reflected in the relevant documentation. The Panel also considered that "[t]he consideration of the appropriate cost allocation methodology necessarily includes the exercise of considering the methodologies used in the respondents' books and records".[297]

(ii) Article 2.2.2 (amounts for administrative, selling and general costs)

124. In *EU – Footwear (China)*, the Panel found that the European Union acted inconsistently with Article 2.2.2(iii) with respect to the determination of the amounts for SG&A and profit for one producer-exporter in the original investigation.[298]

(c) Article 2.4 (comparison between export price and normal value)

(i) General

125. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Articles 2.1 and 2.4 with respect to the analogue country selection procedure, or the selection of Brazil as the analogue country in the original investigation.[299] The Panel found that the European Union did not act inconsistently with Article 2.4 with respect to the PCN system used and the adjustment for leather quality made by the Commission in the original investigation.[300]

(ii) "fair comparison"

126. In *EU – Footwear (China)*, the Panel addressed the terms "fair comparison" in Article 2.4:

> "The first sentence of Article 2.4, on its face, addresses the "comparison" between the export price and normal value and explicitly requires that such a comparison must be "fair". The remainder of the provision, including its subparagraphs, establishes specific rules for ensuring a fair comparison of export price and normal value.
>
> Nothing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price. Indeed, in our view, it is clear that the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established. We note in this regard the views of the panel in *Egypt – Steel Rebar*. Although the issue before that panel was the different question of whether Article 2.4 establishes a "generally applicable rule" as to burden of proof, the panel considered Article 2.4 in detail, and stated:
>
> > "Article 2.4, on its face, refers to the comparison of export price and normal value, i.e. the calculation of the dumping margin, and in particular, requires that such a comparison shall be "fair". A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are

[297] Panel Report, *China – Broiler Products*, paras. 7.186-7.195.
[298] Panel Report, *EU – Footwear (China)*, paras. 7.295-7.301.
[299] Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.
[300] Panel Report, *EU – Footwear (China)*, paras. 7.276-7.287.

> addressed in detail in other provisions), but with the nature of the comparison of export price and normal value."

Moreover, there is nothing in the provisions of the AD Agreement that specifically address the determination of normal value, most notably Article 2.2, that refers to the "fair comparison" called for by Article 2.4.

China argues, however, that Article 2.4 establishes a general "fairness" obligation that applies to all of Article 2, including all aspects of the establishment of normal value. As noted above, however, the "fairness" requirement in Article 2.4 refers to the "comparison" between the normal value and the export price. In our view, to require consideration of whether a "fair comparison" will result in the process of determining normal value introduces a circularity into the analysis which is untenable. Indeed, in our view, the provisions of Article 2.4 are intended precisely to deal with problems that arise in the comparison as a result of, *inter alia*, how normal value was established. In such a circumstance, Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and the export price, and provides explicit guidance on how this is to be done: where there are "differences" affecting price comparability between export price and normal value, "[d]ue allowance shall be made" for those differences. These allowances can only be made after the normal value and the export price have been established.

China relies on three Appellate Body reports in support of its view that Article 2.4 establishes a general requirement of "fairness" that applies to all of Article 2. However, the three cases cited by China in this regard involved the question of whether the investigating authority had made a "fair comparison" between normal value and export price.[301] In none of them was the establishment of the normal value addressed in connection with the "fair comparison"."[302]

127. The Panel in *EU – Footwear (China)* also stated that:

> "We see nothing in Article 2.4 that limits the range of methodological options for investigating authorities in comparing normal value and export price, subject always to the requirement that the comparison actually made must satisfy the fundamental requirement of Article 2.4 that it be a "fair comparison", in which "due allowance" is made for differences demonstrated to affect price comparability."[303]

(iii) Article 2.4.2 (comparison methods)

128. In *US – Shrimp and Sawblades*, the Panel examined USDOC's use of the "zeroing" methodology in the calculation of dumping margins for certain individually examined

[301] (*footnote original*) In *US – Zeroing (EC)* and *US – Softwood Lumber V (Article 21.5 – Canada)*, the issue was whether the United States' practice of zeroing was inconsistent with Article 2.4 of the AD Agreement. Appellate Body Reports, *US – Zeroing (EC)*, paras. 136-147; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 131-146. Similarly, in *EC – Bed Linen*, the issue was whether the European Communities' practice of zeroing was consistent with Article 2.4.2 of the AD Agreement. Appellate Body Report, *EC – Bed Linen*, paras. 46-66. In *US – Zeroing (EC)*, the Appellate Body agreed with the panel's findings that the "'fair comparison' language in the first sentence of Article 2.4 creates an independent obligation" and that "the scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4 (that is to say, the price comparability)." Appellate Body Report, *US – Zeroing (EC)*, para. 146. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body referred to the statements made in the cases noted above. *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 133.

[302] Panel Report, *EU – Footwear (China)*, paras. 7.262-7.265.

[303] Panel Report, *EU – Footwear (China)*, para. 7.279.

exporters/producers. The Panel upheld China's claim concerning the USDOC's use of zeroing in the calculation of dumping margins for individually examined exporters/producers. The Panel found that the "zeroing" methodology used by the USDOC in calculating the margins of dumping in the anti-dumping investigations at issue was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[304] The Panel examined USDOC's calculation of the "separate rate" that was applied on imports from exporters/produces not selected for individual examination. The Panel found that USDOC had relied upon dumping margins, calculated with zeroing, in calculating the "separate rate". However, the Panel considered that Article 2.4.2 did not provide the proper legal basis for a finding of inconsistency with respect to the separate rate.[305]

(d) Article 2.6 (definition of like products)

129. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 2.6 in its determination of the scope of the product under consideration.[306]

2. Article 3: Determination of Injury

(a) General

(i) Objective of Article 3

130. In *China – GOES*, the Appellate Body identified the objective of Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement:

> "[T]he various paragraphs under Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* set forth, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Thus, it may be discerned, from the totality of these paragraphs, that Articles 3 and 15 are intended to delineate the framework and relevant disciplines for the authority's analysis in reaching a final determination on the injury caused by subject imports, and to ensure that the analysis and the conclusion drawn therefrom is robust."[307]

(b) Article 3.1 (positive evidence / objective examination)

131. In *EU – Footwear (China)*, the Panel stated that:

> "We reject China's view that the Article 3.1 requirement of "objective examination" entails "even-handed treatment" in the collection of information for purposes of selecting a sample for the injury determination. Objective examination presumes that information, or positive evidence, is available to be examined, but says nothing about the collection of that information. China's arguments suggest that, in order to be "even-handed", sampling forms must be sent to every interested party, regardless of whether the investigating authority already possesses, with respect to certain parties, what it considers to be sufficient information for purposes of selecting a sample. We see no legal basis in the text of the AD Agreement which could establish that any particular methodology must be used by investigating authorities in this regard. In particular, we see no basis to impose a methodology which would require an investigating authority to undertake the redundant exercise of asking for information

[304] Panel Report, *US – Shrimp and Sawblades*, paras. 7.12-7.32.
[305] Panel Report, *US – Shrimp and Sawblades*, paras. 7.33-7.39.
[306] Panel Report, *EU – Footwear (China)*, paras. 7.308-7.315.
[307] Appellate Body Report, *China – GOES*, para. 153.

> it already possesses. The time and resources spent by some parties in completing sampling forms, while other parties are not required to do so, does not affect our view in this regard. We fail to see why, for purposes of selecting the sample, the investigating authority should be required to seek and collect anew information already in its possession, simply to treat all parties even-handedly.[308] Moreover, even-handed treatment in the collection of information for purposes of selecting a sample is no guarantee that the determination of injury ultimately made will be based on an objective examination of positive evidence. Thus, the requirement China seeks to impose would not, in our view, necessarily further the objectives of Article 3.1, and we see no basis on which to impose it on investigating authorities."[309]

132. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.[310]

133. In *China – GOES*, the Panel found that China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement in relation to MOFCOM's analysis of the price effects of subject imports.[311] The Panel also found that China acted inconsistently with Article 3.1 with respect to MOFCOM's causation analysis.[312]

134. In *China – GOES*, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 3.1.[313] In the course of its analysis, the Appellate Body made the following observations regarding Article 15.1 of the SCM Agreement and Article 3.1 of the Anti-Dumping Agreement:

> "The Appellate Body has found that Article 3.1 of the *Anti-Dumping Agreement* "is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and "informs the more detailed obligations in succeeding paragraphs".[314] According to the Appellate Body, the term "positive evidence" relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible.[315] Furthermore, the Appellate Body has found that the term "objective examination" requires that an investigating authority's examination "conform to the dictates of the basic principles of good faith and fundamental fairness", and be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[316]
>
> In addition to setting forth the overarching obligation regarding the manner in which an investigating authority must conduct a determination of injury caused by subject imports to the domestic industry, Articles 3.1 and 15.1 also outline the content of

[308] (*footnote original*) Indeed, such an exercise would seem to be a waste of the investigating authorities' time and resources. We recall that Article 5.10 establishes time limits on original investigations, and Article 11.4 similarly provides that reviews, including expiry reviews, shall be carried out "expeditiously", and normally concluded within 12 months of initiation.

[309] Panel Report, *EU – Footwear (China)*, para. 7.369.

[310] Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.

[311] Panel Report, *China – GOES*, paras. 7.511-7.554.

[312] Panel Report, *China – GOES*, paras. 7.617-7.638.

[313] Appellate Body Report, *China – GOES*, paras. 116-232.

[314] (*footnote original*) Appellate Body Report, *Thailand – H-Beams*, para. 106.

[315] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[316] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

> such a determination, which consists of the following components: (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. The other paragraphs under Articles 3 and 15 further elaborate on the three essential components referenced in Articles 3.1 and 15.1. Articles 3.2 and 15.2 concern items (i) and (ii) above, and spell out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices. Articles 3.4 and 15.4, together with Articles 3.5 and 15.5, concern item (iii), that is, the "consequent impact" of the same imports on the domestic industry. More specifically, Articles 3.4 and 15.4 set out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.[317]"[318]

135. In *China – GOES*, the Appellate Body also stated the following with respect to the requirements of "positive evidence" involving an "objective examination":

> "In response to questioning at the oral hearing, both participants agreed that an investigating authority must ensure comparability between prices that are being compared. Indeed, although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."
>
> ... We have explained that a price effects finding is subject to the requirement that a determination of injury be based on "positive evidence" and involve an "objective examination". As the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*, the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination".[319] For these reasons, while we may agree with China that investigating authorities "have discretion to frame their investigations and analyses in light of the information gathered by the authorities and the arguments presented to the authorities by the parties", authorities remain bound by their overarching obligation to conduct an objective examination on the basis of positive evidence, irrespective of how the issues were presented or argued during the investigation."[320]

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[317] (*footnote original*) Additionally, Articles 3.3 and 15.3 stipulate the conditions under which an investigating authority may cumulatively assess the effects of imports from more than one country. Articles 3.6 and 15.6 specify that the effect of the subject imports must be assessed in relation to the production of the like domestic product. Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement* set out the requirements regarding the determination of a threat of material injury.

[318] Appellate Body Report, *China – GOES*, paras. 126-127.

[319] (*footnote original*) Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109. See also Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259 (stating that an investigating authority is "bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation").

[320] Appellate Body Report, *China – GOES*, paras. 200-201.

136. In *China – X-Ray Equipment*, the European Union claimed that China did not conduct an objective examination based on positive evidence, and thereby violated Article 3.1, in respect of a number of issues in the final determination. The Panel upheld some of the European Union's claims under Article 3.1, and rejected certain other claims under Article 3.1. See paragraphs 139, 151, and 158 below.

(c) Article 3.2 (obligation to consider volume and price effects of imports)

(i) General

137. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.[321]

138. In *China – GOES*, the Panel found that China acted inconsistently with Article 3.2 in relation to MOFCOM's analysis of the price effects of subject imports.[322] In *China – GOES*, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 3.2.[323] Like the Panel, the Appellate Body rejected China's interpretation that Article 3.2 merely requires an investigating authority to consider the existence of price depression or suppression, and does not require the consideration of any link between subject imports and these price effects.[324] With regard to the Panel's application of the legal standard under Article 3.2, read together with Article 3.1, the Appellate Body found that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression.[325]

139. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, on the basis that China did not conduct an objective examination based on positive evidence of the effect of the dumped imports on prices in the domestic market for like products. In particular, the Panel found that China failed to ensure that the prices it was comparing as a part of its price effects analysis were actually comparable, and that China's price undercutting and price suppression analyses were inconsistent with Articles 3.1 and 3.2 because they were not based on an objective examination of positive evidence.[326]

(ii) "consider"

140. In *China – GOES*, the Appellate Body addressed the requirement, in Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement, to "consider" a series of specific inquiries. In the course of its analysis, the Appellate Body stated:

> "The notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision.[327] By the use of the word 'consider', Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make *a definitive determination* on the volume of subject

[321] Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.
[322] Panel Report, *China – GOES*, paras. 7.511-7.554.
[323] Appellate Body Report, *China – GOES*, paras. 116-232.
[324] Appellate Body Report, *China – GOES*, paras. 116-169.
[325] Appellate Body Report, *China – GOES*, paras. 170-232.
[326] Panel Report, *China – X-Ray Equipment*, paras. 7.30-7.97.
[327] (*footnote original*) The meaning of the word "consider" includes "look at attentively", "think over", and "take into account". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496)

imports and the effect of such imports on domestic prices.[328] Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.

Furthermore, while the *consideration* of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of *what* the investigating authority is required to consider. The fact that the authority is only required to *consider*, rather than to *make a final determination*, does not change the subject matter that requires consideration under Articles 3.2 and 15.2, which includes 'whether the effect of' the subject imports is to depress prices or prevent price increases to a significant degree. We further discuss below what this requirement entails. Finally, an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors.[329],[330]

141. In *China – GOES*, the Appellate Body ultimately concluded that:

"[W]with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices. The outcome of this inquiry will enable the authority to advance its analysis, and to have a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry. Moreover, the inquiry under Articles 3.2 and 15.2 does not duplicate the different and broader examination regarding the causal relationship between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5. Neither do Articles 3.2 and 15.2 require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may be causing injury to the domestic industry. Rather, the investigating authority's inquiry under Articles 3.2 and 15.2 is focused on the relationship between subject imports and domestic prices, and the authority may not disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter."[331]

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[328] (*footnote original*) This stands in contrast with the words used in other paragraphs of Articles 3 and 15. For example, the word "demonstrate" in Articles 3.5 and 15.5 requires an investigating authority to make a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry. Relevant findings by panels in prior disputes also support the above understanding of the word "consider". For example, the panel in *Thailand – H-Beams* noted that the term "consider" in Article 3.2 does not require an explicit "finding" or "determination" by the investigating authority as to whether the increase in dumped imports is "significant". (Panel Report, *Thailand – H-Beams*, para. 7.161) Similarly, the panel in *Korea – Certain Paper* stated that Article 3.2 does not generally require the investigating authority to make a determination about the "significance" of price effects, or indeed as to whether there were price effects as such. (Panel Report, *Korea – Certain Paper*, para. 7.253. See also para. 7.242.)

[329] (*footnote original*) See, for example, Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253.

[330] Appellate Body Report, *China – GOES*, paras. 130-131.

[331] Appellate Body Report, *China – GOES*, para. 154.

(iii) "the effect of"

142. In *China – GOES*, the Appellate Body considered the meaning of the terms "the effect of" in Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement. In the course of its analysis, the Appellate Body stated:

> "The definition of the word 'effect' is, *inter alia*, 'something accomplished, caused, or produced; a result, a consequence'.[332] The definition of this word thus implies that an 'effect' is 'a result' of something else. Although the word 'effect' could be used independently of the factors that produced it, this is not the case in Articles 3.2 and 15.2. Rather, these provisions postulate certain inquiries as to the 'effect' of subject imports on domestic prices, and each inquiry links the subject imports with the prices of the like domestic products.
>
> First, an investigating authority must consider 'whether there has been a significant price undercutting *by the* [*dumped or subsidized*] *imports as compared with* the price of a like product of the importing Member'. Thus, with regard to significant price undercutting, Articles 3.2 and 15.2 expressly establish a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. Second, an investigating authority is required to consider '*whether the effect of such* [*dumped or subsidized*] *imports*' on the prices of the like domestic products is to depress or suppress such prices to a significant degree. By asking the question '*whether the effect of' the subject imports is* significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Moreover, the syntactic relation expressed by the terms '*to* depress prices' and '[*to*] prevent price increases' is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.
>
> The two inquiries set out in the second sentence of Articles 3.2 and 15.2 are separated by the words 'or' and 'otherwise'. This indicates that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression. Thus, even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.
>
> Given that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices, it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression. Thus, for example, it would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating

[332] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798.

> authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. Moreover, the reference to 'the effect of *such* [*dumped or subsidized*] *imports*' in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports.
>
> In our view, therefore, China's argument, that Articles 3.2 and 15.2 do not use any language suggesting the need to establish a link between subject imports and domestic prices, focuses on a meaning of the word 'effect' abstracted from the immediate context in which this word is situated. As noted, Articles 3.2 and 15.2 expressly postulate an inquiry into the relationship between subject imports and domestic prices by requiring a consideration of *whether* the effect of subject imports is to depress or suppress domestic prices. The fact that the word 'effect' is used as a noun does not mean that the link between domestic prices and subject imports expressly referenced in these provisions need not be analyzed."[333]

(iv) "depress prices ... or prevent price increases"

143. In *China – GOES*, the Appellate Body considered the meaning of price depression and price suppression:

> "Price depression refers to a situation in which prices are pushed down, or reduced, by something. An examination of price depression, by definition, calls for more than a simple observation of a price decline, and also encompasses an analysis of what is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider 'whether the effect of' subject imports is '[to] prevent price increases, which otherwise would have occurred, to a significant degree'. By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices 'otherwise would have' increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena."[334]

(v) "price undercutting"

144. The Panel in *China – Broiler Products* considered that, under Articles 3.2 and 15.2, the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence of price undercutting. The Panel explained:

> "There can be no question that the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of price undercutting *by* the dumped or subsidized imports *as compared with* the price of the domestic like product, which may then be relied upon in assessing causality between subject imports and the injury to the domestic industry.[335]" [336] (emphasis original)

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[333] Appellate Body Report, *China – GOES*, paras. 135-139.

[334] Appellate Body Report, *China – GOES*, para. 141.

[335] (*footnote original*) In *China – GOES*, the Appellate Body indicated that the different paragraphs of Articles 3 and 15 contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination and that the outcomes of the inquiries set forth in Articles 3.2 and 15.2 and the examination required in Articles 3.4 and 15.4 form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.

145. After reviewing previous Panel and Appellate Body decisions, the Panel in *China – Broiler Products* concluded that, since several factors determine the sales price in a given transaction, price comparability has to be ensured in terms of the various features of the products and transactions being compared. With respect to ensuring comparability in terms of the feature of the transactions being compared, the Panel noted that:

> "In particular, the sales price of a product reflects the commercial transactions and circumstances in which the product is traded. It is made of different pricing components that reflect the particular conditions or circumstances of the sale, starting with an amount that represents the cost of production and sale of the product, to which is added an amount for profit. Depending on the particular realities of the relevant market, additional pricing elements – generally an amount for additional costs and profit for each of the successive participant in the distribution chain – are added as the product gets traded further down the distribution chain, from producer to wholesaler, from wholesale to retailer, and from retailer to end-user".[337]

146. The Panel in *China – Broiler Products* considered that, for a price comparison to be informative of the level of price undercutting pursuant to Articles 3.2, an investigating authority "must compare transactions that include the same pricing components … it must compare transactions at the same level of trade". Alternatively, "if the transactions are at different levels of trade, the authority must apply appropriate adjustments to render them comparable in terms of the pricing components that they include".[338] For these reasons, in the Panel's view, the concept of level of trade is relevant to the price comparison under Article 3.2 even though it is not specifically referred to in the various paragraphs of Article 3.[339]

147. The Panel in *China – Broiler Products* also considered that, where the authority performs a price comparison on the basis of a "basket" of products, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to take into account relevant differences in the physical or other characteristics of the product. The Panel explained:

> "Another fundamental determining factor of the price is the physical characteristics of the product. Articles 3.1/15.1 and 3.2/15.2 mandate an analysis of the effects of prices on the domestic market of the "like product". Yet, in our view, ensuring that the products being compared are "like products" will not always suffice to ensure price comparability. Where the products under investigation are not homogenous, and where various models command significantly different prices, the investigating authority must ensure that the product compared on both sides of the comparison are sufficiently similar such that the resulting price difference is informative of the "price undercutting", if any, by the imported products. For this reason, for the price undercutting analysis to comply with Articles 3.1/15.1 and 3.2/15.2 may well require the investigating authority to perform its price comparison at the level of product models. In a situation in which it performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price

[336] Panel Report, *China – Broiler Products*, para. 7.475.
[337] Panel Report, *China – Broiler Products*, para. 7.480.
[338] Panel Report, *China – Broiler Products*, para. 7.481.
[339] Panel Report, *China – Broiler Products*, para. 7.482.

> undercutting" and not merely from differences in the composition of the two baskets being compared. Alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product."[340]

(d) Article 3.3 (cumulative assessment of effects of imports)

(i) General

148. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 3.3 with respect to the determination to undertake a cumulative assessment in the original investigation.[341]

(ii) "conditions of competition"

149. In *EU – Footwear (China)*, the Panel stated:

> "Article 3.3 of the AD Agreement does not contain any further guidance with respect to these 'conditions of competition'. Unlike Articles 3.2, 3.4 and 3.5 of the AD Agreement, which set out indicative lists of factors to be considered in examining the volume and price effects and impact of imports on the domestic industry, and the question of causation, in making a determination of injury, Article 3.3 does not indicate anything with respect to factors that might be relevant in assessing the appropriateness of cumulative analysis in light of the 'conditions of competition'.[342] Nevertheless, while investigating authorities enjoy a certain degree of discretion in establishing an analytical framework for determining whether a cumulative assessment is appropriate under Article 3.3, investigating authorities must take into account the particular circumstances of the case in light of the particular conditions of competition in the marketplace.[343] While we agree with China that Article 3.1 informs the obligations under Article 3.3 as a general matter,[344] we consider that this obligation requires that the investigating authority rely on positive evidence and an objective examination of that evidence in exercising its right to undertake a cumulative assessment. It does not, however, establish any substantive obligations on the analysis of whether a cumulative assessment of the effects of imports is appropriate. In this case, we consider that the Commission explained the evidentiary basis and reasoning underlying the decision to undertake a cumulative analysis.

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[340] Panel Report, *China – Broiler Products*, para. 7.483.

[341] Panel Report, *EU – Footwear (China)*, paras. 7.400-7.405.

[342] (*footnote original*) We note in this regard that this is among the questions examined by the Working Group on Implementation of the Committee on Anti-Dumping Practices. While a number of proposals regarding this matter were presented to and discussed extensively in that Group, no recommendation was ever adopted in this regard. See, e.g. documents G/ADP/W/410, G/ADP/AHG/R7, G/ADP/W/93, and G/ADP/W/121 and revs. 1-4. In addition, proposals on this question have been made in the negotiations on anti-dumping in the context of the Doha Development Agenda. Document TN/RL/W/143. These considerations support our view that the current text of Article 3.3 does not prescribe any criteria or methodologies for assessing whether cumulation is appropriate in light of the conditions of competition among imports, and between imports and the domestic like product.

[343] (*footnote original*) Panel Report, *EC – Tube or Pipe Fittings*, para. 7.241.

[344] (*footnote original*) "[T]he right under Article 3.3 to conduct anti-dumping investigations with respect to imports from different exporting countries does not absolve investigating authorities from the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of 'positive evidence' and an 'objective examination'."
Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 145.

> China does not dispute that the Commission considered relevant facts and explained its conclusions, but disagrees with the conclusions reached, and asserts that other facts should have been taken into account as well. However, these are questions of the substantive sufficiency of the Commission's decision, which in our view can be considered, if at all, only in light of the obligations of Article 3.3, and not under Article 3.1. Thus, to the extent China may be asserting a violation of Article 3.1, we consider that the European Union acted consistently with that provision."[345]

(e) Article 3.4 (relevant injury factors)

(i) General

150. In *EU – Footwear (China)*, the Panel found that China failed to demonstrate that the European Union violated Article 3.4 in its evaluation of all relevant economic factors and indices having a bearing on the state of the industry in the context of the original investigation the expiry review.[346]

151. In *China – X-Ray Equipment*, the European Union presented a number of different arguments to support its claim that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Panel found that the European Union had not established that MOFCOM failed to rely upon positive evidence. However, the Panel concluded that China acted inconsistently with Articles 3.1 and 3.4 because MOFCOM failed to consider all relevant economic factors, in particular, the "magnitude of the margin of dumping". Further, MOFCOM's examination of the state of the industry, including the trends in individual injury factors, lacked objectivity and was not always reasoned and adequate. Finally, the Panel exercised judicial economy regarding whether MOFCOM acted inconsistently with Article 3.4 by failing to take into account the differences between high-energy and low-energy scanners.[347]

(ii) "the examination of the impact"

152. In *China – GOES*, the Appellate Body considered the requirements of Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement, as context for the interpretation of Articles 15.2 and 3.2:

> "We recall that Articles 3.4 and 15.4 require an investigating authority to examine *the impact of subject imports on the domestic industry* on the basis of 'all relevant economic factors and indices having a bearing on the state of the industry'. Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry. In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation

[345] Panel Report, *EU – Footwear (China)*, para. 7.403.
[346] Panel Report, *EU – Footwear (China)*, paras. 7.412-7.463.
[347] Panel Report, *China – X-Ray Equipment*, paras. 7.141-7.217.

analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 *contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5.

Moreover, an investigating authority is required to *examine* the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is *not* required to *demonstrate* that subject imports are causing injury to the domestic industry. Rather, the latter analysis is specifically mandated by Articles 3.5 and 15.5. The demonstration of the causal relationship under Articles 3.5 and 15.5 requires an investigating authority to examine 'all relevant evidence' before it, and thus covers a broader scope than the examination under Articles 3.4 and 15.4. As discussed below, Articles 3.5 and 15.5 further impose a requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry. Given these intrinsic differences between Articles 3.4 and 15.4, on the one hand, and Articles 3.5 and 15.5, on the other hand, we do not consider that our interpretation leads to a 'duplicative analysis of causation', as China suggests."[348]

(iii) "Factors affecting domestic prices"

153. In *EU – Footwear (China)*, the Panel stated that:

"China also acknowledges that the Commission analysed trends in domestic sales prices, but asserts that there is no evaluation of the factors affecting those prices. 'Factors affecting domestic prices' is identified in Article 3.4, and therefore must be evaluated by the investigating authority in all cases. There is, however, nothing in Article 3.4 that provides any guidance as to the scope of this factor, or how an investigating authority is to evaluate it, or on the basis of what information such evaluation should proceed. Nor has China made any arguments in this regard, simply asserting that the Commission did not address this factor. We agree with the European Union that consideration of 'factors affecting domestic prices' does not require an investigating authority to analyse the causes of changes in those prices *per se*. We note, moreover, that the Commission did address at least one factor affecting domestic prices, when it concluded that dumped imports undercut the prices of the domestic like product, and that the domestic industry's sales prices were depressed. China makes no other arguments as to the sufficiency or consistency of the Commission's examination in this regard, and we therefore reject this aspect of China's claim."[349]

(iv) "profits"

154. In *EU – Footwear (China)*, the Panel noted that "while Article 3.4 requires an investigating authority to evaluate 'profits', there is no explicit requirement that it evaluate variations in profitability, or whether such variations are large or small."[350]

(v) "magnitude of the margin of dumping"

155. In *EU – Footwear (China)*, the Panel noted that "[w]ith respect to China's assertion that this evaluation was insufficient, we note, as above, that there is nothing in Article 3.4 that provides any guidance as to how an investigating authority is to evaluate the magnitude of the margin of dumping,

[348] Appellate Body Report, *China – GOES*, paras. 149-150.
[349] Panel Report, *EU – Footwear (China)*, para. 7.445.
[350] Panel Report, *EU – Footwear (China)*, para. 7.448.

or what information should be taken into account in that evaluation – beyond, of course, the actual margin of dumping in question."[351]

(f) Article 3.5 (causation)

(i) General

156. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 3.5 with respect to the causation determination in the original investigation and the expiry review.[352]

157. In *China – GOES*, the Panel found that China acted inconsistently with Article 3.5 with respect to MOFCOM's causation analysis.[353]

158. In *China – X-Ray Equipment*, the European Union presented a number of arguments to support its claim that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in conducting its causation analysis. The Panel concluded that MOFCOM acted inconsistently with Articles 3.1 and 3.5 due to the failure to take into consideration the differences in the products under consideration in the price effects analysis and due to the failure to provide a reasoned and adequate explanation regarding how the prices of the dumped imports caused price suppression in the domestic industry, particularly in 2008. The Panel exercised judicial economy with respect to MOFCOM's analysis of the effect of the volume of subject imports. Finally, the Panel concluded that MOFCOM failed to consider certain "known factors", and failed to consider evidence relating to other factors that it did explicitly consider, in its non-attribution analysis.[354]

(ii) "demonstrate"

159. In *China – GOES*, the Appellate Body stated that "the word 'demonstrate' in Articles 3.5 and 15.5 requires an investigating authority to make a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry".[355]

(iii) "known factors other than dumped imports"

160. In *EU – Footwear (China)*, the Panel stated:

> "The issue for us is whether the consideration of the injurious effects of 'known factors other than dumped imports' by the Commission, and the explanations given in light of the facts, in the Review and Definitive Regulations, fall short of the requirements of Article 3.5 of the AD Agreement.
>
> In this context, we recall that Article 3.5 contains no guidance on the assessment of other factors, and the reports of the Appellate Body concerning the need to 'separate and distinguish' the effects of dumped imports from those of other factors causing injury similarly do not provide any direction to investigating authorities as to how this is to be done. We consider that, in reviewing the Commission's determinations in this respect, it is appropriate for us to undertake a careful and in depth scrutiny of those determinations, in order to evaluate whether the explanations given by the Commission as to why the effects of certain factors did not break the causal link between dumped imports and material injury, and why certain other factors were not

[351] Panel Report, *EU – Footwear (China)*, para. 7.456.
[352] Panel Report, *EU – Footwear (China)*, paras. 7.481-7.541.
[353] Panel Report, *China – GOES*, paras. 7.617-7.638.
[354] Panel Report, *China – X-Ray Equipment*, paras. 7.237-7.300.
[355] Appellate Body Report, *China – GOES*, footnote 217.

a source of injury, are such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given. However, we recall that we are not to substitute our judgment for that of the Commission.

…

Although the Union interest questionnaires provide information with respect to 'outsourcing', we see nothing in them that would identify 'outsourcing' as an 'other factor' allegedly causing injury. Indeed, it would in our view be somewhat surprising for the domestic industry, in responding to questionnaires seeking information as to whether imposition of an anti-dumping measure is in the interest of the European Union, to identify factors other than the dumped imports that are causing injury. Moreover, we agree with the parties that outsourcing may be a symptom of injury, and consider that in such a case, it is illogical to at the same time treat it as a factor in itself causing injury, particularly in the absence of specific assertions to that effect. We recall that there is no requirement under Article 3.5 that an investigating authority in each case seek out and examine on its own initiative the possibility that some factor other than dumped imports is causing injury to the domestic industry.[356] Thus, merely because the Community interest questionnaires mention outsourcing is not sufficient to demonstrate that this was an 'other factor' causing injury which the European Union was required to consider in its determination.

…

We agree that, in a situation where numerous different types of footwear constitute one like product, consideration of the performance of a particular type as opposed to other types within one like product is not necessarily relevant. We recall that the industry is defined as producers of the like product, and the determination to be made is whether the industry as a whole is materially injured by dumped imports.[357] In this context, we consider that declining consumption in one market segment need not be analysed as an 'other factor' causing injury to the industry of which that market segment is a part.

…

With respect to the Euro-U.S. dollar exchange rate fluctuation, there is again no dispute that this was raised before the Commission as an 'other factor' allegedly causing injury. We agree that the European Union cannot ignore fluctuations in exchange rates simply because this factor is not explicitly mentioned in either Article 3.5 of the AD Agreement or the corresponding provisions in the EU regulation, namely Articles 3(6) and 3(7) of the Basic AD Regulation."[358]

161. The Panel in *EU – Footwear (China)* added that:

"We do not consider that it is either possible or appropriate for us to define a general rule regarding whether the investigating authority must estimate the extent of the

[356] (*footnote original*) Panel Report, *Thailand – H-Beams*, para. 7.273.

[357] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 190. While the Appellate Body in that report indicated that an analysis of market segments was permitted, it made clear that the analysis had to take account of all market segments in some way, to ensure that the determination of injury was with respect to the industry as a whole.

[358] Panel Report, *EU – Footwear (China)*, paras. 7.482-7.483, 7.512, 7.533, 7.535.

> contribution of various known 'other factors'. The question whether the determination is consistent with Article 3.5 can only be addressed upon an examination of the particular facts of each case."[359]

(iv) Relationship with Article 3.2

162. In *China – GOES*, the Appellate Body addressed the requirements of Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement. In the course of its analysis, the Appellate Body discussed the relationship between Articles 15.2/15.5 and Articles 3.2/3.5:

> "Interpreting Articles 3.2 and 15.2 as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Articles 3.5 and 15.5. Rather, Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other hand, posit different inquiries. The analysis pursuant to Articles 3.5 and 15.5 concerns the causal relationship between *subject imports* and *injury* to the domestic industry. In contrast, the analysis under Articles 3.2 and 15.2 concerns the relationship between subject imports and a different variable, that is, *domestic prices*. As discussed, an understanding of the latter relationship serves as a basis for the injury and causation analysis under Articles 3.5 and 15.5. In addition, Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury 'through the effects of [dumping or subsidies]', as set forth in Articles 3.2 and 15.2, as well as in Articles 3.4 and 15.4. We recall that Articles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of 'all relevant economic factors and indices having a bearing on the state of the industry', and provide a list of such factors and indicia that the authority must evaluate. Thus, the examination under Articles 3.5 and 15.5 encompasses 'all relevant evidence' before the authority, including the volume of subject imports and their price effects listed under Articles 3.2 and 15.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Articles 3.4 and 15.4. The examination under Articles 3.5 and 15.5, by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Articles 3.2 and 15.2.
>
> ...
>
> Articles 3.5 and 15.5 require an investigating authority to 'examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry', and to ensure that 'the injuries caused by these other factors [are not] attributed to the [dumped or subsidized] imports'.[360] As the Appellate Body has found, the non-attribution language of Articles 3.5 and 15.5 requires that 'an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports'.[361] In contrast, Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and *domestic prices*, so as to understand whether the former may have explanatory force for the occurrence of significant depression or suppression of the latter. For this purpose, the authority is not required to conduct a

[359] Panel Report, *EU – Footwear (China)*, para. 7.487.

[360] (*footnote original*) Pursuant to Articles 3.5 and 15.5, these other factors include the volume and prices of imports not sold at dumped or subsidized prices; contraction in demand or changes in the patterns of consumption; trade-restrictive practices of, and competition between, the foreign and domestic producers; developments in technology; and the export performance and productivity of the domestic industry.

[361] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

> fully fledged and exhaustive analysis of all known factors that may cause *injury* to the domestic industry, or to separate and distinguish the *injury* caused by such factors."[362]

3. Article 4: Definition of domestic industry

(a) Whether an investigating authority must attempt to identify and seek information from all domestic producers

163. The Panel in *China – Broiler Products* determined that "[t]he texts of Articles 4.1 and 16.1 do not contain explicit instructions on how investigating authorities are to determine whether the domestic industry will be comprised of the domestic producers as a whole or those whose output represents a major proportion of total domestic production".[363] In the Panel's view, "[a]lthough the texts of Articles 4.1 and 16.1 do list one definition before the other, we see nothing that explicitly indicates a hierarchy or sequencing between the two definitions".[364] According to the Panel, "[t]he use of the term "or" indicates the flexibility the agreements provide to investigating authorities with respect to defining the domestic industry".[365] After recalling the Appellate Body's decision in *EC – Fasteners (China)*, the Panel established that the "inherent flexibility" provided in Articles 4.1 and 16.1 "means that investigating authorities are not required by the agreements to first attempt to identify every domestic producer before they can define the domestic industry as those producers whose output constitutes a major proportion of total domestic production".[366]

164. The Panel in *China – Broiler Products* clarified that Articles 4.1 and 16.1 do not require the investigating authority to attempt to define the domestic industry as the domestic industry as a whole or to have to make efforts to identify all domestic producers before defining the domestic industry as a "major proportion" of total domestic output. The Panel, however, acknowledged that the determination that a group of producers represents a "major proportion" of total domestic output must necessarily be determined in relation to the production of the domestic producers as a whole. The Panel explained:

> "Articles 4.1 and 16.1 do not require the investigating authority at the outset to attempt to define the domestic industry as the domestic producers as a whole or to have to make efforts to identify all domestic producers before then defining the domestic industry as producers whose output represents a major proportion of total production. Nevertheless, the determination that a group of producers represents a "major proportion" of total domestic output must necessarily be determined in relation to the production of the domestic producers as a whole.[367]
>
> It is only after establishing total domestic production that an investigating authority can determine whether it can define the domestic industry as the domestic producers as a whole; or those producers that represent a major proportion of total domestic production; or conclude that it does not have information on a "domestic industry" within the meaning of Articles 4.1 and 16.1." [368]

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[362] Appellate Body Report, *China – GOES*, paras. 147, 151.
[363] Panel Report, *China – Broiler Products*, para. 7.415.
[364] Panel Report, *China – Broiler Products*, para. 7.416.
[365] Panel Report, *China – Broiler Products*, para. 7.416.
[366] Panel Report, *China – Broiler Products*, para. 7.416 (referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 412-415).
[367] (*footnote original*) Appellate Body Report, *EC – Fasteners (China)*, para. 412.
[368] Panel Report, *China – Broiler Products*, paras. 7.420-7.421.

4. Article 6: Evidence

(a) Article 6.1 (evidence from interested parties)

(i) Article 6.1.1 (30-day period to respond to questionnaires)

165. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 6.1.1 by giving interested parties only 15 days to submit certain information, because the forms at issue were not "questionnaires" within the meaning of Article 6.1.1.[369] The Panel rejected China's related claim under Paragraph 15(a)(i) of China's Accession Protocol.[370]

(ii) Article 6.1.2 (making evidence available promptly)

166. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union violated Article 6.1.2 by not making certain evidence available promptly to other interested parties.[371] In the course of its analysis, the Panel stated that:

> "The word 'promptly' is defined as 'in a prompt manner, without delay'[372] and '[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then'.[373] In our view, these definitions do not support the conclusion that information must be made available immediately in order to comply with Article 6.1.2. We consider that to make evidence available promptly must be understood in the context of the proceeding in question. In the context of a proceeding lasting months, where there are numerous opportunities for the parties to participate in the investigation after the evidence has been made available, we consider that the delays in this case do not establish a violation of Article 6.1.2, and we therefore reject China's claim with respect to Companies B, C and G."[374]

(b) Article 6.2 (right to defend interests)

167. In *China – X-Ray Equipment*, the Panel exercised judicial economy over the European Union's claims under Article 6.2 of the Anti-Dumping Agreement, as a consequence of having already upheld many of the EU claims under Articles 6.5.1 and 6.9 of the Anti-Dumping Agreement.[375]

(c) Article 6.4 (timely opportunities to see information)

168. In *EU – Footwear (China)*, the Panel rejected China's claims that the European Union acted inconsistently with Article 6.4 by failing to provide timely opportunities for interested parties to see non-confidential information that was relevant to the presentation of their cases and that was used by the Commission in the expiry review and original investigation at issue.[376]

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[369] Panel Report, *EU – Footwear (China)*, paras. 7.547-7.554.
[370] Panel Report, *EU – Footwear (China)*, paras. 7.555-7.560.
[371] Panel Report, *EU – Footwear (China)*, paras. 7.572-7.588.
[372] (*footnote original*) New Shorter Oxford English Dictionary, Clarendon Press, 1993.
[373] (*footnote original*) Oxford English Dictionary, on-line edition, consulted 27 March 2011.
[374] Panel Report, *EU – Footwear (China)*, para. 7.583.
[375] Panel Report, *China – X-Ray Equipment*, paras. 7.372-7.374, 7.427-7.429.
[376] Panel Report, *EU – Footwear (China)*, paras. 7.601-7.660.

169. In *China – X-Ray Equipment*, the Panel exercised judicial economy over the European Union's claims under Article 6.4 of the Anti-Dumping Agreement, having already upheld many of the EU claims under Articles 6.5.1 and 6.9 of the Anti-Dumping Agreement.[377]

(d) Article 6.5 (confidential information)

170. In *EU – Footwear (China)*, the Panel addressed a series of claims that the European Union acted inconsistently with Article 6.5 in both the expiry review and the original investigation by wrongly treating certain information as confidential; acted inconsistently with Article 6.5.1 in both the expiry review and the original investigation by failing, with respect to some of the information at issue that was treated as confidential, to require adequate non-confidential summaries thereof, or an explanation as to why such summarization was not possible; and with Article 6.5.2 by failing to disregard certain information because confidential treatment of that information was not warranted. The Panel found certain EU acts or omissions were inconsistent with Article 6.5 and 6.5.1 while others were not, and rejected the claims under Article 6.5.2.[378]

171. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.[379]

172. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement on the basis that China did not require interested parties providing confidential information to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the following information submitted in confidence.[380] The Panel also found that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement on the basis that China did not require an interested party to explain why certain information submitted in confidence could not be summarized.[381]

(e) Article 6.8 and Annex II (use of facts available)

(i) General

173. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Article 6.8 for not being even handed and applying "facts available" to domestic producers whose injury questionnaire responses contained errors.[382]

174. In *China – GOES*, the Panel found that China acted inconsistently with Article 6.8 and Annex II:1 of the Anti-Dumping Agreement in using "facts available" to calculate the dumping margins for unknown exporters, on the grounds that the preconditions for the application of facts available were not met.[383]

"Facts available" for unknown exporters ("all others")

175. In *China – Broiler Products*, the Panel noted that "[n]either Article 6.8 nor Annex II specify what form the request for information should take or how the authority should communicate its

[377] Panel Report, *China – X-Ray Equipment*, paras. 7.372-7.374, 7.427-7.429.
[378] Panel Report, *EU – Footwear (China)*, paras. 7.667-7.808.
[379] Panel Report, *China – GOES*, paras. 7.187-7.225.
[380] Panel Report, *China – X-Ray Equipment*, paras. 7.328-7.364.
[381] Panel Report, *China – X-Ray Equipment*, paras. 7.365-7.371.
[382] Panel Report, *EU – Footwear (China)*, paras. 7.815-7.821.
[383] Panel Report, *China – GOES*, paras. 7.383-7.394.

request to the interested party concerned".[384] The Panel then pointed out that "[i]t is generally recognised and accepted that the manner to inform unknown interested parties in an administrative or judicial proceeding is by way of public notices, including notices published in an official gazette or on the internet".[385] In the Panel's view, a similar concept is reflected in GATT Article X and Article 12 of the Anti-Dumping Agreement, requiring the issuance of public notices of preliminary and final determinations. The Panel explained that "[t]hese provisions rely on the notion that the intended recipients will consult the relevant documents emanating from national authorities of the countries where they conduct business".[386] The Panel thus recognized that "[a]n investigating authority which has no other, more direct, means of reaching certain producers/exporters, may have no choice but to similarly proceed through communications to the general public to request information from the parties it is unable to identify".[387]

(f) Article 6.9 (disclosure of essential facts)

(i) General

176. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Article 6.9 by failing to provide sufficient time for comment following issuance of the "Additional Final Disclosure Document" in the original investigation.[388]

177. In *China – GOES*, the Panel found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform interested parties of the "essential facts" under consideration in calculating the all others dumping margin.[389] The Panel also found that China's failure to disclose the "essential facts" underlying MOFCOM's finding of "low" subject import prices was inconsistent with Article 6.9.[390] The Panel further found that China acted inconsistently with Article 6.9 in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation anaylsis.[391]

178. In *China – GOES*, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 6.9.[392] The Appellate Body agreed with the Panel that MOFCOM failed to disclose in its preliminary determination and its final injury disclosure document all the "essential facts" relating to the "low price" of subject imports on which it relied for its price effects finding. The Appellate Body found that MOFCOM was required to disclose, under Article 6.9, the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

179. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently withArticle 6.9 of the Anti-Dumping Agreement on the basis that China did not inform interested parties of the following essential facts under consideration forming the basis for the decision to apply definitive measures: (i) the AUVs and underlying price data used to analyse the price effects of dumped imports; (ii) the price and adjustment data underlying Smiths' margin of dumping; and (iii) the facts that formed the basis for the determination of the residual duty rate. However, the Panel found that the European Union failed to establish that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in connection with informing interested parties of: (i) the underlying facts and criteria on the basis of which the affiliated distributor adjustment to export price was made; (ii) the

[384] Panel Report, *China – Broiler Products*, para. 7.301.
[385] Panel Report, *China – Broiler Products*, para. 7.303.
[386] Panel Report, *China – Broiler Products*, para. 7.303.
[387] Panel Report, *China – Broiler Products*, para. 7.303.
[388] Panel Report, *EU – Footwear (China)*, paras. 7.826-7.834.
[389] Panel Report, *China – GOES*, paras. 7.404-7.412.
[390] Panel Report, *China – GOES*, paras. 7.567-7.575.
[391] Panel Report, *China – GOES*, paras. 7.639-7.660.
[392] Appellate Body Report, *China – GOES*, paras. 233-251.

calculations of Smiths' margin of dumping; and (iii) the facts forming the basis of the decision to apply facts available in relation to the residual duty rate.[393]

(ii) "essential facts"

180. In *China – GOES*, the Appellate Body addressed the meaning of the terms "essential facts" in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement:

> "At the heart of Articles 6.9 and 12.8 is the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures. As to the type of information that must be disclosed, these provisions cover 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties. We highlight that, unlike Articles 12.2.2 of the *Anti-Dumping Agreement* and 22.5 of the *SCM Agreement*, which govern the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping and countervailing duty investigations, Articles 6.9 and 12.8 concern the disclosure of 'facts' in the course of such investigations 'before a final determination is made'. Moreover, we note that Articles 6.9 and 12.8 do not require the disclosure of *all* the facts that are before an authority but, instead, those that are 'essential'; a word that carries a connotation of significant, important, or salient. In considering which facts are 'essential', the following question arises: essential for what purpose? The context provided by the latter part of Articles 6.9 and 12.8 clarifies that such facts are, first, those that 'form the basis for the decision whether to apply definitive measures' and, second, those that ensure the ability of interested parties to defend their interests.[394] Thus, we understand the 'essential facts' to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.
>
> We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link' between the dumping or subsidization and the injury to the domestic industry.[395] What constitutes an 'essential fact' must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application

[393] Panel Report, *China – X-Ray Equipment*, paras. 7.398-7.426.

[394] (*footnote original*) An effective right for parties to defend their interests requires that, before a final determination is made, the authority explains, in the light of the substantive obligations of the *Anti-Dumping Agreement* and the *SCM Agreement*, how the essential facts serve as the basis for the decision whether to apply definitive measures. We agree with the panel in *EC – Salmon (Norway)* that these provisions are therefore intended "to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts." (Panel Report, *EC – Salmon (Norway)*, para. 7.805)

[395] (*footnote original*) We note that, in *Mexico – Olive Oil*, the panel similarly found that, in the context of the *SCM Agreement*, the "essential facts" are "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements—subsidization, injury and causation—that must be present for application of definitive measures." (Panel Report, *Mexico – Olive Oil*, para. 7.110)

> of definitive measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*."[396]

181. The Appellate Body concluded that:

> "In sum, MOFCOM was required to disclose the 'essential facts' relating to the 'low price' of subject imports on which it relied for its finding of significant price depression and suppression. This means that, in addition to the finding regarding the 'low price' of subject imports, MOFCOM was also required to disclose the facts of price undercutting that were required to understand that finding. As the Panel found, the Preliminary Determination and the Final Injury Disclosure only state that subject imports were at a 'low price', without providing any facts relating to the price comparisons of subject imports and domestic products. We consider that these facts constituted 'essential facts' within the meaning of Articles 6.9 and 12.8, which should have been disclosed to all interested parties."[397]

182. The Panel in *China – Broiler Products* established that what constitutes "essential facts" depends on the elements that an authority is required to examine in order to reach the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement. In the Panel's view, in the case of a determination of dumping, the elements that an authority is required to examine are those set forth in Article 2 of the Anti-Dumping Agreement. Accordingly, the Panel concluded that the essential facts which must be disclosed in the context of the determination of dumping include: the underlying data for particular elements that ultimately comprise the normal value and the export price, the sales that were used in the comparisons between normal value and export price, the formula applied to compare them, and any adjustments for differences that affect price comparability. The Panel explained:

> "What constitutes "essential facts" must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine.[398] In the context of the determination of whether dumping exists, the magnitude of such dumping, and thus whether to apply definitive measures, the elements an authority is required to examine are those set forth in Article 2 of the Anti-Dumping Agreement, including, depending upon the authority's findings, the determination of normal value and export price under Article 2.1, constructed normal value under Article 2.2, constructed export price under Article 2.3, and the fair comparison between normal value and export price under Article 2.4.
>
> …
>
> Bearing in mind the requirements of Article 2, we find that in the context of the determination of dumping, the essential facts which must be disclosed include the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like

[396] Appellate Body Report, *China – GOES*, paras. 240-241.
[397] Appellate Body Report, *China – GOES*, para. 251.
[398] (*footnote original*) Appellate Body Report, *China – GOES*, para. 241.

> product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data.[399] Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made, would also have to be disclosed.[400] In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used, but also the formula being applied to compare them. What formula was applied is an essential element of a comparison of normal value to export price and is just as fundamental to an understanding of the establishment of the margin of dumping as the data reflecting the individual sales. The disclosure of the formulas applied is necessary to enable the respondent to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[401] Without these formulas, a respondent would have an insufficient understanding of what the authority has done with its information and how that information was being used to determine the dumping margin."[402]

"Essential facts" for unknown exporters ("all others")

183. In *China – Broiler Products*, the Panel suggested that, even in the case of unknown exporters, the essential facts that an investigating authority is expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information.[403] Furthermore, the Panel noted that "the authority has an obligation to disclose the actual data underlying its decision [to resort to facts available]".[404] The Panel applied this standard to the underlying investigation and concluded that "MOFCOM's disclosure of the essential facts does not satisfy the requirements of Article 6.9 because it is essentially reduced to a conclusory statement, instead of providing the essential facts underlying the authority's decision".[405] As noted by the Panel, contrary to that requirement, "MOFCOM's Disclosure [did] not explain the data that the authority used for replacing the missing information".[406] The Panel then concluded that "China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to disclose certain "essential facts" forming the basis of its determination of the

[399] (*footnote original*) Panel Report, *China – X-Ray Equipment*, para. 7.417.

[400] (*footnote original*) See e.g. Appellate Body Report, *China – GOES,* para. 247. In this case the Appellate Body found that the panel correctly concluded that the essential facts that MOFCOM should have disclosed with respect to the "low price" of imports "include the price comparisons between subject imports and the like domestic products" including the average unit values used for determining the prices. We are of the view that the same logic that applies to price comparisons to determine the impact of subject imports on the domestic industry as part of the inquiry as to whether injury exists also applies to the price comparisons between normal value and export price to determine whether dumping exists. As the panels in *Mexico – Olive Oil* and *China – GOES* noted, the essential facts underlying these determinations (injury and dumping) form the basis of the decision to apply definitive measures and must be disclosed.

[401] (*footnote original*) Panel Report, *EC – Salmon (Norway)*, para. 7.805.

[402] Panel Report, *China – Broiler Products*, paras. 7.89-7.91.

[403] Panel Report, *China – Broiler Products*, para. 7.317.

[404] Panel Report, *China – Broiler Products*, para. 7.318.

[405] Panel Report, *China – Broiler Products*, para. 7.318.

[406] Panel Report, *China – Broiler Products*, para. 7.319.

"all others" rate of 105.4%, and in particular the facts pertaining to the data relied upon by MOFCOM in calculating this rate".[407]

(g) Article 6.10 (individual margin)

(i) General

184. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Article 6.10.[408]

185. The Panel in *EU – Footwear (China)* found that the European Union did not act inconsistently with Article 6.10.2, Paragraph 15(a)(ii) of China's Accession Protocol, or Paragraphs 151(e) and (f) of China's Accession Working Party Report, with respect to the examination of the non-sampled cooperating Chinese exporting producers' MET applications in the original investigation.[409] The Panel also rejected China's claims that the European Union acted inconsistently with Article 6.10.2 in selecting the sample for the dumping determination in the original investigation[410], and in the procedures for and selection of a sample of the domestic industry for purposes of examining injury in the original investigation.[411]

5. Article 9: Imposition and Collection of Anti-Dumping Duties

(a) Article 9.1 (lesser duty principle)

186. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.[412]

(b) Article 9.2 (appropriate amount)

187. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Article 9.2.[413]

188. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.[414]

[407] Panel Report, *China – Broiler Products*, para. 7.323.
[408] Panel Report, *EU – Footwear (China)*, paras. 7.82-7.89.
[409] Panel Report, *EU – Footwear (China)*, paras. 7.178-7.205.
[410] Panel Report, *EU – Footwear (China)*, paras. 7.211-7.226.
[411] Panel Report, *EU – Footwear (China)*, paras. 7.353-7.391.
[412] Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.
[413] Panel Report, *EU – Footwear (China)*, paras. 7.90-7.92.
[414] Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.

(c) Article 9.3 (not to exceed margin established under Article 2)

189. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Articles 6.10 and 9.2.[415] Like the panel in *EC – Fasteners (China)*, the Panel then exercised judicial economy with respect to the related claims under Articles 9.3 and 9.4.[416]

(d) Article 9.4 (rate applied to exporters not examined)

190. See immediately above under Article 9.3.

6. Article 11: Duration and Review of Anti-Dumping Duties and Price Undertakings

(a) Article 11.3 (expiry/sunset reviews)

191. In *EU – Footwear (China)*, the Panel rejected China's claims under Article 11.3 with respect to the analogue country selection procedure and the selection of Brazil as the analogue country in the expiry review, the PCN system used by the Commission in the expiry review, the procedure for sample selection and the selection of the sample for the injury determination in the expiry review, and the finding of likelihood of continuation or recurrence of injury in the expiry review.[417]

7. Article 12: Public Notice and Explanation of Determinations

(a) Article 12.2 (of preliminary and final determinations)

(i) General

192. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 12.2.2 in connection with the information and explanations provided in respect of specific issues in the original investigation and expiry review.[418]

193. In *China – GOES*, the Panel found that China did not act inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by not including in a public notice or separate report the data and calculations used to determine the respondent companies' final dumping margins, on the grounds that Article 12.2.2 contains no obligation to do so.[419] In *China – GOES*, the Panel found that China did act inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in relation to deficiencies in the public notice and explanation of its determination of the "all others" dumping margin.[420] The Panel also found that China acted inconsistently with Article 12.2.2 by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.[421] The Panel further found that China acted inconsistently with Article 12.2.2 in relation to the public notice and explanation of its causation analysis with respect to non-subject imports.[422]

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[415] Panel Report, *EU – Footwear (China)*, paras. 7.82-7.92.
[416] Panel Report, *EU – Footwear (China)*, para. 7.93.
[417] Panel Report, *EU – Footwear (China)*, paras. 7.153-7.158, 7.163-7.165, 7.266, 7.287, 7.329-7.340, 7.391, 7.432, 7.493-7.494, and 7.517.
[418] Panel Report, *EU – Footwear (China)*, paras. 7.842-7.898.
[419] Panel Report, *China – GOES*, paras. 7.330-7.339.
[420] Panel Report, *China – GOES*, paras. 7.419-7.426.
[421] Panel Report, *China – GOES*, paras. 7.587-7.592.
[422] Panel Report, *China – GOES*, paras. 7.669-7.675.

194. In *China – GOES*, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 12.2.2 because MOFCOM failed to disclose in its final determination all relevant information on the matters of fact relating to the "low price" of subject imports on which it relied for its price effects finding.[423] The Appellate Body found that MOFCOM was required to disclose under Article 12.2.2 the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

195. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with the first sentence of Article 12.2.2 of the Anti-Dumping Agreement, on the basis that MOFCOM's public notice was deficient in failing to provide relevant information regarding: (i) its price effects analysis; and (ii) the factual basis for the determination of the residual rate. However, the Panel found that the European Union failed to establish that China acted inconsistently with the first sentence of Article 12.2.2 by failing to include in the public notice: (i) the calculations and underlying data for Smiths' margin of dumping; and (ii) the calculation of the residual duty rate.[424] In *China – X-Ray Equipment*, the Panel also found that China acted inconsistently with the second sentence of Article 12.2.2 of the Anti-Dumping Agreement, on the basis that MOFCOM's public notice was deficient in failing to explain why MOFCOM rejected Smiths' arguments regarding the treatment of domestic sales to affiliated distributors. However, the Panel found that the European Union failed to establish that China acted inconsistently with the second sentence of Article 12.2.2 in connection with: (i) Smiths' arguments on the credibility of certain injury data; and (ii) additional arguments allegedly made by Smiths concerning MOFCOM's injury and causation analysis.[425]

196. In *China – Broiler Products*, the Panel observed that "Article 12.2 of the Anti-Dumping Agreement requires that a public notice be given of any preliminary or final determination and that each such notice set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority". In the Panel's view, Article 12.2.2 then "elaborates on this requirement by establishing, *inter alia*, that the public notice must contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".[426] In *China – Broiler Products*, the Panel noted the Appellate Body's conclusion in *China – GOES* that, in relation to the obligation contained in Article 12.2.2, "the disclosure must allow an understanding of the factual basis that led to the imposition of final measures and give a reasoned account of the factual support for an authority's decision".[427] In addition, the Panel considered that:

> "[t]he fact that confidential information may have been part of the relevant information that had to be disclosed does not excuse failure to comply with Articles 12.2 and 12.2.2. Rather, in such circumstances, the investigating authority should meet its disclosure obligations by providing non-confidential summaries of the confidential information[428]".[429]

(ii) "all relevant information on the matters of fact"

197. In *China – GOES*, the Appellate Body concluded that, in the context of the second sentence of Articles 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, "all relevant information on the matters of fact" consists of those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures:

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[423] Appellate Body Report, *China – GOES*, paras. 252-267.
[424] Panel Report, *China – X-Ray Equipment*, paras. 7.456-7.470.
[425] Panel Report, *China – X-Ray Equipment*, paras. 7.471-7.491.
[426] Panel Report, *China – Broiler Products*, para. 7.327.
[427] Panel Report, *China – Broiler Products*, para. 7.328 (referring to Appellate Body Report, *China – GOES*, para. 256).
[428] (*footnote original*) Appellate Body Report, *China – GOES*, para. 259.
[429] Panel Report, *China – Broiler Products*, para. 7.330.

"Relevant to this dispute is the requirement in Articles 12.2.2 and 22.5 that a public notice contain 'all relevant information' on 'matters of fact' 'which have led to the imposition of final measures'.[430] With regard to 'matters of fact', these provisions do not require authorities to disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures.[431] The inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures. Moreover, we note that the obligations under Articles 12.2.2 and 22.5 come at a later stage in the process than the requirement to disclose the essential facts pursuant to Articles 6.9 and 12.8. While the disclosure of essential facts must take place 'before a final determination is made', the obligation to give public notice of the conclusion of an investigation within the meaning of Articles 12.2.2 and 22.5 is triggered once there is an affirmative determination providing for the imposition of definitive duties.

As noted in our examination of Articles 6.9 and 12.8, the imposition of final anti-dumping or countervailing duties requires that an authority finds dumping or subsidization, injury, and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes 'relevant information on the matters of fact' is therefore to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*. Articles 3.2 and 15.2 require, *inter alia*, an investigating authority to consider the effect of the subject imports on prices by considering whether there has been significant price undercutting, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. We note that Articles 12.2.2 and 22.5 further underscore the requirement of public notice of these elements by cross-referencing, respectively, to Articles 12.2.1 of the *Anti-Dumping Agreement* and 22.4 of the *SCM Agreement*, which require that the public notice or report contain considerations relevant to the injury determination as set out in Articles 3 and 15.

Articles 12.2.2 and 22.5 are both situated in the context of provisions that concern the public notice and explanation of determinations in anti-dumping and countervailing duty investigations. In the case of an affirmative determination providing for the imposition of a definitive duty, Articles 12.2.2 and 22.5 provide that such notice shall contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. Articles 12.2.2 and 22.5 capture the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Articles 12.2.2 and 22.5 is framed by the

[430] (*footnote original*) We note that, in addition to matters of fact, Articles 12.2.2 and 22.5 also require that the public notice contain all relevant information on the matters of law and reasons which have led to the imposition of final measures.

[431] (*footnote original*) We observe that, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body held that Article 22.5 of the *SCM Agreement* "does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination". (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164)

requirement of 'relevance', which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of 'all relevant information' regarding these categories of information, Articles 12.2.2 and 22.5 seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* and Article 23 of the *SCM Agreement*.

With respect to the form in which the relevant information must be disclosed, Articles 12.2.2 and 22.5 allow authorities to decide whether to include the information in the public notice itself 'or otherwise make [it] available through a separate report'. We note that Articles 12.2.2 and 22.5 also provide that the notice or report shall pay 'due regard … to the requirement for the protection of confidential information'. When confidential information is part of the relevant information on the matters of fact within the meaning of Articles 12.2.2 and 22.5, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.

In sum, in the context of the second sentence of Articles 3.2 and 15.2, we consider that 'all relevant information on the matters of fact' consists of those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures."[432]

8. Article 17: Consultation and Dispute Settlement

(a) Article 17.6(i) (standard of review of factual findings)

198. In *EU – Footwear (China)*, the Panel found that Article 17.6(i) of the Anti-Dumping Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping investigations that could be the subject of a finding of violation, and therefore dismissed all of China's claims of violation of that provision.[433]

[432] Appellate Body Report, *China – GOES*, paras. 256-260.
[433] Panel Report, *EU – Footwear (China)*, paras. 7.35-7.44.

G. SCM AGREEMENT

1. Article 1: Definition of Subsidy

(a) "public body" (Art. 1.1(a)(1))

199. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that all of the entities involved were "public bodies" within the meaning of Article 1.1(a) of the SCM Agreement.[434] The Panel found that the OPA and the IESO are agents of the Government of Ontario and noted that there is no dispute between the parties that they are a "public bod[ies]" for the purpose of Article 1.1(a)(1). The Panel found that "Hydro One is an agent of the Government of Ontario", thereby being "a provincial government organization … to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service".

(b) "financial contribution" (Art. 1.1(a)(1))

(i) Whether subparagraphs of Article 1.1(a)(1) are mutually exclusive

200. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body considered that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement:

> "To the extent that this finding by the Panel means that the coverage of subparagraphs (i) and (iii) of Article 1.1(a)(1) is mutually exclusive, we disagree. We recall that, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that Article 1.1(a)(1) "does not explicitly spell out the intended relationship between the constituent subparagraphs"[435] and that the structure of this provision "does not expressly preclude that a transaction could be covered by more than one subparagraph".[436] In that dispute, the Appellate Body also found that "a direct transfer of funds" under subparagraph (i) "may involve reciprocal rights and obligations"[437], given that it covers situations where the recipient assumes obligations to the government in exchange for the funds provided, such as loans and equity infusions.[438] The Appellate Body further held that the term "purchase" under subparagraph (iii) usually means "that the person or entity providing the goods will receive some consideration in return".[439]
>
> When determining the proper legal characterization of a measure under Article 1.1(a)(1) of the SCM Agreement, a panel must assess whether the measure may fall within any of the types of financial contributions set out in that provision. In doing so, a panel should scrutinize the measure both as to its design and operation

[434] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.234, 7.235, 7.239, and fn 464 thereto.

[435] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 613.

[436] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fn 1287 to para. 613.

[437] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617.

[438] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617. The Appellate Body indicated that, in the case of grants, "the conveyance of funds will not involve a reciprocal obligation on the part of the recipient". (Ibid.)

[439] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 619.

> and identify its principal characteristics.[440] Having done so, the transaction may naturally fit into one of the types of financial contributions listed in Article 1.1(a)(1). However, transactions may be complex and multifaceted. This may mean that different aspects of the same transaction may fall under different types of financial contribution. It may also be the case that the characterization exercise does not permit the identification of a single category of financial contribution and, in that situation, as described in the *US – Large Civil Aircraft (2nd complaint)* Appellate Body report, a transaction may fall under more than one type of financial contribution. We note, however, that the fact that a transaction may fall under more than one type of financial contribution does not mean that the types of financial contributions set out in Article 1.1(a)(1) are the same or that the distinct legal concepts set out in this provision would become redundant, as the Panel suggests. We further observe that, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body did not address the question of whether, in the situation described above, a panel is under an obligation to make findings that a transaction falls under more than one subparagraph of Article 1.1(a)(1).
>
> In the light of these considerations, we believe that the Panel's finding that subparagraphs (i) and (iii) are mutually exclusive is not consistent with the Appellate Body's interpretations in *US – Large Civil Aircraft (2nd complaint)*. Consequently, we declare moot and of no legal effect the Panel's finding, in paragraph 7.246 of the Panel Reports, that "government 'purchases [of] goods' could [not] also be legally characterized as 'direct transfer[s] of funds' without infringing [the] principle [of effective treaty interpretation]", inasmuch as it negates the possibility that a transaction may fall under more than one type of financial contribution under Article 1.1(a)(1) of the SCM Agreement."[441]

(ii) "direct transfer of funds" (Art. 1.1(a)(1)(i))

201. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the payments and access to facilities, equipment, and employees provided to Boeing pursuant to the NASA procurement contracts and DOD assistance instruments at issue involved a "direct transfers of funds" and the "provision of goods or services", and were therefore financial contributions covered by Article 1.1(a)(1)(i) and Article 1.1(a)(1)(iii) of the SCM Agreement.[442] The Appellate Body declared moot and of no legal effect the Panel's finding that transactions properly characterized as "purchases of services" are excluded from the scope of Article 1.1(a)(1) of the SCM Agreement. In the course of its analysis, the Appellate Body stated that:

> "Subparagraph (i) of Article 1.1(a)(1) identifies, as one type of financial contribution, a government practice involving 'a direct transfer of funds'. It indicates action involving the conveyance of funds from the government to the recipient. The Appellate Body has endorsed a meaning of 'funds' that includes not only money, but also financial resources and other financial claims more generally.[443] The direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient.

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[440] (*footnote original*) Appellate Body Reports, *China – Auto Parts*, para. 171. See also, Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 586.

[441] Appellate Body Reports. *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.119-5.121.

[442] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 550-625.

[443] (*footnote original*) See Appellate Body Report, *Japan – DRAMs (Korea)*, para. 250.

Article 1.1(a)(1)(i) lists in brackets examples of direct transfers of funds ('e.g. grants, loans, and equity infusion'). As the Appellate Body has confirmed, the fact that the words 'grants, loans, and equity infusion' are preceded by the abbreviation 'e.g.', indicates that they are cited as examples of transactions falling within the scope of Article 1.1(a)(1)(i).[444] These examples, which are illustrative, do not exhaust the class of conduct captured by subparagraph (i). The inclusion of specific examples nevertheless provides an indication of the types of transactions intended to be covered by the more general reference to 'direct transfer of funds'.[445] Indeed, in *Japan – DRAMs (Korea)*, the Appellate Body found that transactions that are similar to those expressly listed in subparagraph (i)—in that case, debt forgiveness, the extension of a loan maturity, and debt-to-equity swaps—are also covered by that provision.[446]

Turning to the first example—a 'grant'—we note that, in such a transaction, money or money's worth is given to a recipient, normally without an obligation or expectation that anything will be provided to the grantor in return.[447] 'Loans' and 'equity infusions' are characterized by reciprocity. With a loan, the lender lends money or money's worth on the basis that the principal, along with interest as may be agreed, is repaid. Under a loan, the lender will usually earn a return on the amount borrowed. In the case of an equity infusion, a government's provision of capital to a recipient is made in return for the acquisition of shares. The provider of the capital thereby makes an investment in the recipient enterprise[448] and will be entitled to the dividends or any capital gains attributable to that investment. The returns on the investment will depend on the success of the recipient enterprise. At the time the government provides the capital, it does not know how the recipient enterprise will perform. The equity investor enjoys a return on its capital to the extent the enterprise succeeds, and suffers losses in capital to the extent it fails.

It is clear from the examples in subparagraph (i) that a direct transfer of funds will normally involve financing by the government to the recipient. In some instances, as in the case of grants, the conveyance of funds will not involve a reciprocal obligation on the part of the recipient. In other cases, such as loans and equity infusions, the recipient assumes obligations to the government in exchange for the funds provided.[449] Thus, the provision of funding may amount to a donation or may involve reciprocal rights and obligations.

…

[444] (*footnote original*) Appellate Body Report, *Japan – DRAMs (Korea)*, para. 251.

[445] (*footnote original*) At the oral hearing, the United States referred to the Latin canon of construction, "*ejusdem generis*", which provides that, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. (*Black's Law Dictionary*, 7th edn (West Group, 1999), p. 535) In our view, the doctrine would equally apply to situations where the general word or phrase precedes the specified list.

[446] (*footnote original*) Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 251 and 252.

[447] (*footnote original*) Grants can take many forms. Some conditional grants, for example, require the recipient to use the funds for a specific purpose. Other conditional grants may require a recipient to itself raise part of the funds needed for a project.

[448] (*footnote original*) This notion of an investment through an equity infusion is reinforced by Article 14(a) of the *SCM Agreement*, which expressly provides that the determination of whether an equity infusion confers a benefit must be made based on whether the "investment decision" is *inconsistent* with the "usual investment practice" of private investors in the territory of the Member.

[449] (*footnote original*) The fact that there is an element of reciprocity in some of the transactions listed as examples in subparagraph (i) does not mean that what is provided to the government by the recipient in return for the funds must be equivalent to the value of the funds. That issue becomes relevant in the subsequent assessment of benefit under Article 1.1(b) of the *SCM Agreement*.

> In sum, the particular characteristics of the NASA procurement contracts and USDOD assistance instruments before us are such that, in our view, they are most appropriately characterized as being akin to a species of joint venture. Furthermore, these joint venture arrangements between NASA/USDOD and Boeing have characteristics analogous to equity infusions, one of the examples of financial contributions included in Article 1.1(a)(1)(i) of the *SCM Agreement*. We recall that, under subparagraph (i), there is a financial contribution where 'a government practice involves a direct transfer of funds'. Several examples of direct transfers of funds are provided. These examples are not exhaustive. Where, as here, there are measures that have sufficient characteristics in common with one of the examples in subparagraph (i), this commonality indicates to us that the measures fall within the concept of 'direct transfers of funds' in Article 1.1(a)(1)(i). We have identified two contributions by NASA and the USDOD under the respective joint ventures. Both NASA and the USDOD provided payments to Boeing to undertake the research. These payments constitute a direct transfer of funds within the meaning of Article 1.1(a)(1)(i). "[450]

202. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body, having upheld the Panel's finding that the measures at issue are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, rejected Japan's argument that the measures should also be characterized as a "direct transfer of funds" or "potential direct transfer of funds" within the meaning of Article 1.1(a)(1)(i):

> "[W]e do not believe that the arguments advanced by Japan are sufficient to demonstrate that the measures at issue are "direct transfer[s] of funds" or "potential direct transfers of funds". We recall that Japan argued that the challenged measures are "direct transfer[s] of funds" because the OPA distributes funds to FIT generators from the amounts collected from consumers through the GA. Japan further argues that the fact that FIT and microFIT generators are entitled to guaranteed payments for all electricity generated for the duration of the FIT and microFIT Contracts makes the payments under these contracts "potential direct transfers of funds". Japan's arguments in this respect do not present any new characteristics of the measures at issue that go beyond, or are different from, the payment of consideration by the Government of Ontario through the OPA in exchange for electricity delivered into the grid by FIT and microFIT suppliers during a 20-year contract. To us, Japan's arguments merely underscore and reiterate certain specific aspects of the FIT Programme and Contracts, such as the conveyance of funds in exchange for delivered electricity and the fact that the OPA commits to pay for such electricity for the duration of the contracts. Japan overlooks that all these aspects are part of a broader transaction that involves an exchange of rights and obligations, that is, the payment of consideration in return for electricity delivered into Ontario's electricity system. Pursuant to this composite transaction, the Government of Ontario, through the OPA, enters into 20-year contracts with FIT and microFIT suppliers and pays them a Contract Price as consideration in exchange for electricity delivered into the system. We do not see in Japan's arguments any aspects different from, or in addition to, those characteristics that led us to agree with the Panel that the transactions at issue constitute government "purchases [of] goods". We are not persuaded that, on the basis of these arguments and features of the challenged measures, Japan has established that these measures should in addition be characterized as "direct transfer[s] of funds" or "potential direct transfers of funds"."[451]

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[450] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 614-617, 624.
[451] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.131.

(iii) "government revenue otherwise due is foregone" (Art 1.1(a)(1)(ii))

203. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body upheld the Panel's finding that the reduction in the Washington State B&O tax rate applicable to commercial aircraft and component manufacturers constituted the foregoing of revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.[452] In the course of its analysis, the Appellate Body stated that:

> "We have explained above that a panel must be aware of the limitations inherent in identifying and comparing a general rule of taxation, and an exception from that rule. For instance, we noted that it could be misleading to identify a benchmark within a domestic tax regime solely by reference to historical tax rates. By that measure, the fact that commercial aircraft and component manufacturers were *previously* subject to higher tax rates would not in itself be determinative of what the benchmark is at the time of the challenge. In the circumstances of this case, however, we do not consider that the Panel was conducting a purely historical comparison. In particular, we note the Panel's acknowledgement that House Bill 2294 provided for a reversion to the 'full taxes' associated with the general categories of activities in the event that certain reporting requirements were not met. This supports the Panel's view that the benchmark consisted of the generalized tax rates of 0.484% (manufacturing and wholesaling) and 0.471% (retailing), not because those rates reflected what *previously* applied to commercial aircraft manufacturing activities, but rather because they reflected what would *currently* apply to these activities if the conditions for the lower rates were not met.
>
> We have also noted that it could be misleading to compare rates applicable to a general category of income with rates applicable to a subcategory of that income, without considering whether the scope of the 'exceptions' undermines the existence of a 'general rule'. In this dispute, we note that the Panel analyzed what portion of income was entitled to a rate of taxation different from that applicable to income from general manufacturing activities. The United States had argued before the Panel that 60% of total taxable income in Washington State was subject to an adjusted rate of taxation. The European Communities responded that, once the aerospace industry was excluded, only 20% of manufacturing income was subject to an adjusted B&O tax rate. The Panel concluded that, 'if {House Bill} 2294 had not adjusted the rate for aerospace manufacturing, approximately 80 per cent of manufacturing activities in Washington State would be subject to the 0.484 per cent tax rate'. This reflects consideration by the Panel as to the relative tax treatment of other taxpayers engaged in the same broad category of business activities as commercial aircraft manufacturers.
>
> In sum, the Panel identified broad categories of tax treatment under the Washington State tax code that apply to general manufacturing, wholesaling, and retailing activities in Washington State. The Panel also determined that commercial aircraft and component manufacturers are subject to a lower tax rate, which would in certain circumstances revert to the higher, general tax rates. The Panel moreover considered that the scope of the general tax rates in relation to that of various lower tax rates did not alter its conclusion that the general rates reflected what would have been applied to commercial aircraft and component manufacturers in the absence of the B&O tax reduction. Thus, we are satisfied that the Panel had a proper basis for selecting as the benchmark the tax treatment generally applicable in Washington State to businesses engaged in manufacturing (0.484%), wholesaling (0.484%), and retailing (0.471%)

[452] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 801-831.

> activities. In addition, we consider that the Panel properly concluded that a comparison of these general tax rates to the lower tax rate of 0.2904% that was applied to the gross income of commercial aircraft and component manufacturers under House Bill 2294 indicates the foregoing of government revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*."[453]

(iv) "provides goods or services … or purchases goods" (Art. 1.1(a)(1)(iii))

204. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the payments and access to facilities, equipment, and employees provided to Boeing pursuant to the NASA procurement contracts and DOD assistance instruments at issue involved a "direct transfers of funds" and the "provision of goods or services", and are therefore financial contributions covered by Article 1.1(a)(1)(i) and Article 1.1(a)(1)(iii) of the SCM Agreement.[454] The Appellate Body declared moot and of no legal effect the Panel's finding that transactions properly characterized as "purchases of services" are excluded from the scope of Article 1.1(a)(1) of the SCM Agreement. In the course of its analysis, the Appellate Body stated that:

> "With respect to the second sub-clause of subparagraph (iii)—where a government 'purchases goods'—we note that the goods are provided *to* the government by the recipient, in contrast to the first sub-clause of that paragraph, where the goods are provided *by* the government. There are two additional differences between the first and second sub-clauses of subparagraph (iii). The second sub-clause uses the term 'purchase', which is usually understood to mean that the person or entity providing the goods will receive some consideration in return. The other difference is that, in contrast to the first sub-clause that addresses the provision of goods *and services*, the second sub-clause refers only to purchases of 'goods', and not of 'services'.[455]
>
> The Panel in this dispute interpreted the omission of the term 'services' from the second sub-clause of subparagraph (iii) as an indication that the drafters of the *SCM Agreement* did not intend measures constituting government purchases of services to be covered as financial contributions under Article 1.1(a)(1)(i). This interpretative issue does not need to be resolved by us because it is not relevant for purposes of resolving the dispute before us, that is, whether the NASA procurement contracts and USDOD assistance instruments, which we have found to resemble joint ventures, constitute financial contributions within the meaning of Article 1.1(a)(1) of the *SCM Agreement*.[456] We therefore *declare* the Panel's interpretation that 'transactions properly characterized as purchases of services are excluded from the scope of Article 1.1(a)(1)(i) of the SCM Agreement'[457] to be moot and of no legal effect."[458]

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[453] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 823-825.

[454] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 550-625.

[455] (*footnote original*) "Goods" are tangible items. They are often contrasted against "services", which are intangible. There are a number of distinctions usually drawn between services and goods. As opposed to goods, typical features of services include their immaterial, invisible, intangible, non-storable, and transitory nature. Services are usually produced and consumed simultaneously, while goods are not. However, it may be difficult to separate goods from services, for instance where services are an input or processing step in the production of goods.

[456] (*footnote original*) The Appellate Body proceeded in a similar manner in *US – Upland Cotton* with respect to the interpretation of Article 6.3(d) of the *SCM Agreement*.

[457] (*footnote original*) Panel Report, para. 7.970. (emphasis omitted) Our findings of financial contributions regarding the payments and other support provided under the NASA procurement contracts and USDOD assistance instruments are based on the particular characteristics of those measures. We also declare moot the Panel's finding, in paragraph 7.1171 of its Report, that the USDOD procurement contracts are properly

205. The Panel in *Canada – Renewable Energy / Feed-In Tariff Program* determined that the measures amounted to government "purchases of goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[459] The Panel endorsed The Oxford English Dictionary's definition of "purchase", finding the terms means "(i) "to obtain; to gain possession of"; and (ii) "to acquire in exchange for payment in money or an equivalent; to buy"."[460] With these definitions in mind, the Panel found that:

> "[T]he act of purchasing a good might be described in terms of gaining possession of, acquiring, buying or obtaining a good. Among the definitions of the verbs to 'acquire', to 'buy' and to 'obtain', found in the same dictionary used by Japan and Canada are, respectively: (i) to 'gain possession of through skill or effort; to obtain, develop, or secure in a careful, concerted, often gradual manner'[461]; (ii) to 'get possession of by giving an equivalent, usually in money; to obtain by paying a price; to purchase'[462]; and (iii) to 'come into the possession of; to procure; to get, acquire, or secure'[463].
>
> The fact that the notion of 'possession' is central to all three of the above definitions suggests that irrespective of the particular term used to explain what is meant by a 'purchase', it should necessarily be understood as an act that, in the context of Article 1.1(a)(1)(iii) of the SCM Agreement, will result in the government 'possessing' the good that is purchased. Furthermore, it follows from most of the above formulations, that the notion of a 'purchase' for the purpose of Article 1.1(a)(1)(iii) should involve some kind of payment (usually monetary) in exchange for a good. This latter proposition finds support in *US – Large Civil Aircraft (Second Complaint)*, where the Appellate Body observed that '[t]he second sub-clause [of Article 1.1(a)(1)(iii) of the SCM Agreement] uses the term 'purchase', which is usually understood to mean that the person or entity providing the goods will receive some consideration in return'[464]. Thus, we find that the ordinary meaning of the term 'purchase' suggests that for the purpose of Article 1.1(a)(1)(iii) of the SCM Agreement, government 'purchases [of] goods' will arise when a government obtains possession over a good through some kind of payment (monetary or otherwise).
>
> […] [N]othing in the ordinary meanings we have reviewed suggests that a 'purchase' must involve obtaining *physical* possession over something. Although a purchase of goods may exist when an entity takes physical possession over of a good in exchange

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characterized as "purchases of services" and thus are not financial contributions under Article 1.1(a)(1). However, as neither participant has requested us to do so, we do not complete the analysis regarding the USDOD procurement contracts at issue in this dispute.

[458] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 619-620.

[459] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.194-7.249.

[460] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 7.225.

[461] (*footnote original*) Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/1731.

[462] (*footnote original*) Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/25484.

[463] (*footnote original*) Shorter Oxford English Dictionary, online version at http://www.oed.com/view/Entry/130002.

[464] (*footnote original*) Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 619. We note that the notion of "consideration" is derived from common law, where it plays a critical role in determining the existence of a contract. However, the word "consideration" does not appear in the above dictionary definitions. Moreover, the notion of "consideration" is not a necessary element of contracts executed under civil law (and possibly other legal) systems. Thus, to the extent that the concept of "consideration" may inform the meaning of the term "purchase [of] goods" under Article 1.1(a)(1)(iii) of the SCM Agreement, it needs to be recalled that it is a legal construct that cannot be found in the legal systems of many WTO Members.

> for a payment of some kind, it may also arise in other situations when a purchaser does not physically possess the purchased good."[465]

206. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body upheld the Panel's fiding that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[466]

(c) "income or price support" (Art. 1.1(a)(2))

(i) General

207. In *China – GOES*, the Panel found that certain export restrictions did not constitute "price support" within the meaning of Article 1.1(a)(2). The Panel did so in the context of finding a violation of Article 11.3 of the SCM Agreement, on the grounds that, for certain of the measures at issue in the CVD investigation at issue, the application to initiate the CVD investigation contained insufficient evidence of the existence of a financial contribution within the meaning of Article 1.1(a)(1), or of income or price support within the meaning of Article 1.1(a)(2).[467]

208. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel declined to make a finding on whether the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement, after finding that they constitute a "financial contribution" within the meaning of Article 1.1(a)(1). The Appellate Body rejected Japan's claim that, in so doing, the Panel exercised false judicial economy and acted inconsistently with Article 11 of the DSU; the Appellate Body declined to make a finding on whether the measures at issue might be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.[468]

(ii) "price support"

209. In *China – GOES*, the Panel addressed the meaning of "price support" in Article 1.1(a)(2). In the course of its analysis, the Panel stated:

> "On the one hand, the phrase 'any…price support' under Article 1.1(a)(2) of the SCM Agreement is broad and, on its face, could be read to include any government measure that has the effect of raising prices within a market. According to *Blacks Oxford Dictionary of Economics*, price support includes 'government policies to keep the producer prices…above some minimum level'.[469] This does not necessarily contradict a broad reading of Article 1.1(a)(2), although it does suggest that the government sets or targets a given price, and consequently does not capture every government measure that has an incidental and random effect on price.[470]

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[465] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.226-7.228.

[466] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.122-5.128.

[467] Panel Report, *China – GOES*, paras. 7.79-7.93.

[468] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.133-5.139.

[469] (*footnote original*) *Oxford Dictionary of Economics*, 3rd ed., J. Black (ed.) (Oxford University Press, 2009), p. 355.

[470] (*footnote original*) Indeed, the *Macmillan Dictionary of Economics*, 4th ed., D.W. Pearce (ed.), (Macmillian Press Ltd., 1992) defines a "price support scheme" as " a method of artificially raising the price of a good in the market. This will give rise to a situation in which supply exceeds demand and would therefore normally result in the government agency responsible for the support having to purchase the excess supplies itself". A similar definition is provided in the *Dictionary of Economics*, G. Banncok, R.E. Baxter and E. Davis

However, despite the potential for a broad interpretation of the term 'price support', reading it in the context of Article 1.1(a) of the SCM Agreement suggests that a more narrow interpretation is appropriate. Under Article 1.1(a)(1)(i)-(iv), the existence of each of the four types of financial contribution is determined by reference to the action of the government concerned, rather than by reference to the effects of the measure on a market. This is consistent with the panel's interpretation of 'financial contribution' in *US – Export Restraints*, which the Appellate Body concurred with in *US – Countervailing Duty Investigation on DRAMS*.[471] In *US – Export Restraints*, the panel noted that the concept of 'financial contribution' was included in the definition of subsidy in order to avoid an effects-based approach to the concept of a subsidy. …

Reading the term 'price support' in this context, it is our view that it does not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions. In particular, it is not clear that Article 1.1(a)(2) was intended to capture all manner of government measures that do not otherwise constitute a financial contribution, but may have an indirect effect on a market, including on prices. The concept of 'price support' also acts as a gateway to the SCM Agreement, and it is our view that its focus is on the nature of government action, rather than upon the effects of such action. Consequently, the concept of 'price support' has a more narrow meaning than suggested by the applicants, and includes direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium.

Although neither the Appellate Body nor any WTO dispute settlement panels have been required to resolve the meaning of the term 'price support' under Article 1.1(a)(2) of the SCM Agreement, we find some support for our approach in the reasoning of a GATT panel, which speculated on the circumstances under which 'a system which fixes domestic prices to producers at above the world price level might be considered a subsidy in the meaning of Article XVI'. The panel agreed that 'a system under which a government, by direct or indirect methods, maintains such a price by purchases and resale at a loss is a subsidy'. However, the Panel speculated that 'where a government fixes by law a minimum price to producers which is maintained by quantitative restrictions…there would be no loss to government' and consequently, no subsidy.[472] We note that the conclusion regarding the latter example is less relevant in the context of the SCM Agreement, under which the benefit of a subsidy is defined by reference to market benchmarks, rather than by the cost to government. However, both examples used by the GATT panel at least illustrate that it envisaged 'price support' to involve the government setting and maintaining a fixed price, rather than a random change in price merely being a side-effect of any form of government measure.

Further, although the SCM Agreement does not include a definition of the term 'price support', we note that a concept of 'market price support' is included in the Agreement on Agriculture. Annex 3 of that Agreement provides that 'market price support' is calculated as the difference between an external reference price and the 'applied

(eds.) (the Economist Books, 1999). This supports a much more narrow concept of price support than suggested in the application.

[471] (*footnote original*) Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

[472] (*footnote original*) GATT Panel on Subsidies and State Trading, Report on Subsidies, L/1160, 23 March 1960. See L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective*, (Oxford University Press, 2009), pp. 123-125 for discussion of this GATT panel.

> administered price'.[473] This indicates, at least for the type of price support contemplated in Annex 3 of the Agreement on Agriculture, that a direct form of government control over domestic prices is required, in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention."[474]

(d) "benefit" (Art. 1.1(b))

(i) General

210. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body upheld, albeit for different reasons, the Panel's findings that the payments and access to facilities, equipment, and employees provided under the NASA procurement contracts and USDOD assistance instruments at issue conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement.[475]

211. The Panel in *Canada – Renewable Energy / Feed-In Tariff Program* concluded that the complainants failed to demonstrate that the financial contribution conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, given the inappropriateness of the benchmark used by the complainants.[476] The Appellate Body reversed the Panel's finding that the complainants failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. However, the Appellate Body was unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b).[477]

(ii) Arising from the allocation of intellectual property rights

212. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body upheld, albeit for different reasons, the Panel's findings that the payments and access to facilities, equipment, and employees provided under the NASA procurement contracts and USDOD assistance instruments at issue conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement.[478] In the course of its analysis, the Appellate Body stated that:

> "US law constrains NASA's and the USDOD's ability to negotiate ownership over any intellectual property developed under the relevant contracts and agreements. We explain in Part VII that, pursuant to the Bayh-Dole Act of 1980, the 1983 Presidential Memorandum, the 1987 Executive Order, and the relevant general and NASA-specific federal regulations, neither the USDOD nor NASA will seek to obtain title to any inventions discovered as part of the work conducted under the NASA procurement contracts and USDOD assistance instruments. Rather, it is expected that the contractor (Boeing) will obtain ownership over the intellectual property rights. The contractor also owns 'all technical data (i.e. data rights) produced with U.S. government funding, and may use these for {its} own commercial purposes'. Thus, in effect, the allocation of intellectual property rights is pre-determined under the US legal framework. Put differently, there is no bargaining over the ownership of the intellectual property. Whereas, in a transaction between two market actors, the party undertaking the research would have to bargain to obtain ownership of any intellectual property, firms that enter into contracts or agreements

[473] (*footnote original*) This is multiplied by the quantity of production eligible to receive the applied administered price, to calculate the "aggregate measures of support".

[474] Panel Report, *China – GOES*, paras. 7.84-7.87.

[475] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 626-666.

[476] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.270-7.327.

[477] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.140-5.246.

[478] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 626-666.

> with NASA and the USDOD need not bargain at all over intellectual property rights because they can expect to obtain ownership under the prevailing US legal framework. NASA and the USDOD are thus constrained by US law as to the gains that they can extract from the transaction. Meanwhile, the party undertaking research commissioned by NASA or the USDOD—in this case, Boeing—obtains ownership rights over intellectual property that it would otherwise have had to bargain for if the counterparty were a market actor.
>
> We recall that the determination of 'benefit' under Article 1.1(b) of the *SCM Agreement* seeks to identify whether the financial contribution has made 'the recipient 'better off' than it would otherwise have been, absent that contribution'.[479] Moreover, the Appellate Body has said that 'the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.'[480] As we have discussed above, even assuming that the evidence submitted by the United States is accurate and uncontested, the allocation of intellectual property rights in the examples of market transactions on record has been more favourable to the commissioning party and less favourable to the commissioned party than under the NASA procurement contracts and USDOD assistance instruments before us. This evidence thus indicates that transactions in the market result in an equilibrium that is more favourable to the commissioning party than in the measures before us. In other words, Boeing obtained more and NASA and the USDOD obtained less than they would have obtained in the market. In our view, this conclusion is sufficient to establish that the provision by NASA and by the USDOD of funding and other support to Boeing on the terms of the joint venture arrangements that are before us conferred a benefit on Boeing within the meaning of Article 1.1(b) of the *SCM Agreement*."[481]

(iii) "Common sense" approach to benefit

213. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the Panel erred in its "common sense" approach to finding the existence of a benefit:

> "[W]e have difficulties with the Panel's reasoning about the market benchmark. With respect to both the NASA procurement contracts and the USDOD assistance instruments, the Panel stated its view that 'no commercial entity, i.e. no private entity acting pursuant to commercial considerations, would provide payments (and access to its facilities and personnel) to another commercial entity on the condition that the other entity perform R&D activities principally for the benefit and use of that other entity.' The Panel added that '{a}t a minimum, it is to be expected that some form of royalties or repayment would be required in the event that financial contributions were provided on such terms.' The Panel's finding as to the behaviour of a market actor was based exclusively on the Panel's own view of how a commercial actor would behave and its inferences as to what a rational investor would do. The Panel did not indicate what evidence there was on the record to sustain its view that a private entity acting pursuant to commercial considerations would not provide payments (and access to its facilities and/or personnel) to another commercial entity where this other entity performs R&D activities principally for its own benefit and

[479](*footnote original*) Appellate Body Report, *Canada – Aircraft*, para. 157.
[480] (*footnote original*) Appellate Body Report, *Canada – Aircraft*, para. 157.
[481] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 661-662.

use, and that, at a minimum, it would be expected that some form of royalties or repayment would be required.

It is possible that the Panel believed that its view represented common sense, or its own conception of economic rationality. If this were indeed the case, we would nevertheless consider the Panel's approach unsatisfactory. We do not believe that panels can base determinations as to what would occur in the marketplace only on their own intuition of what rational economic actors would do. We recognize that a panel confronted with a measure of the kind at issue here may have intuitions as to the consistency of the measure with the market, based on economic theory. However, we would expect that in such circumstances the panel would at least explain the economic rationale or theory that supports its intuition. The Panel in this case did not do so. More importantly, we are of the view that a panel should test its intuitions empirically, especially where the parties have submitted evidence as to how market actors behave. Indeed, in this case, both the European Communities and the United States submitted evidence as to how research transactions between two market actors are structured. Yet, while the Panel referenced some of that evidence in its summary of the parties' arguments, it did not discuss this evidence in its reasoning."[482]

(iv) Method for benefit analysis may depend on how financial contribution is characterized

214. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body observed that:

"As a preliminary matter, we note that the characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted. For instance, the context provided by Article 14 of the SCM Agreement presents different methods for calculating the amount of a subsidy in terms of benefit to the recipient depending on the type of financial contribution at issue. However, although different characterizations of a measure may lead to different *methods* for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a "financial contribution" or "any form of income or price support" has conferred a benefit to the recipient.[483],[484]

(v) Where governments intervene to create markets that would otherwise not exist

215. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body stated:

"Nevertheless, while introducing legitimate policy considerations into the determination of benefit cannot be reconciled with Article 1.1(b) of the SCM Agreement, we do not think that a market-based approach to benefit benchmarks excludes taking into account situations where governments intervene to create markets that would otherwise not exist. For example, governments create electricity markets with constant and reliable supply. By regulating the quantity and the type of electricity that is supplied through the network (base-load, intermediate-load, or peak-load) and the timing of such supply, governments ensure

[482] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 642-643.

[483] (*footnote original*) In the context of examining a financial contribution, the Appellate Body found in *Canada – Aircraft* that the analysis under Article 1.1(b) of the SCM Agreement requires assessing whether a financial contribution "makes the recipient 'better off' than it would otherwise have been, absent that contribution". (Appellate Body Report, *Canada – Aircraft*, para. 157)

[484] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.130.

> that there is a continuous supply-demand balance between generators and consumers, thus avoiding imbalances that would destabilize the network and cause interruptions of power supply. Although this type of intervention has an effect on market prices, as opposed to a situation where prices are determined by unconstrained forces of supply and demand, it does not exclude *per se* treating the resulting prices as market prices for the purposes of a benefit analysis under Article 1.1(b) of the SCM Agreement. In fact, in the absence of such government intervention, there could not be a market with a constant and reliable supply of electricity.[485]
>
> …
>
> Nevertheless, a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. While the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries."[486]

2. Article 2: Specificity

(a) General

216. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the allocation of patent rights under NASA/DOD contracts was not specific within the meaning of Article 2.1(a) of the SCM Agreement.[487] The Appellate Body began its analysis by setting forth its reservations about the Panel's use of an *arguendo* approach with respect to the existence of a subsidy under Article 1. It then upheld the Panel's finding that the allocation of patent rights under contracts and agreements between NASA/USDOD and Boeing was not explicitly limited to certain enterprises within the meaning of Article 2.1(a) of the SCM Agreement. Having found that the Panel erred by failing to examine the European Communities' argument that such allocation was "in fact" specific under Article 2.1(c) of the SCM Agreement, the Appellate Body proceeded to reject this argument. The Appellate Body also upheld the Panel's finding that the Washington State B&O tax rate reduction was specific within the meaning of Article 2.1(a) of the SCM Agreement.[488] The Appellate Body upheld, albeit for different reasons, the Panel's finding that the subsidies provided by the City of Wichita through the issuance of Industrial Revenue Bonds subsidies provided to Boeing and Spirit were specific within the meaning of Article 2.1(c) of the SCM Agreement.[489]

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[485] In particular, the Panel points out that, if supply and demand were not continuously balanced between generators and consumers, this would destabilize the networks, "leading to brownouts, blackouts or, in extreme cases, the interruption of power to all consumers". (Panel Reports, para. 7.11 (referring to Hogan Report, p. 13))

[486] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.185, 5.188.

[487] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 724-800.

[488] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 832-858.

[489] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 859-889.

(b) When subsidy at issue is part of the wider subsidy scheme

217. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the allocation of patent rights under NASA/DOD contracts is not specific within the meaning of Article 2.1(a) of the SCM Agreement, on the grounds that the allocation of patent rights under NASA/DOD contracts was the same as under other US government contracts. In the course of its analysis, the Appellate Body stated:

> "Article 2.1(a) refers to limitations on access to 'a subsidy'. Although the use of this term in the singular might suggest a limited conception, we note that, if construed too narrowly, any individual subsidy transaction would be, by definition, specific to the recipient. Other context in Article 2.1 suggests a potentially broader framework within which to examine specificity. As we have noted, subparagraphs (a) and (b) of Article 2.1 refer to 'the granting authority, or the legislation pursuant to which the granting authority operates'. The second sentence of subparagraph (c) refers both to 'a subsidy' and to 'a subsidy programme'. Similarly, examining economic diversification or the duration of a subsidy programme under the last sentence of Article 2.1(c) also entails consideration of the broader framework pursuant to which a particular challenged subsidy has been issued. We do not consider that the use of the term 'granting authority' in the singular limits the inquiry. The use of the term 'granting authority', in our view, does not preclude there being multiple granting authorities. Rather, this is likely where a subsidy is part of a broader scheme.
>
> The foregoing indicates that the scope of the inquiry called for under Article 2.1(a) is not necessarily limited to the subsidy as defined in Article 1.1. Although the subsidy as defined in Article 1.1 is the starting point of the analysis under Article 2.1(a), the scope of the inquiry is broader in the sense that it must examine the legislation pursuant to which the granting authority operates, or the express acts of the granting authority. We note that a granting authority will normally administer subsidies pursuant to legislation. Thus, we would expect that most claims of specificity under Article 2.1(a) would focus on limitations set out in the legislation pursuant to which the granting authority operates. Members may design the legal framework for the distribution of subsidies in many ways. However, the choice of the legal framework by the respondent cannot predetermine the outcome of the specificity analysis. For instance, a Member may choose to authorize the distribution of subsidies to eligible enterprises or industries in the same legal instrument. In such cases, the inquiry may focus solely on that legal instrument. In other circumstances, a Member may set up a more complex regime by which the same subsidy is provided to different recipients through different legal instruments. It may also be that a Member may administer the distribution of subsidies through multiple granting authorities. In these cases, the inquiry may have to take into account this legal framework. This framework may be set out in laws, regulations, or other official documents, all of which may be part of the 'legislation' pursuant to which the granting authority operates. We find support for this reading of 'legislation' in Article 2.1(b), which provides that, '{w}here the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy', these criteria or conditions 'must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification'.
>
> …
>
> Determining whether multiple subsidies are part of the same subsidy is not always a clear-cut exercise. As we have explained, it requires careful scrutiny of the relevant

> legislation —whether set out in one or several instruments—or the pronouncements of the granting authority(ies) to determine whether the subsidies are provided pursuant to the same subsidy scheme. Another factor that may be considered is whether there is an overarching purpose behind the subsidies. Of course, this overarching purpose must be something more concrete than a vague policy of providing assistance or promoting economic growth.
>
> Once the proper subsidy scheme is identified, then the question is whether that subsidy is explicitly limited to 'certain enterprises', defined in the chapeau of Article 2.1 as 'an enterprise or industry or group of enterprises or industries'. To be clear, such examination must seek to discern from the legislation and/or the express acts of the granting authority(ies) which enterprises are eligible to receive the subsidy and which are not. This inquiry focuses not only on whether the subsidy was provided to the particular recipients identified in the complaint, but focuses also on all enterprises or industries eligible to receive that same subsidy. Thus, even where a complaining Member has focused its complaint on the grant of a subsidy to one or more enterprises or industries, the inquiry may have to extend beyond the complaint to determine what other enterprises or industries also have access to that same subsidy under that subsidy scheme."[490]

218. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body also upheld the Panel's finding that the differential B&O tax rates maintained by Washington State formed "part of a common subsidy programme".[491]

(c) "disproportionately large"

219. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body addressed the meaning of "disproportionately large" in the context of Article 2.1(c):

> "In this dispute, the Panel conducted an analysis of the IRBs under each of the factors set out in Article 2.1(c). However, the factor on which the Panel based its specificity finding, and which is directly at issue on appeal, concerns 'the granting of disproportionately large amounts of subsidy to certain enterprises'. Article 2.1(c) does not offer clear guidance as to how to measure whether certain enterprises are 'grant{ed} disproportionately large amounts of subsidy'. The language of Article 2.1(c) indicates that the first task is to identify the 'amounts of subsidy' granted. Second, an assessment must be made as to whether the amounts of subsidy are 'disproportionately large'. This term suggests that disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large.[492] When viewed against the analytical framework set out above regarding Article 2.1(c), this factor requires a panel to determine whether the actual allocation of the 'amounts of subsidy' to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the

[490] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 749-753.
[491] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 856.
[492] (*footnote original*) The term "disproportionate" signifies "{l}acking proportion; poorly proportioned; out of proportion *(to)*; relatively too large or too small"; and the term "proportion" refers to "{a} portion, a part, a share, esp. in relation to a whole; a relative amount or number". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 713 and Vol. 2, p. 2372, respectively)

conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.

…

We do not consider that the focus by the parties and the Panel on determining what share of employment Boeing and Spirit had within the Wichita economy is particularly relevant to the inquiry of whether the IRB subsidies granted to Boeing and Spirit were disproportionately large. As we have explained, a panel's inquiry under Article 2.1(c) should focus on the reasons that explain any disparity between the actual and expected distributions of a subsidy. On appeal, the United States seeks to explain why the fact that Boeing and Spirit were granted 69% of IRB benefits does not indicate the granting of disproportionately large amounts of subsidy. The United States argues that IRBs are not available to the entire economy of Wichita, and that, as a result, calculating Boeing's and Spirit's share of economic participation as a ratio of employment levels of the entire Wichita manufacturing sector is not informative. As the United States argues, 'only those companies that fund, construct or improve industrial and/or commercial property during the relevant time period actually had access to the IRB program', and there is therefore no reason to assume 'that there is necessarily a logical and 'proportionate' relationship between the number of employees of a particular company or group of companies as compared to all employment in the Wichita manufacturing sector, and the amount of IRB tax benefits received'. It would have made much more sense, the United States argues, to take a look at 'qualifying investments' during the relevant period of time—that is, 'those companies that actually made investments in industrial or commercial property'.

We agree that examining qualifying investments would have been a reasonable basis on which to show why the 69% figure does not indicate that IRB subsidies were granted in disproportionately large amounts. In particular, such a showing may have explained why, for IRB benefits seemingly broadly available over a 25-year period to enterprises seeking to develop commercial or industrial property, one company and its successor received over two thirds of those benefits. However, we do not see on the Panel record that the United States provided evidence in support of such an explanation.

Instead, the United States advanced the generalized arguments that the Wichita economy is undiversified, that the 'core industry of Wichita has focused on aircraft production', and that Wichita is sometimes known as the 'Air Capital of the World'. We do not see, however, that the United States put forward evidence to demonstrate that, even taking into account the particular focus in Wichita on aircraft manufacturing, Boeing and Spirit would be expected to receive over two thirds of IRB subsidies. On this basis, we agree with the Panel's assessment that the United States' arguments regarding the diversification of the Wichita economy were made only at 'a relatively high level of generality'. In sum, we do not see that the United States provided sufficient reasons supported by evidence to undermine the assessment that the granting to Boeing and Spirit of 69% of the amounts of IRB subsidy represents an allocation at variance from what would have been expected from the allocation of IRBs in accordance with their conditions for eligibility."[493]

[493] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 879, 886-888.

3. Article 3: Prohibition

(a) Article 3.1(b) (subsidies contingent on the use of domestic goods)

(i) Relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement

220. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body discussed the relationship between Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and the TRIMs Agreement. In the course of its analysis, the Appellate Body stated:

> "Both the national treatment obligations in Article III:4 of the GATT 1994 and the TRIMs Agreement, and the disciplines in Article 3.1(b) of the SCM Agreement, are cumulative obligations. Article III:4 of the GATT 1994 and the TRIMs Agreement, as well as Article 3.1(b) of the SCM Agreement, prohibit the use of local content requirements in certain circumstances. These provisions address discriminatory conduct. We see nothing in these provisions to indicate that there is an obligatory sequence of analysis to be followed when claims are made under Article III:4 of the GATT 1994 and the TRIMs Agreement, on the one hand, and Article 3.1(b) of the SCM Agreement, on the other hand. Nor has Japan argued that the disposition of its claim under Article 3.1(b) of the SCM Agreement would somehow pre-empt our assessment under Article III:4 of the GATT 1994 and the TRIMs Agreement.
>
> We are aware that, in a series of previous disputes, issues concerning the sequence of analysis have been dealt with by seeking to identify the agreement that "deals specifically, and in detail, with" the measures at issue.[494] Japan and the European Union both emphasized before the Panel that the focus of their complaints is the domestic content requirements that form part of the FIT Programme and FIT and microFIT Contracts. We note that the TRIMs Agreement deals specifically with investment measures related to trade in goods or TRIMs. It does not regulate anything else. Domestic content requirements are one type of TRIM regulated under the TRIMs Agreement. One of the examples in the Illustrative List annexed to the TRIMs Agreement refers specifically to requirements relating to "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production". The SCM Agreement deals specifically with subsidies. It defines what government conducts constitute subsidies, classifies different kinds of subsidies, and establishes different regulations for each type of subsidy. The SCM Agreement also sets out the remedies available to WTO Members affected by subsidies and provides detailed guidance on how domestic countervailing duty investigations should be conducted. The local content requirements of the FIT Programme and related FIT and microFIT Contracts are being challenged by Japan under Article 3.1(b) of the SCM Agreement. This provision regulates so-called import-substitution subsidies, which are one of only two kinds of subsidies prohibited under the SCM Agreement. At the same time, the SCM Agreement regulates a broader universe of measures. Thus, based on the above discussion, we are not persuaded that, compared to the GATT 1994 and the

[494] (*footnote original*) Appellate Body Report, *EC – Bananas III*, para. 204. See also Panel Reports, *Indonesia – Autos*, paras. 14.61-14.63; *EC – Bananas III*, paras. 7.185-7.187; *Canada – Autos*, paras. 10.63 and 10.64; and *India – Autos*, paras. 7.157-7.162.

TRIMs Agreement, the SCM Agreement can be described as regulating more "specifically, and in detail,"[495] the measures challenged in this dispute."[496]

4. Article 5: Adverse Effects

(a) Article 5(c) (serious prejudice)

221. See below under Article 6.

5. Article 6: Serious Prejudice

(a) General

222. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body upheld but modified the Panel's overall conclusion that the aeronautic R&D subsidies and tax subsidies at issue caused serious prejudice to the interests of the European Communities within the meaning of Articles 5(c), 6.3(b) and 6.3(c)of the SCM Agreement. In its examination of whether the specific subsidies provided to Boeing caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) and 6.3 of the SCM Agreement, the Appellate Body first considered the "technology effects" of the aeronautics R&D subsidies with respect to the 200-300 seat LCA market, and then considered the "price effects" of certain tax and other subsidies with respect to the 100-200 seat and 300-400 seat LCA markets.

223. With respect to the "technology effects" of the aeronautics R&D subsidies, the Appellate Body upheld the Panel's finding of significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, reversed the Panel's finding that the effect of the aeronautics R&D subsidies was a threat of displacement and impedance of EC exports in third-country markets within the meaning of Article 6.3(b) of the SCM Agreement, and upheld the Panel's finding that that the effect of the aeronautics R&D subsidies was significant price suppression within the meaning of Article 6.3(c).[497]

224. With respect to the "price effects" of certain tax and other subsidies at issue, the Appellate Body concluded that the Panel did not provide a proper legal basis for its generalized findings and therefore reversed the Panel's findings that the FSC/ETI subsidies and the B&O tax rate reductions caused significant price suppression, significant lost sales, and displacement and impedance in the 100-200 seat and 300-400 seat LCA markets, and therefore serious prejudice to the interests of the European Communities, within the meaning of Articles 5(c) and 6.3(b) and 6.3(c) of the SCM Agreement.

225. In completing the analysis, the Appellate Body found that, in two sales campaigns, the FSC/ETI subsidies and the Washington State B&O tax rate reduction caused, through their effects on Boeing's prices, significant lost sales to Airbus within the meaning of Article 6.3(c) of the SCM Agreement.[498] Moreover, the Appellate Body: (i) found that the Panel erred in failing to consider whether the price effects of the B&O tax rate reductions complement and supplement the technology effects of the aeronautics R&D subsidies in causing significant lost sales and significant price suppression, and a threat of displacement and impedance, in the 200-300 seat LCA market; (ii) reversed the Panel's finding that the remaining subsidies had not been shown to have affected Boeing's prices in a manner giving rise to serious prejudice with respect to the 100-200 seat and 300-400 seat LCA markets; and (iii) in completing the analysis, found that the effects of the City of Wichita IRBs complemented and supplemented the price effects of the FSC/ETI subsidies and the

[495] (*footnote original*) Appellate Body Report, *EC – Bananas III*, para. 204.
[496] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.5-5.6.
[497] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 923-1127.
[498] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1146-1274.

State of Washington B&O tax rate reduction, thereby causing serious prejudice, in the form of significant lost sales, within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement, in the 100-200 seat LCA market.[499]

(b) "genuine and substantial" causal relationship

226. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that:

> "In setting out the above approach, the Panel did not extensively elaborate its understanding of the requisite causal link pursuant to Articles 5(c) and 6.3 of the *SCM Agreement*. Although neither participant has appealed the Panel's articulation of its intended approach, we nevertheless consider it useful to recall briefly the main elements of a causation analysis under Part III of the *SCM Agreement* because of the centrality of the issue of causation to many of the claims of error raised in this appeal.
>
> A plain reading of the language of Article 5 ('No Member should *cause*, through the use of any {specific subsidy} … (c) serious prejudice to the interests of another Member'); of Article 6.2 ('serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not *resulted in* any of the *effects* enumerated in {Article 6.3}'); and of Article 6.3 (which provides that serious prejudice may arise when 'the *effect* of the subsidy' is one or more of the market phenomena listed in that provision) makes clear that, in disputes involving claims under Part III of the *SCM Agreement*, a complainant must demonstrate not only the existence of the relevant subsidies and the adverse effects to its interests, but also that the subsidies at issue have *caused* such effects.[500] The Appellate Body has consistently articulated the causal link required as 'a genuine and substantial relationship of cause and effect'.[501] In other words, the subsidies must contribute, in a 'genuine'[502] and 'substantial'[503] way, to producing or bringing about one or more of the effects, or market phenomena, enumerated in Article 6.3.
>
> When tasked with determining whether the causal link in question meets the requisite standard of a 'genuine and substantial' causal relationship, a panel will often be confronted with multiple factors that may have contributed, to varying degrees, to

[499] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1275-1349.

[500] (*footnote original*) This fundamental precept was recognized by the first panel to assess a claim under Part III of the *SCM Agreement*. (Panel Report, *Indonesia – Autos*, para. 14.154)

[501] (*footnote original*) See, for example, Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1232. In identifying the nexus that must be established between the subsidies at issue and the relevant market effects, the Appellate Body has drawn to some extent on jurisprudence with respect to the causation requirements in trade remedy cases, while at the same time cautioning that the explicit causation requirements that the covered agreements prescribe in connection with anti-dumping, countervailing duty, and safeguards investigations "apply in different contexts and with different purposes" and, therefore, "must not be automatically transposed into Part III of the *SCM Agreement*". (Appellate Body Report, *US – Upland Cotton*, para. 438)

[502] (*footnote original*) The "genuine" nature of the causal link requires a complainant to show that the nexus between cause and effect is "real" or "true". Dictionary definitions of "genuine" include "{h}aving the character claimed for it: real, true, not counterfeit", and "{n}atural or proper to a person or thing". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1094)

[503] (*footnote original*) As for the "substantial" component of the causal relationship, this concerns the relative importance of the causal agent (the subsidies at issue) in bringing about the adverse effect(s) in question. Dictionary definitions of "substantial" include "{h}aving solid worth or value, of real significance; solid; weighty; important, worthwhile" and "{o}f ample or considerable amount or size; sizeable, fairly large". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3088)

that effect. Indeed, in some circumstances, it may transpire that factors other than the subsidy at issue have caused a particular market effect. Yet the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a 'genuine and substantial' cause of that effect. Thus, as part of its assessment of the causal nexus between the subsidy at issue and the effect(s) that it is alleged to have had, a panel must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative importance of the subsidy and of the other factors in bringing about, the relevant effects. In order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect. A panel must, however, take care to ensure that it does not attribute the effects of those other causal factors to the subsidies at issue[504], and that the other causal factors do not dilute the causal link between those subsidies and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect.[505] The subsidy at issue may be found to exhibit the requisite causal link notwithstanding the existence of other causes that contribute to producing the relevant market phenomena if, having given proper consideration to all other relevant contributing factors and their effects, the panel is satisfied that the contribution of the subsidy has been demonstrated to rise to that of a genuine and substantial cause.

Finally, we note that a demonstration that subsidies are a genuine and substantial cause of the alleged serious prejudice is a fact-intensive exercise, and one that inevitably involves extensive, case-specific evidence. The manner in which a complainant may seek to demonstrate the existence of the effects and the links between the subsidies at issue and those effects, and the type of supporting evidence that may be adduced, are likely to vary considerably. Even though each panel's assessment will turn very much on the particular facts and circumstances of the case, it must not deviate from the requirements outlined above."[506]

(c) "significant lost sales"

227. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that:

"We begin with the United States' challenge to the Panel's finding that the effect of the aeronautics R&D subsidies was significant lost sales to Airbus in the same market, within the meaning of Article 6.3(c) of the *SCM Agreement*.

The Appellate Body has defined a 'lost sale' as one that a supplier 'failed to obtain'.[507] The Appellate Body has understood that concept as 'relational', entailing consideration of 'the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales', due to the effect of the subsidy.[508] Sales can be lost 'in the same market', within the meaning of Article 6.3(c), only if the subsidized product and the like product compete in the same

[504] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, para. 437; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1232.

[505] (*footnote original*) Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375; Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1376.

[506] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 912-915.

[507] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214.

[508] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214.

product market. With respect to the meaning of 'significant', the Appellate Body has noted that this term means 'important, notable or consequential'[509], and has both quantitative and qualitative dimensions."[510],[511]

(d) "displacement" and "impedance"

228. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that:

> "Before addressing the specific arguments on appeal, we recall the meaning of the concepts of displacement and impedance as previously stated by the Appellate Body. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that 'displacement' refers to an economic mechanism in which exports of a like product are replaced by the sales of the subsidized product.[512] Specifically, it found that 'displacement' connotes that there is 'a substitution effect between the subsidized product and the like product of the complaining Member' and, in the context of Article 6.3(b), 'displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product.'[513] The existence of displacement depends upon there being a competitive relationship between these two sets of products in that market and, when this is the case, certain behaviour such as '{a}ggressive pricing' may 'lead to displacement of exports … in {that} particular market'.[514] An analysis of displacement should assess whether this phenomenon is discernible by examining trends in data relating to export volumes and market shares over an appropriately representative period.[515] With respect to 'impedance', the Appellate Body expressed the view that this concept may involve a broader range of situations than displacement and arises both in 'situations where the exports or imports of the like product of the complaining Member would have expanded had they not been 'obstructed' or 'hindered' by the subsidized product', as well as when such exports or imports 'did not materialize at all because production was held back by the subsidized product'.[516] While there may be some overlap between the concepts, 'displacement' and 'impedance' are therefore not interchangeable concepts."[517]

(e) "market"

229. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body recalled that:

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[509] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, para. 426 (referring to Panel Report, *US – Upland Cotton*, para. 7.1326).

[510] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218.

[511] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1051-1052.

[512] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

[513] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1160.

[514] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

[515] (*footnote original*) See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1165, 1166, and 1170.

[516] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1161. The Appellate Body noted that it was not required to consider the meaning of impedance in that appeal. Nevertheless, the Appellate Body considered that this concept, which is found within the same provision of the *SCM Agreement*, serves as relevant context for "a better understanding of displacement". (*Ibid*.)

[517] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1071.

"In *EC and certain member States – Large Civil Aircraft*, the Appellate Body clarified that a 'market', within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*, is a particular set of products that are in actual or potential competition with each other within a particular geographical area. An assessment of the competitive relationship between products in the market is required in order to determine 'whether and to what extent one product may displace another'.[518] There is 'both a geographic and product market component to the assessment of displacement'[519] and, by implication, impedance.[520] In principle, the manner in which the geographic dimension of a market is determined will depend on a number of factors: in some cases, the geographic market may extend to cover the entire country concerned; in others, an analysis of the conditions of competition for sales of the product in question may provide an appropriate foundation for a finding that a geographic market exists *within* that area, for example, a region. There may also be cases where the geographic dimension of a particular market exceeds national boundaries or could be the world market.[521] A plain reading of Article 6.3(b), however, reveals that a finding of displacement or impedance under that provision is to be limited to the territory of the third country at issue. Accordingly, findings of displacement and impedance are to be made only with respect to the territory of the third country involved, even though, from an economic perspective, the geographic market may not be national in scope. Thus, the Appellate Body explained that, even in cases where the geographic dimension of a particular market exceeds national boundaries or is worldwide, a panel faced with a claim under Article 6.3(b) should 'focus the analysis of displacement and impedance on the territory of the … third countries involved.'[522]"[523]

(f) "significant price suppression"

230. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that:

"The United States advances three separate arguments as to why the Panel's finding of price suppression should be reversed. Before turning to these arguments, we recall that the Appellate Body has provided the following definition of price suppression:

> '{P}rice suppression' refers to the situation where 'prices' ... either are prevented or inhibited from rising (i.e. they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been. Price depression

[518] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1119.

[519] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1168.

[520] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, footnote 2466 to para. 1119.

[521] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1117. Where the geographic dimension of the market is smaller in scope than the entire territory of the third-country Member concerned, the wording of Article 6.3(b) suggests that a panel will nonetheless have to ensure that any finding reached relates to that territory as a whole, and explain why this is so.

[522] (*footnote original*) Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1117.

[523] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1076.

> refers to the situation where 'prices' are pressed down, or reduced.[524] (original emphasis)

> Price suppression is therefore concerned with 'whether prices are less than they would otherwise have been in consequence of … the subsidies'.[525] For this reason, a counterfactual analysis is likely to be of particular utility for panels faced with claims that subsidies have caused price suppression."[526]

(g) Magnitude of subsidies

231. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body discussed the relevance of the magnitude of subsidies to the analysis of serious prejudice:

> "We recall that the Appellate Body addressed issues relating to the amounts of the subsidies at issue in *US – Upland Cotton.* In that dispute, the Appellate Body rejected the United States' contention that Article 6.3(c) requires a panel to quantify precisely the amount of the challenged subsidy benefiting the product at issue in every case. The Appellate Body nevertheless stressed that, in analyzing a claim of significant price suppression, 'a panel will need to consider the effects of the subsidy on prices' and that, in doing so, 'it may be difficult to decide' whether the effect of a subsidy is significant price suppression without having regard to 'the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market.'[527] Moreover, although '{t}he magnitude of the subsidy is an important factor'[528], a panel needs to take into account 'all relevant factors'[529] in determining the effects of subsidies on prices.
>
> In our view, both the absolute and the relative magnitudes of subsidies are likely to be relevant to a panel's analysis of the effects of subsidies on prices. Both considerations may shed light on the impact that those subsidies have on price, although the extent to which either or both considerations shed light on this relationship will depend on the particular subsidies, products, and markets at issue. Through scrutinizing magnitude in the light of and as part of an analysis of the particular subsidies, the particular products, and the particular characteristics of the market within which those products compete, a panel can gain an understanding of the effects that the subsidies have on prices, and of the relevance of the subsidies' magnitude to such effects. In other words, what it means to take account of considerations of 'magnitude' will also depend upon the circumstances of each case and the market phenomenon at issue.[530]

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[524] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, para. 423 (quoting Panel Report, *US – Upland Cotton* para. 7.1277). Like the panel in *US – Upland Cotton*, we use the term "price suppression" to refer both to an actual decline (which otherwise would not have declined, or would have done so to a lesser degree) and an increase in prices (which otherwise would have increased to a greater degree). (Appellate Body Report, *US – Upland Cotton*, para. 423; Panel Report, *US – Upland Cotton*, footnote 1388 to para. 7.1277)

[525] (*footnote original*) Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351.

[526] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1091-1092.

[527] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, paras. 461 and 467.

[528] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, para. 461. Moreover, the Appellate Body noted: "A large subsidy that is closely linked to prices of the relevant product is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices." (*Ibid.*)

[529] (*footnote original*) Appellate Body Report, *US – Upland Cotton*, para. 461.

[530] (*footnote original*) Like the Panel, we use the term "magnitude" here in its broad sense ("{t}he 'magnitude' of something is generally understood as a reference to its size, extent, degree, or numerical quantity or value") and not in the specialized sense that it was at times used by the European Communities before the Panel, meaning a per-LCA aircraft amount calculated by allocating the total amounts of subsidies over time and across aircraft models. (Panel Report, footnote 3390 to para. 7.1615; see also para. 7.1616)

> Depending on the circumstances of each case, an assessment of whether subsidy amounts are significant should not necessarily be limited to a mere inquiry into *what* those amounts are, either in absolute or per-unit terms. Rather, such an analysis may be situated within a larger inquiry that could, for instance, entail viewing these amounts against considerations such as the size of the market as a whole, the size of the subsidy recipient, the per-unit price of the subsidized product, the price elasticity of demand, and, depending on the market structure, the extent to which a subsidy recipient is able to set its own prices in the market, and the extent to which rivals are able or prompted to react to each other's pricing within that market structure. Considerations of some of these elements formed part of the Appellate Body's analysis of the magnitude of price-contingent subsidies in *US – Upland Cotton (Article 21.5 – Brazil)*[531], and of the submissions that each of the parties made before the Panel in this dispute regarding the amount of the FSC/ETI subsidies relative to Boeing's delivery and order revenues.
>
> Like that of the panel in *US – Upland Cotton*[532], the reasoning of the Panel in this dispute with respect to the magnitude of the subsidies is somewhat opaque, and could have been more clearly elaborated. It may well be that, in considering magnitude, the Panel relied primarily on its findings regarding the *absolute* amounts of the tied tax subsidies. In this case, however, the parties also presented arguments and evidence regarding the *relative* significance of the subsidies and, in particular, on the issue of whether those subsidies were of a size that, when considered in relation to product values or prices, could produce market effects amounting to serious prejudice. We do not exclude that subsidies of a relatively small magnitude in relation to product values or prices could have such effects, or that the Panel could have reasoned to that conclusion in the circumstances of this case. Instead, however, the Panel dismissed the evidence advanced by the parties as not 'particularly informative or illustrative' of the capacity of these subsidies to affect Boeing's prices, without explaining why it considered this to be so. Given that a comparison of the magnitude of the FSC/ETI subsidies in relation to LCA values was a relevant matter clearly put before the Panel, we consider that the Panel should have offered more of an explanation as to why it rejected the relevance of such data for its analysis."[533]

6. Article 11: Initiation and Subsequent Investigation

(a) Article 11.2 (application must contain sufficient evidence)

(i) General

232. In *China – GOES*, the Panel found that China acted inconsistently with Article 11.3 of the SCM Agreement, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without "sufficient evidence" to justify this. The Panel reached its conclusions by reference to the requirements for "sufficient

[531] (*footnote original*) The Appellate Body explained that the panel in that case had found that the "magnitude of the marketing loan and counter-cyclical payments {was} significant not only in absolute terms, but also as a share of United States producers' total revenues". (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 362 (referring to Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.111))

[532] (*footnote original*) Although the Appellate Body accepted that panel's characterization of the magnitude of the subsidies as "very large amounts", it nonetheless observed that the panel "could have been more explicit and specified what it meant" in that regard. (Appellate Body Report, *US – Upland Cotton*, para. 468)

[533] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1192-1194.

evidence" set forth in Article 11.2 of the SCM Agreement, but did not consider it necessary to make a separate finding under this provision.[534]

(ii) "sufficient evidence"

233. The Panel in *China – GOES* addressed the meaning of "sufficient evidence" in the context of Article 11.2 and 11.3 of the SCM Agreement. In the course of its analysis, the Panel stated:

> "Under Article 11.3 of the SCM Agreement an investigating authority has an obligation to determine whether there is 'sufficient evidence' to justify initiation of an investigation. Part of this analysis must involve an assessment of the accuracy and adequacy of the evidence furnished. In the Panel's view, when evidence not in the application but relevant to the decision to initiate is submitted to an investigating authority, for example by an exporting Member, an unbiased and objective investigating authority would weigh this evidence in its assessment. Indeed, this is what the language in Article 11.3 implies, in providing that an investigating authority has a duty to determine the accuracy and adequacy of the evidence in the application.[535]
>
> …
>
> The term 'evidence' is defined, relevantly, as 'the available facts, circumstances, etc. supporting or otherwise a belief, proposition, etc., or indicating whether or not a thing is true or valid' and 'information given personally or drawn from a document etc. and tending to prove a fact or proposition'. The term 'sufficient' is defined, relevantly, as 'adequate'.[536] The Panel notes that the phrase 'sufficient evidence' in Articles 11.2 and 11.3 of the SCM Agreement is used in the context of determining whether the initiation of a countervailing duty investigation is justified. In making this determination, the investigating authority is balancing two competing interests, namely the interest of the domestic industry 'in securing the initiation of an investigation' and the interest of respondents in ensuring that 'investigations are not initiated on the basis of frivolous or unfounded suits'.[537] It is clear that at the stage of initiating an investigation, an investigating authority is not required to reach definitive conclusions regarding the existence of a subsidy, injury or a causal link between the two. Rather, as the panel noted in *Guatemala – Cement II*, an 'investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward'.[538] Indeed, both parties appear to agree with the reasoning of the panel in *US – Softwood Lumber V*, in examining the analogous provisions under the Anti-Dumping Agreement, that 'the quantity and the quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination'.[539]

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[534] Panel Report, *China – GOES*, paras. 7.48-7.148.

[535] (*footnote original*) Article 13.1 of the SCM Agreement also suggests that an investigating authority is required to weigh the evidence submitted prior to initiation by an exporting Member, as a part of the process of "clarifying the situation" as to the matters in Article 11.2 of the SCM Agreement.

[536] (*footnote original*) *The Concise Oxford English Dictionary*, D. Thompson (ed.) (Clarendon Press, 1995), pp. 467 and 1392.

[537] (*footnote original*) Panel Reports, *US – Offset Act (Byrd Amendment)*, para. 7.61 and *Guatemala – Cement I*, para. 7.52.

[538] (*footnote original*) Panel Report, *Guatemala – Cement II*, para. 8.35.

[539] (*footnote original*) Panel Report, *US – Softwood Lumber V*, para. 7.84.

> Therefore, while the amount and quality of the evidence required at the time of initiation is less than that required to reach a final determination, at the same time the requirement of 'sufficient evidence' is also a means by which investigating authorities filter those applications that are frivolous or unfounded. Although definitive proof of the existence and nature of a subsidy, injury and a causal link is not necessary for the purposes of Article 11.3, adequate evidence, tending to prove or indicating the existence of these elements, is required. Indeed, in considering the quality of the evidence that should be provided in an application before an investigation is justified, we note that Article 11.2 requires 'sufficient evidence of the *existence* of a subsidy', meaning that the evidence should provide an indication that a subsidy actually exists. It is also clear from the terms of Article 11.2 that 'simple assertion, unsubstantiated by relevant evidence' is not sufficient to justify the initiation of an investigation.
>
> According to China, the standard for 'sufficient evidence' must be interpreted in the light of the requirement in Article 11.2 that the application contain such information as is 'reasonably available' to the applicant. In the Panel's view, the fact that an applicant must provide such information as is 'reasonably available' to it confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination. However, an investigation cannot be justified where, for example, there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not 'reasonably available' to the applicant. Indeed, to justify initiation under Article 11.3, an investigating authority must have 'sufficient evidence' (whether from the applicant, exporting Member or arising out its own enquiries) and not mere assertion before it.[540]
>
> In the light of these considerations, the Panel considers that the standard advocated by China is at times overly permissive, as indicated in the Panel's consideration of the 11 programmes at issue."[541]

(iii) "the nature of the subsidy"

234. The Panel in *China – GOES* concluded that the requirement to provide sufficient evidence of the "nature of the subsidy" in Article 11.2(ii) requires sufficient evidence of each of the constitutive elements of a specific subsidy. In the course of its analysis, the Panel stated that:

> "In relation to whether evidence of specificity is required in an application, the Panel concurs with the parties that the reference to evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. Article 11 is found within Part V of the SCM Agreement. Further, Article 1.2 provides that a subsidy will be subject to Part V only if it is specific within the meaning of Article 2. Therefore, in our view, it is reasonable to conclude that evidence of the 'nature of the subsidy' includes evidence regarding whether the subsidy is specific. The alternative would be that the initiation of an investigation would be justified under Article 11.3, even though it may be clear at the time of initiation that the alleged subsidy is not subject to the disciplines of Part V of the SCM Agreement because it is broadly

[540] (*footnote original*) In relation to whether evidence must be analysed by an applicant, we note that with respect to each of the 11 programmes at issue in this case, the matter in contention between the parties is whether "sufficient evidence" was included in the application, rather than whether included evidence was analysed or not. In any event, we agree with the United States' statement that mere allegations cannot constitute sufficient evidence and that an applicant need not engage "in an in-depth analysis of the available information" (United States' response to Panel question 3, para. 11). However, we note that an investigating authority must review the accuracy and adequacy of the evidence in accordance with Article 11.3 of the SCM Agreement.

[541] Panel Report, *China – GOES*, paras. 7.52-7.57.

> available in a given jurisdiction. This would not be effective in filtering those applications that are 'frivolous or unfounded'.
>
> The Panel acknowledges that the term 'nature' is used in a number of sections of the SCM Agreement, and that it may not necessarily refer to 'specificity' in each instance. For example, the reference to 'nature' in Article 4.5 of the SCM Agreement appears to refer to whether or not a subsidy is prohibited. However, in the Panel's view, and as both parties agree, a consideration of the context in which a term is used can result in different meanings across different provisions.[542] As outlined in the previous paragraph, the context in which Articles 11.2 and 11.3 are found supports the parties' view that the 'nature' of a subsidy under Article 11.2 (iii) includes evidence of whether or not an alleged subsidy is specific.
>
> Having concluded that the evidence referred to in Article 11.2 of the SCM Agreement includes evidence of specificity, the Panel finds no basis for China's argument that a lower evidentiary standard applies in relation to it. There is nothing within the terms of Articles 11.2 or 11.3 to suggest that differing evidentiary standards apply depending upon the purpose for which the evidence is furnished. Rather, the same standard of 'sufficient evidence' applies regardless of whether the evidence relates to the existence of a financial contribution, benefit or specificity.
>
> …
>
> Further, the Panel is not convinced by China's argument that the purported evidence of specificity was sufficient in the light of the pervasive government support to the United States steel industry, which was discernible from the application. Article 11.2(iii) requires evidence of the 'nature', namely the specificity, 'of the subsidy in question'. In our view, this requires evidence of the nature of each alleged subsidy programme. General information about government policy, with no direct connection to the programme at issue, is not 'sufficient evidence' of specificity."[543]

(b) Article 11.3 (obligation to review evidence)

(i) General

235. In *China – GOES*, the Panel found that China acted inconsistently with Article 11.3 of the SCM Agreement, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without sufficient evidence to justify this.[544]

7. Article 12: Evidence

(a) Article 12.4 (confidentiality)

(i) General

236. In *China – GOES*, the Panel found that China acted inconsistently with Articles 12.4.1 of the SCM Agreement and 6.5.1of the Anti-Dumping Agreement, on the basis that MOFCOM did not

[542] (*footnote original*) For support for this proposition, see Appellate Body Report, *Japan – DRAMs (Korea)*, para. 272. For the views of the parties on this matter, see the United States' and China's responses to Panel question 37.

[543] Panel Report, *China – GOES*, paras. 7.60-7.62, 7.66.

[544] Panel Report, *China – GOES*, paras. 7.48-7.148.

require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.[545]

(b) Article 12.7 (use of facts available)

(i) General

237. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.7 of the SCM Agreement in connection with MOFCOM's use of a 100% utilization rate in calculating the subsidy rates for the two known respondents under certain procurement programmes.[546] The Panel found that China also acted inconsistently with Article 12.7 in applying 'facts available' to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation.[547] The Panel further found that China applied facts available in a manner inconsistent with Article 12.7 of the SCM Agreement by including programmes found by MOFCOM not to confer countervailable subsidies in the calculation of the 'all others' subsidy rate.[548]

(ii) "Facts available" for unknown exporters ("all others")

238. In *China – Broiler Products*, the Panel noted that "[t]he text of Article 12.7 of the SCM Agreement largely mirrors that of Article 6.8 of the Anti-Dumping Agreement", and it agreed with prior decisions that notwithstanding certain differences, these provisions impose "similar disciplines concerning the circumstances under which an authority may resort to facts available.[549]".[550] Consequently, the Panel found it appropriate to transpose *mutatis mutandis* its reasoning and conclusions concerning the complainant's parallel claim under Article 6.8 of the Anti-Dumping to the claim it raised under Article 12.7 of the SCM Agreement. Accordingly, the Panel found "that MOFCOM, having posted the Notice of Initiation (including the warning that facts available could be resorted to in the case of failure to register) and Registration Form on its website, could consider the failure to register and to provide the requested information as a failure to "otherwise … provide … necessary information" within the meaning of Article 12.7".[551] Thus, "MOFCOM … could determine the "all others" rate on the basis of available facts on the record of the investigation".[552]

(c) Article 12.8 (disclosure of essential facts)

(i) General

239. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose certain essential facts underlying its decision to apply an "all others" subsidy rate.[553] The Panel also found that China's failure to disclose the "essential facts" underlying MOFCOM's finding of "low" subject import prices was inconsistent with Article 12.8.[554]

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[545] Panel Report, *China – GOES*, paras. 7.187-7.225.
[546] Panel Report, *China – GOES*, paras. 7.266-7.311.
[547] Panel Report, *China – GOES*, paras. 7.446-7.448.
[548] Panel Report, *China – GOES*, paras. 7.449-7.452.
[549] (*footnote original*) See, *inter alia*, Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 291-298; Panel Report, *China – GOES*, para. 7.446, 7.450.
[550] Panel Report, *China – Broiler Products*, para. 7.355.
[551] Panel Report, *China – Broiler Products*, para. 7.356.
[552] Panel Report, *China – Broiler Products*, para. 7.356.
[553] Panel Report, *China – GOES*, paras. 7.461-7.466.
[554] Panel Report, *China – GOES*, paras. 7.567-7.575.

The Panel also found that China acted inconsistently with Article 12.8 in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation anaylsis.[555]

240. In *China – GOES*, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 12.8.[556] The Appellate Body agreed with the Panel that MOFCOM failed to disclose in its preliminary determination and its final injury disclosure document all the "essential facts" relating to the "low price" of subject imports on which it relied for its price effects finding. The Appellate Body found that MOFCOM was required to disclose, under Article 12.8, the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

(ii) "essential facts"

241. In *China – GOES*, the Appellate Body addressed the meaning of the terms "essential facts" in Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement:

> "At the heart of Articles 6.9 and 12.8 is the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures. As to the type of information that must be disclosed, these provisions cover 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties. We highlight that, unlike Articles 12.2.2 of the *Anti-Dumping Agreement* and 22.5 of the *SCM Agreement*, which govern the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping and countervailing duty investigations, Articles 6.9 and 12.8 concern the disclosure of 'facts' in the course of such investigations 'before a final determination is made'. Moreover, we note that Articles 6.9 and 12.8 do not require the disclosure of *all* the facts that are before an authority but, instead, those that are 'essential'; a word that carries a connotation of significant, important, or salient. In considering which facts are 'essential', the following question arises: essential for what purpose? The context provided by the latter part of Articles 6.9 and 12.8 clarifies that such facts are, first, those that 'form the basis for the decision whether to apply definitive measures' and, second, those that ensure the ability of interested parties to defend their interests.[557] Thus, we understand the 'essential facts' to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.

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[555] Panel Report, *China – GOES*, paras. 7.639-7.660.

[556] Appellate Body Report, *China – GOES*, paras. 233-251.

[557] (*footnote original*) An effective right for parties to defend their interests requires that, before a final determination is made, the authority explains, in the light of the substantive obligations of the *Anti-Dumping Agreement* and the *SCM Agreement*, how the essential facts serve as the basis for the decision whether to apply definitive measures. We agree with the panel in *EC – Salmon (Norway)* that these provisions are therefore intended "to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts." (Panel Report, *EC – Salmon (Norway)*, para. 7.805)

> We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link' between the dumping or subsidization and the injury to the domestic industry.[558] What constitutes an 'essential fact' must therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*."[559]

242. The Appellate Body concluded that:

> "In sum, MOFCOM was required to disclose the 'essential facts' relating to the 'low price' of subject imports on which it relied for its finding of significant price depression and suppression. This means that, in addition to the finding regarding the 'low price' of subject imports, MOFCOM was also required to disclose the facts of price undercutting that were required to understand that finding. As the Panel found, the Preliminary Determination and the Final Injury Disclosure only state that subject imports were at a 'low price', without providing any facts relating to the price comparisons of subject imports and domestic products. We consider that these facts constituted 'essential facts' within the meaning of Articles 6.9 and 12.8, which should have been disclosed to all interested parties."[560]

8. Article 15: Determination of Injury

(a) General

(i) Objective of Article 15

243. In *China – GOES*, the Appellate Body identified the objective of Article 15 of the SCM Agreement and Article 3 of the Anti-Dumping Agreement in the following terms:

> "[T]he various paragraphs under Article 3 of the *Anti-Dumping Agreement* and Article 15 of the *SCM Agreement* set forth, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Thus, it may be discerned, from the totality of these paragraphs, that Articles 3 and 15 are intended to delineate the framework and relevant disciplines for the authority's analysis in reaching a final determination on the injury caused by subject imports, and to ensure that the analysis and the conclusion drawn therefrom is robust."[561]

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[558] (*footnote original*) We note that, in *Mexico – Olive Oil*, the panel similarly found that, in the context of the *SCM Agreement*, the "essential facts" are "the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements—subsidization, injury and causation—that must be present for application of definitive measures." (Panel Report, *Mexico – Olive Oil*, para. 7.110)

[559] Appellate Body Report, *China – GOES*, paras. 240-241.

[560] Appellate Body Report, *China – GOES*, para. 251.

[561] Appellate Body Report, *China – GOES*, para. 153.

(b) Article 15.1 (positive evidence / objective examination)

(i) General

244. In *China – GOES*, the Panel found that China acted inconsistently with Article 15.1 of the SCM Agreement in relation to MOFCOM's analysis of the price effects of subject imports.[562] The Panel also found that China acted inconsistently with Article 15.1 with respect to MOFCOM's causation analysis.[563]

245. In *China – GOES*, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 15.1.[564] In the course of its analysis, the Appellate Body made the following observations regarding Article 15.1 of the SCM Agreement and Article 3.1 of the Anti-Dumping Agreement:

> "The Appellate Body has found that Article 3.1 of the *Anti-Dumping Agreement* 'is an overarching provision that sets forth a Member's fundamental, substantive obligation' with respect to the injury determination, and 'informs the more detailed obligations in succeeding paragraphs'.[565] According to the Appellate Body, the term 'positive evidence' relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible.[566] Furthermore, the Appellate Body has found that the term 'objective examination' requires that an investigating authority's examination 'conform to the dictates of the basic principles of good faith and fundamental fairness', and be conducted 'in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation'.[567]
>
> In addition to setting forth the overarching obligation regarding the manner in which an investigating authority must conduct a determination of injury caused by subject imports to the domestic industry, Articles 3.1 and 15.1 also outline the content of such a determination, which consists of the following components: (i) the volume of subject imports; (ii) the effect of such imports on the prices of like domestic products; and (iii) the consequent impact of such imports on the domestic producers of the like products. The other paragraphs under Articles 3 and 15 further elaborate on the three essential components referenced in Articles 3.1 and 15.1. Articles 3.2 and 15.2 concern items (i) and (ii) above, and spell out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices. Articles 3.4 and 15.4, together with Articles 3.5 and 15.5, concern item (iii), that is, the 'consequent impact' of the same imports on the domestic industry. More specifically, Articles 3.4 and 15.4 set out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.[568],[569]

[562] Panel Report, *China – GOES*, paras. 7.511-7.554.
[563] Panel Report, *China – GOES*, paras. 7.617-7.638.
[564] Appellate Body Report, *China – GOES*, paras. 116-232.
[565] (*footnote original*) Appellate Body Report, *Thailand – H-Beams*, para. 106.
[566] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[567] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[568] (*footnote original*) Additionally, Articles 3.3 and 15.3 stipulate the conditions under which an investigating authority may cumulatively assess the effects of imports from more than one country. Articles 3.6 and 15.6 specify that the effect of the subject imports must be assessed in relation to the production of the like

246. In *China – GOES*, the Appellate Body also stated the following with respect to the requirements of "positive evidence" involving an "objective examination":

> "In response to questioning at the oral hearing, both participants agreed that an investigating authority must ensure comparability between prices that are being compared. Indeed, although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of, *inter alia*, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that '[a]s soon as price comparisons are made, price comparability necessarily arises as an issue.'
>
> ... We have explained that a price effects finding is subject to the requirement that a determination of injury be based on 'positive evidence' and involve an 'objective examination'. As the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)*, the obligations under Articles 3.1 and 3.2 'must be met by every investigating authority in every injury determination'.[570] For these reasons, while we may agree with China that investigating authorities 'have discretion to frame their investigations and analyses in light of the information gathered by the authorities and the arguments presented to the authorities by the parties', authorities remain bound by their overarching obligation to conduct an objective examination on the basis of positive evidence, irrespective of how the issues were presented or argued during the investigation."[571]

(c) Article 15.2 (obligation to consider volume and price effects of imports)

(i) General

247. In *China – GOES*, the Panel found that China acted inconsistently with Article 15.2 of the SCM Agreement in relation to MOFCOM's analysis of the price effects of subject imports.[572]

248. In *China – GOES*, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 15.2.[573] Like the Panel, the Appellate Body rejected China's interpretation that Article 15.2 merely requires an investigating authority to consider the existence of price depression or suppression, and do not require the consideration of any link between subject imports and these price effects.[574] With regard to the Panel's application of the legal standard under Article 15.2, read together with Article 15.1, the Appellate Body found that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the

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domestic product. Articles 3.7 and 3.8 of the *Anti-Dumping Agreement* and Articles 15.7 and 15.8 of the *SCM Agreement* set out the requirements regarding the determination of a threat of material injury.

[569] Appellate Body Report, *China – GOES*, paras. 126-127.

[570] (*footnote original*) Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 109. See also Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.259 (stating that an investigating authority is "bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation").

[571] Appellate Body Report, *China – GOES*, paras. 200-201.

[572] Panel Report, *China – GOES*, paras. 7.511-7.554.

[573] Appellate Body Report, *China – GOES*, paras. 116-232.

[574] Appellate Body Report, *China – GOES*, paras. 116-169.

existence of price undercutting, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression.[575]

(ii) "consider"

249. In *China – GOES*, the Appellate Body addressed the requirement, in Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement, to "consider" a series of specific inquiries. In the course of its analysis, the Appellate Body stated:

> "The notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision.[576] By the use of the word 'consider', Articles 3.2 and 15.2 do not impose an obligation on an investigating authority to make *a definitive determination* on the volume of subject imports and the effect of such imports on domestic prices.[577] Nonetheless, an authority's *consideration* of the volume of subject imports and their price effects pursuant to Articles 3.2 and 15.2 is also subject to the overarching principles, under Articles 3.1 and 15.1, that it be based on positive evidence and involve an objective examination. In other words, the fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2 and 15.2.
>
> Furthermore, while the *consideration* of a matter is to be distinguished from the definitive determination of that matter, this does not diminish the scope of *what* the investigating authority is required to consider. The fact that the authority is only required to *consider*, rather than to *make a final determination*, does not change the subject matter that requires consideration under Articles 3.2 and 15.2, which includes 'whether the effect of' the subject imports is to depress prices or prevent price increases to a significant degree. We further discuss below what this requirement entails. Finally, an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation, such as an authority's final determination, so as to allow an interested party to verify whether the authority indeed *considered* such factors.[578],[579]

250. In *China – GOES*, the Appellate Body ultimately concluded that:

> "[W]with regard to price depression and suppression under the second sentence of Articles 3.2 and 15.2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to

[575] Appellate Body Report, *China – GOES*, paras. 170-232.

[576] (*footnote original*) The meaning of the word "consider" includes "look at attentively", "think over", and "take into account". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496)

[577] (*footnote original*) This stands in contrast with the words used in other paragraphs of Articles 3 and 15. For example, the word "demonstrate" in Articles 3.5 and 15.5 requires an investigating authority to make a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry. Relevant findings by panels in prior disputes also support the above understanding of the word "consider". For example, the panel in *Thailand – H-Beams* noted that the term "consider" in Article 3.2 does not require an explicit "finding" or "determination" by the investigating authority as to whether the increase in dumped imports is "significant". (Panel Report, *Thailand – H-Beams*, para. 7.161) Similarly, the panel in *Korea – Certain Paper* stated that Article 3.2 does not generally require the investigating authority to make a determination about the "significance" of price effects, or indeed as to whether there were price effects as such. (Panel Report, *Korea – Certain Paper*, para. 7.253. See also para. 7.242.)

[578] (*footnote original*) See, for example, Panel Report, *Thailand – H-Beams*, para. 7.161; and Panel Report, *Korea – Certain Paper*, para. 7.253.

[579] Appellate Body Report, *China – GOES*, paras. 130-131.

> understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices. The outcome of this inquiry will enable the authority to advance its analysis, and to have a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry. Moreover, the inquiry under Articles 3.2 and 15.2 does not duplicate the different and broader examination regarding the causal relationship between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5. Neither do Articles 3.2 and 15.2 require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may be causing injury to the domestic industry. Rather, the investigating authority's inquiry under Articles 3.2 and 15.2 is focused on the relationship between subject imports and domestic prices, and the authority may not disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter."[580]

(iii) "the effect of"

251. In *China – GOES*, the Appellate Body considered the meaning of the terms "the effect of" in Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement. In the course of its analysis, the Appellate Body stated:

> "The definition of the word 'effect' is, *inter alia*, 'something accomplished, caused, or produced; a result, a consequence'.[581] The definition of this word thus implies that an 'effect' is 'a result' of something else. Although the word 'effect' could be used independently of the factors that produced it, this is not the case in Articles 3.2 and 15.2. Rather, these provisions postulate certain inquiries as to the 'effect' of subject imports on domestic prices, and each inquiry links the subject imports with the prices of the like domestic products.
>
> First, an investigating authority must consider 'whether there has been a significant price undercutting *by the* [*dumped or subsidized*] *imports as compared with* the price of a like product of the importing Member'. Thus, with regard to significant price undercutting, Articles 3.2 and 15.2 expressly establish a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. Second, an investigating authority is required to consider '*whether the effect of such* [*dumped or subsidized*] *imports*' on the prices of the like domestic products is to depress or suppress such prices to a significant degree. By asking the question '*whether the effect of*' *the subject imports is* significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Moreover, the syntactic relation expressed by the terms '*to* depress prices' and '[*to*] prevent price increases' is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices.

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[580] Appellate Body Report, *China – GOES*, para. 154.

[581] (*footnote original*) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798.

> The two inquiries set out in the second sentence of Articles 3.2 and 15.2 are separated by the words 'or' and 'otherwise'. This indicates that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression. Thus, even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.
>
> Given that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices, it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression. Thus, for example, it would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. Moreover, the reference to 'the effect of *such* [*dumped or subsidized*] *imports*' in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports.
>
> In our view, therefore, China's argument, that Articles 3.2 and 15.2 do not use any language suggesting the need to establish a link between subject imports and domestic prices, focuses on a meaning of the word 'effect' abstracted from the immediate context in which this word is situated. As noted, Articles 3.2 and 15.2 expressly postulate an inquiry into the relationship between subject imports and domestic prices by requiring a consideration of *whether* the effect of subject imports is to depress or suppress domestic prices. The fact that the word 'effect' is used as a noun does not mean that the link between domestic prices and subject imports expressly referenced in these provisions need not be analyzed."[582]

(iv) "depress prices ... or prevent price increases"

252. In *China – GOES*, the Appellate Body considered the meaning of price depression and price suppression:

> "Price depression refers to a situation in which prices are pushed down, or reduced, by something. An examination of price depression, by definition, calls for more than a simple observation of a price decline, and also encompasses an analysis of what is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider 'whether the effect of' subject imports is '[to] prevent price increases, which otherwise would have occurred, to a significant degree'. By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices 'otherwise would have' increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena."[583]

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[582] Appellate Body Report, *China – GOES*, paras. 135-139.
[583] Appellate Body Report, *China – GOES*, para. 141.

(d) Article 15.4 (relevant injury factors)

(i) "the examination of the impact"

253. In *China – GOES*, the Appellate Body considered the requirements of Article 15.4 of the SCM Agreement and Article 3.4 of the Anti-Dumping Agreement:

> "We recall that Articles 3.4 and 15.4 require an investigating authority to examine *the impact of subject imports on the domestic industry* on the basis of 'all relevant economic factors and indices having a bearing on the state of the industry'. Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry. In our view, such an interpretation does not duplicate the relevant obligations in Articles 3.5 and 15.5. As noted, the inquiry set forth in Articles 3.2 and 15.2, and the examination required under Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5. Thus, similar to the consideration under Articles 3.2 and 15.2, the examination under Articles 3.4 and 15.4 *contributes to*, rather than duplicates, the overall determination required under Articles 3.5 and 15.5.
>
> Moreover, an investigating authority is required to *examine* the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is *not* required to *demonstrate* that subject imports are causing injury to the domestic industry. Rather, the latter analysis is specifically mandated by Articles 3.5 and 15.5. The demonstration of the causal relationship under Articles 3.5 and 15.5 requires an investigating authority to examine 'all relevant evidence' before it, and thus covers a broader scope than the examination under Articles 3.4 and 15.4. As discussed below, Articles 3.5 and 15.5 further impose a requirement to conduct a non-attribution analysis regarding all factors causing injury to the domestic industry. Given these intrinsic differences between Articles 3.4 and 15.4, on the one hand, and Articles 3.5 and 15.5, on the other hand, we do not consider that our interpretation leads to a 'duplicative analysis of causation', as China suggests."[584]

(e) Article 15.5 (causation)

(i) General

254. In *China – GOES*, the Panel found that China acted inconsistently with Article 15.5 of the SCM Agreement with respect to MOFCOM's causation analysis.[585]

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[584] Appellate Body Report, *China – GOES*, paras. 149-150.
[585] Panel Report, *China – GOES*, paras. 7.617-7.638.

(ii) "demonstrate"

255. In *China – GOES*, the Appellate Body stated that "the word 'demonstrate' in Articles 3.5 and 15.5 requires an investigating authority to make a definitive determination regarding the causal relationship between subject imports and injury to the domestic industry".[586]

(iii) Relationship with Article 15.2

256. In *China – GOES*, the Appellate Body addressed the requirements of Article 15.2 of the SCM Agreement and Article 3.2 of the Anti-Dumping Agreement. In the course of its analysis, the Appellate Body discussed the relationship between Articles 15.2/3.2 and Article 15.5/3.2:

> "Interpreting Articles 3.2 and 15.2 as requiring a consideration of the relationship between subject imports and domestic prices does not result in duplicating the causation analysis under Articles 3.5 and 15.5. Rather, Articles 3.5 and 15.5, on the one hand, and Articles 3.2 and 15.2, on the other hand, posit different inquiries. The analysis pursuant to Articles 3.5 and 15.5 concerns the causal relationship between *subject imports* and *injury* to the domestic industry. In contrast, the analysis under Articles 3.2 and 15.2 concerns the relationship between subject imports and a different variable, that is, *domestic prices*. As discussed, an understanding of the latter relationship serves as a basis for the injury and causation analysis under Articles 3.5 and 15.5. In addition, Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury 'through the effects of [dumping or subsidies]', as set forth in Articles 3.2 and 15.2, as well as in Articles 3.4 and 15.4. We recall that Articles 3.4 and 15.4 require an investigating authority to examine the impact of subject imports on the domestic industry on the basis of 'all relevant economic factors and indices having a bearing on the state of the industry', and provide a list of such factors and indicia that the authority must evaluate. Thus, the examination under Articles 3.5 and 15.5 encompasses 'all relevant evidence' before the authority, including the volume of subject imports and their price effects listed under Articles 3.2 and 15.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Articles 3.4 and 15.4. The examination under Articles 3.5 and 15.5, by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Articles 3.2 and 15.2.
>
> ...
>
> Articles 3.5 and 15.5 require an investigating authority to 'examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry', and to ensure that 'the injuries caused by these other factors [are not] attributed to the [dumped or subsidized] imports'.[587] As the Appellate Body has found, the non-attribution language of Articles 3.5 and 15.5 requires that 'an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports'.[588] In contrast, Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and *domestic prices*, so as to understand whether the former

[586] Appellate Body Report, *China – GOES*, footnote 217.

[587] (*footnote original*) Pursuant to Articles 3.5 and 15.5, these other factors include the volume and prices of imports not sold at dumped or subsidized prices; contraction in demand or changes in the patterns of consumption; trade-restrictive practices of, and competition between, the foreign and domestic producers; developments in technology; and the export performance and productivity of the domestic industry.

[588] (*footnote original*) Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

> may have explanatory force for the occurrence of significant depression or suppression of the latter. For this purpose, the authority is not required to conduct a fully fledged and exhaustive analysis of all known factors that may cause *injury* to the domestic industry, or to separate and distinguish the *injury* caused by such factors."[589]

9. Article 22: Public Notice and Explanation of Determinations

(a) Article 22.3 (of preliminary and final determinations)

(i) General

257. In *China – GOES*, the Panel found that China did not act inconsistently with Article 22.3 of the SCM Agreement in connection with MOFCOM's explanation of the findings and conclusions supporting its determination that the bidding process under the United States Government procurement statutes at issue did not result in prices that reflected market conditions.[590] In *China – GOES*, the Panel also found that China acted inconsistently with Article 22.3 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate.[591]

(b) Article 22.5 (of conclusion or suspension of an investigation)

(i) General

258. In *China – GOES*, the Panel found that China acted inconsistently with Article 22.5 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate.[592] The Panel also found that China acted inconsistently with Article 22.5 by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.[593] The Panel further found that China acted inconsistently with Article 22.5in relation to the public notice and explanation of its causation analysis with respect to non-subject imports.[594]

259. In *China – GOES*, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 22.5 because MOFCOM failed to disclose in its final determination all relevant information on the matters of fact relating to the "low price" of subject imports on which it relied for its price effects finding.[595] The Appellate Body found that MOFCOM was required to disclose under Article 22.5 the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

(ii) "all relevant information on the matters of fact"

260. In *China – GOES*, the Appellate Body concluded that, in the context of the second sentence of Articles 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, "all relevant information on the matters of fact" consists of those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures:

> "Relevant to this dispute is the requirement in Articles 12.2.2 and 22.5 that a public notice contain 'all relevant information' on 'matters of fact' 'which have led to the

[589] Appellate Body Report, *China – GOES*, paras. 147, 151.
[590] Panel Report, *China – GOES*, paras. 7.354-7.367.
[591] Panel Report, *China – GOES*, paras. 7.472-7.474.
[592] Panel Report, *China – GOES*, paras. 7.472-7.474.
[593] Panel Report, *China – GOES*, paras. 7.587-7.592.
[594] Panel Report, *China – GOES*, paras. 7.669-7.675.
[595] Appellate Body Report, *China – GOES*, paras. 252-267.

imposition of final measures'.[596] With regard to 'matters of fact', these provisions do not require authorities to disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures.[597] The inclusion of this information should therefore give a reasoned account of the factual support for an authority's decision to impose final measures. Moreover, we note that the obligations under Articles 12.2.2 and 22.5 come at a later stage in the process than the requirement to disclose the essential facts pursuant to Articles 6.9 and 12.8. While the disclosure of essential facts must take place 'before a final determination is made', the obligation to give public notice of the conclusion of an investigation within the meaning of Articles 12.2.2 and 22.5 is triggered once there is an affirmative determination providing for the imposition of definitive duties.

As noted in our examination of Articles 6.9 and 12.8, the imposition of final anti-dumping or countervailing duties requires that an authority finds dumping or subsidization, injury, and a causal link between the dumping or subsidization and the injury to the domestic industry. What constitutes 'relevant information on the matters of fact' is therefore to be understood in the light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case. These findings each rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in, *inter alia*, Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* and Articles 15.1, 15.2, 15.4, and 15.5 of the *SCM Agreement*. Articles 3.2 and 15.2 require, *inter alia*, an investigating authority to consider the effect of the subject imports on prices by considering whether there has been significant price undercutting, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. We note that Articles 12.2.2 and 22.5 further underscore the requirement of public notice of these elements by cross-referencing, respectively, to Articles 12.2.1 of the *Anti-Dumping Agreement* and 22.4 of the *SCM Agreement*, which require that the public notice or report contain considerations relevant to the injury determination as set out in Articles 3 and 15.

Articles 12.2.2 and 22.5 are both situated in the context of provisions that concern the public notice and explanation of determinations in anti-dumping and countervailing duty investigations. In the case of an affirmative determination providing for the imposition of a definitive duty, Articles 12.2.2 and 22.5 provide that such notice shall contain all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures. Articles 12.2.2 and 22.5 capture the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Articles 12.2.2 and 22.5 is framed by the requirement of 'relevance', which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By

[596] (*footnote original*) We note that, in addition to matters of fact, Articles 12.2.2 and 22.5 also require that the public notice contain all relevant information on the matters of law and reasons which have led to the imposition of final measures.

[597] (*footnote original*) We observe that, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body held that Article 22.5 of the *SCM Agreement* "does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination". (Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164)

> requiring the disclosure of 'all relevant information' regarding these categories of information, Articles 12.2.2 and 22.5 seek to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* and Article 23 of the *SCM Agreement*.
>
> With respect to the form in which the relevant information must be disclosed, Articles 12.2.2 and 22.5 allow authorities to decide whether to include the information in the public notice itself 'or otherwise make [it] available through a separate report'. We note that Articles 12.2.2 and 22.5 also provide that the notice or report shall pay 'due regard … to the requirement for the protection of confidential information'. When confidential information is part of the relevant information on the matters of fact within the meaning of Articles 12.2.2 and 22.5, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of that information.
>
> In sum, in the context of the second sentence of Articles 3.2 and 15.2, we consider that 'all relevant information on the matters of fact' consists of those facts that are required to understand an investigating authority's price effects examination leading to the imposition of final measures."[598]

10. Article 32: Other Final Provisions

(a) Article 32.5 (conformity of laws, regulations and administrative procedures)

261. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel found that the panel request permitted sufficiently clear inferences as to the WTO obligations at issue, and therefore provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2 of the DSU.[599] In the course of its reasoning, the Panel commented as follows on a general reference to "Article 32" in the panel request:

> "On closer inspection, we see no plausible basis on which to infer that China wished to base a claim on Article 32.5. In this regard, the Panel recalls that the problem identified in Part D of the panel request is the United States' alleged failure to investigate and avoid double remedies "in certain investigations and reviews". In contrast to Parts B and C of the panel request, there is no suggestion that in Part D China is challenging any "laws, regulations and administrative procedures".[600],[601]

11. Annex V: Procedures for Developing Information Concerning Serious Prejudice

(i) Automatic initiation in the absence of DSB consensus

262. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for the initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus to initiate the

[598] Appellate Body Report, *China – GOES*, paras. 256-260.

[599] See WT/DS449/4, paras. 3.17-3.52.

[600] (*footnote original*) The wording of Article 32.5 of the SCM Agreement is similar to that found in Article 18.4 of the Anti-Dumping Agreement (and also to Article XVI:4 of the WTO Agreement). In the context of discussing the expression "laws, regulations and administrative procedures" in the context of Article 18.4 of the Anti-Dumping Agreement, the Appellate Body has observed that the phrase "laws, regulations and administrative procedures" means "the entire body of *generally applicable rules, norms and standards* adopted by Members in connection with the conduct of anti-dumping proceedings". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87 and footnote 106, emphasis added).

[601] WT/DS449/4, para. 3.40.

procedure.[602] The Appellate Body found that the Panel erred in denying various requests made by the European Communities with respect to the information-gathering procedure under Annex V of the SCM Agreement. However, the Appellate Body declined to make findings on whether the conditions for an initiation of an Annex V procedure were fulfilled in this dispute. After reviewing various provisions of the SCM Agreement, the Appellate Body concluded that:

> "We have considered the meaning of the obligation that paragraph 2 of Annex V imposes on the DSB, namely, that 'the DSB shall, upon request, initiate' an information-gathering procedure in disputes involving claims of serious prejudice. For the reasons set out above, we have reached the view that the text and context of paragraph 2 of Annex V, together with the object and purpose of the WTO dispute settlement system as reflected in the DSU and the *SCM Agreement*, support an understanding of this provision as imposing an obligation on the DSB to initiate an Annex V procedure upon request, and that such DSB action occurs automatically when there is a request for initiation of an Annex V procedure and the DSB establishes a panel.[603]
>
> The first sentence of paragraph 2 of Annex V, along with other provisions of Annex V, refers directly to the establishment of a panel pursuant to Article 7.4 of the *SCM Agreement*. Provided that a request for initiation of an Annex V procedure has been made, the DSB's initiation of such a procedure is a procedural incident of the establishment of a panel in serious prejudice cases. The function assigned to the DSB under paragraph 2 of Annex V is executory in nature, and is automatically discharged by it once the two specified conditions precedent are satisfied. This interpretation of paragraph 2 of Annex V also finds support in the structure of the information-gathering mechanism set out in Annex V and Articles 6.6 and 6.8 of the *SCM Agreement*, and in Members' expressed preference, as set out in Article 1.2 of the DSU, for the use of the special or additional dispute settlement rules set out in the *SCM Agreement* and listed in Appendix 2 to the DSU.
>
> In contrast, an interpretation of paragraph 2 of Annex V that would enable a single WTO Member to frustrate the important role that an information-gathering procedure plays in serious prejudice disputes by preventing the DSB from initiating such a procedure would be at odds with WTO Members' clear intention to promote the early and targeted collection of information pertinent to the parties' subsequent presentation of their cases to the panel, and with the obligation to cooperate in the collection of information in serious prejudice disputes imposed on all Members under paragraph 1 of Annex V and Article 6.6 of the *SCM Agreement*. Such an interpretation would also hamper the collection of information from third-country WTO Members and delay until the stage of panel proceedings the collection of necessary information. The initiation and conduct of Annex V procedures have important consequences for the ability of parties to a dispute to present their case, and for panels and the Appellate Body to fulfil their respective roles in complex serious prejudice disputes under the *SCM Agreement*. Annex V procedures are key to affording parties early access to critical information, which may in turn serve as the foundation upon which those parties will construct their arguments and seek to satisfy their evidentiary burden. Moreover, the initiation and conduct of such procedures are key to the ability

[602] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 480-549.

[603] (*footnote original*) One Member of the Division wishes to qualify this understanding of paragraph 2 of Annex V to the *SCM Agreement*. In the opinion of this Member, to initiate an Annex V procedure, an act of the DSB is required. The DSB's initiation of an Annex V procedure in the manner described above can occur only when the complaining Member's request for an Annex V procedure forms an integral part of that Member's request for the establishment of a panel.

of panels to make findings of fact that have a sufficient evidentiary basis or to draw negative inferences from instances of non-cooperation."[604]

[604] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 524.

H. SAFEGUARDS AGREEMENT

1. Article 2: Conditions

(a) Article 2.1 (conditions for safeguards)

263. In *Dominican Republic – Safeguard Measures*, the Panel found the following violations of Article 2.1: (i) the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994[605]; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that is inconsistent with Article 4.1(c) of the Agreement on Safeguards[606]; (iii) the determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry[607]; and (iv) the imposition of a safeguard measure on the basis of a determination of the existence of "serious injury" that is inconsistent with Article 4.1(a) of the Agreement on Safeguards.[608]

(b) Article 2.2 (to be applied irrespective of source)

264. In *Dominican Republic – Safeguard Measures*, the Panel found that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard those imports from developing country Members that meet the requirements laid down in Article 9.1, even when those imports were taken into account in the substantive analysis during the investigation.[609] The Panel found that the Dominican Republic did not act inconsistently with its obligations under Article 2.2 and certain other provisions of the Safeguards Agreement as regards the principle of "parallelism" by not conducting a new analysis, i.e. a new analysis that excluded imports from those developing countries that the Dominican Republic had excluded from the scope of application of the safeguard measure by virtue of Article 9.1, to determine the existence of an increase in imports, serious injury and causation in respect of imports from non-excluded countries.

2. Article 3: Investigation

(a) Article 3.1 (general requirements)

265. In *Dominican Republic – Safeguard Measures*, the Panel found the following violations of Article 3.1: (i) the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994[610]; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that is inconsistent with Article 4.1(c) of the Agreement on Safeguards[611]; and (iii) failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.[612]

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[605] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.
[606] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.
[607] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.
[608] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.
[609] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.367-7.392.
[610] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.
[611] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.
[612] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

3. Article 4: Determination of Serious Injury or Threat Thereof

(a) Article 4.1(a) (definition of serious injury)

266. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.1(a) by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.[613]

(b) Article 4.1(c) (definition of domestic industry)

267. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.1(c) in how it defined the "domestic industry".[614] More specifically, the Panel found that by excluding from the definition of the directly competitive domestic product certain like or directly competitive products and, ultimately, producers of the like or directly competitive product, for the purpose of defining the domestic industry in its preliminary and definitive determinations, the Dominican Republic acted inconsistently with its obligations under Article 4.1(c) of the Agreement on Safeguards.

(c) Article 4.2(a) (relevant injury factors)

(i) General

268. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with Article 4.2(a) in its determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry.[615] On this issue, the Panel found that the report of the competent authority contained a reasoned and adequate explanation of the way in which the relevant factors corroborate the determination of the existence of an absolute increase in imports of the products in question. However, the Panel went on to find that the Dominican Republic acted inconsistently with Article 4.2(a) by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.[616] The Panel found that the indicators of serious injury mentioned in Article 4.2(a) were inadequately evaluated and that the explanations provided by the competent authority in the preliminary and final determinations do not support the conclusion that the overall position of the domestic industry indicated significant overall impairment.

(ii) "serious injury"

269. With respect to the terms "serious injury" in Article 4.2(a), the Panel in *Dominican Republic – Safeguard Measures* stated that:

> "The Panel recalls that, as pointed out by the Appellate Body, the standard for the existence of *serious injury* under the definition contained in Article 4.1(a) of the Agreement on Safeguards is very strict and rigorous: 'the word 'injury' is qualified by the adjective 'serious', which … underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met'.[617]

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[613] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.
[614] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.
[615] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.
[616] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.
[617] (*footnote original*) Likewise, the Appellate Body has indicated that the standard of *serious injury* in the Agreement on Safeguards is a very high one when contrasted with the standard of *material injury* envisaged

> Considering that the injury evaluated within the context of the Agreement on Safeguards is *serious injury*, the Panel does not believe that the fact that four factors evaluated displayed a negative trend, as compared with the evidence that seven factors (including important elements indicative of the position of the domestic industry, such as production, sales, installed capacity and capacity utilization, and production's share of domestic consumption) performed positively, without the competent authority having provided a sufficient explanation, can result in an adequate and reasoned conclusion with respect to the existence of serious injury."[618]

(d) Article 4.2(b) (causation)

270. In *Dominican Republic – Safeguard Measures*, the Panel, having already found that the competent authority failed to adequately establish the existence of serious injury to the domestic industry, concluded that it would not be possible for the Panel to find that the competent authority had demonstrated the existence of a "causal link" between the increase in imports and serious injury, as required by Article 4.2(b).[619] The Panel therefore considered that it was not necessary to issue any finding with respect to causal link. However, the Panel proceeded to offer several observations on the competent authority's determination of the existence of causation.

(e) Article 4.2(c) (duty to publish detailed analysis)

271. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.2(c) because the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994.[620]

272. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with Article 4.2(c) in its determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry.[621] Instead, the Panel found that the report of the competent authority contained a reasoned and adequate explanation of the way in which the relevant factors corroborate the determination of the existence of an absolute increase in imports of the products in question.

273. In addition, the Panel in *Dominican Republic – Safeguard Measures* found that the Dominican Republic acted inconsistently with Article 4.2(c) by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.[622]

4. Article 6: Provisional Safeguard Measures

274. In *Dominican Republic – Safeguard Measures*, the Panel considered it unnecessary to make any separate findings on the provisional safeguard measure which had expired and been replaced by the definitive safeguard measure at the time of the establishment of the panel, given that the complainants' principal claims in respect of the expired provisional measure were the same claims made in respect of the definitive safeguard measure.[623]

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under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures and the GATT 1994. See Appellate Body, *US – Lamb*, paragraph 124.

[618] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.312-7.313.

[619] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.327-7.329.

[620] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

[621] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.

[622] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

[623] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.22.

5. Article 8: Level of Concessions or Other Obligations

(a) Article 8.1 (trade compensation)

275. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article 8.1 of the Safeguards Agreement by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.[624]

6. Article 9: Developing Country Members

(a) Article 9.1 (exclusion from safeguards under certain conditions)

276. In *Dominican Republic – Safeguard Measures*, the Panel found that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard those imports from developing country Members that meet the requirements laid down in Article 9.1, even when those imports were taken into account in the substantive analysis during the investigation.[625] The Panel found that the Dominican Republic did not act inconsistently with its obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Safeguards Agreement as regards the principle of "parallelism" by not conducting a new analysis, i.e. a new analysis that excluded imports from those developing countries that the Dominican Republic had excluded from the scope of application of the safeguard measure by virtue of Article 9.1, to determine the existence of an increase in imports, serious injury and causation in respect of imports from non-excluded countries. The Panel reasoned as follows:

> "Taking into account the foregoing points of view and the analysis of the legal provisions cited above, the Panel considers that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard measure a share of the imports (corresponding to those from developing country Members that meet the requirements laid down in the provision) even when these have been taken into account in the substantive analysis during the investigation.
>
> In the present case, both the complainants and the Dominican Republic agree that Article 9.1 of the Agreement on Safeguards is an exception.
>
> In the Panel's view, when Article 9.1 of the Agreement on Safeguards is applicable, this affects the scope of the obligation contained in Article 2.2. Because of the way in which Article 9.1 of the Agreement on Safeguards is worded, it contains an obligation to exclude developing country Members that satisfy the requirements in the provision and is not a discretionary faculty given to a Member imposing a measure which it may decide to employ or not. In other words, when a Member conducting a safeguards investigation finds, as a result of its examination, that products from certain origins are covered by the provisions in Article 9.1 of the Agreement on Safeguards, it is obliged to grant special and differential treatment to the developing countries concerned when imposing the measure by excluding them from its application. In such cases, in their report the competent authorities must provide an explanation of the way in which the foregoing was determined.
>
> The findings of the Panel in *US – Wheat Gluten* suggest that the principle of parallelism (as developed until now) seeks to ensure that origins which collectively make a significant contribution to the injury caused to the domestic industry are not

[624] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.
[625] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.367-7.392.

> excluded from the application of the measure. Nevertheless, in the present case the exclusion was based on Article 9.1 of the Agreement on Safeguards, which provides that the imports excluded must not exceed 9 per cent of the total imports of the Member imposing the measure, so that the exclusion of developing country Members does not run the risk of generating the disproportionate effects indicated.
>
> Accordingly, in cases in which the exclusion is based on Article 9.1 of the Agreement, the Panel does not consider it necessary to undertake a new analysis of the increase in imports, the injury and causation. In this case, it would be enough for the competent authorities to show in their report that the excluded Members actually satisfied the requirements laid down in Article 9.1 itself of the Agreement on Safeguards. Moreover, the Panel agrees with the Dominican Republic that the fact that the Agreement on Safeguards itself, in Article 9.1, imposes the obligation to exclude products from specific origins from the application of the safeguard measure results in a departure from the usual application of the principle of parallelism with regard to such imports."[626]

277. As a separate matter, the Panel in *Dominican Republic – Safeguard Measures* found that the Dominican Republic did act inconsistently with its obligations under Article 9.1 of the Safeguards Agreement by failing to specifically and expressly include imports from Thailand in the list of developing countries that the Dominican Republic excluded, by virtue of Article 9.1, from the application of the provisional and definitive safeguard measures.[627] The Panel found that it was not enough for the Dominican Republic to assert without any further substantiation that imports from Thailand were de facto excluded from the measure's application.

7. Article 11: Prohibition and Elimination of Certain Measures

(a) Article 11.1(a) (requirement to conform to WTO obligations)

278. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 11.1(a) as a consequence of other violations of the Agreement Safeguards.[628]

(b) Article 11.1(b) (prohibition)

279. The Panel in *China – GOES* observed that "Article 11(1)(b) of the Safeguards Agreement prohibits the use of voluntary export restraints. This further reinforces our conclusion that voluntary export restraints were not intended to be disciplined by the SCM Agreement."[629]

8. Article 12: Notification and Consultation

(a) Article 12.1 (notification requirements)

280. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article 12.1(c) of the Safeguards Agreement by failing to properly notify the definitive safeguard measure.[630]

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[626] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.381-7.385.
[627] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.393-7.402.
[628] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.
[629] Panel Report, *China – GOES*, footnote 109.
[630] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.415-7.438.

(b) Article 12.3 (consultation requirements)

(i) General

281. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligations under Article 12.3 of the Safeguards Agreement by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.[631]

(ii) "taking a decision to apply"

282. The Panel in *Dominican Republic – Safeguard Measures* considered when the obligation to notify, under Article XIX:2 of the GATT 1994 and Article 12.1 of the Safeguards Agreement, is triggered:

> "The first sentence of Article XIX:2 of the GATT 1994 determines an obligation to notify before a situation arises. This situation is described in the Spanish text of the General Agreement by the words '*adopte medidas*'*;* in the English by the words 'take action'; and in the French text by the words '*prenne des mesures*'. The words '*adopte medidas'* in Spanish suggest that the moment at which the obligation arises is the adoption of a measure. The words '*prenne des mesures*' in French and 'take action' in English, however, are not clear regarding the moment at which the obligation to notify is triggered. The words 'take action' translate into Spanish in one of its meanings as '*emprender acciones judiciales, actuar*' (take legal action, act), whereas the words '*prenne des mesures*' could be translated as '*tomar una medida o decisión judicial*' (take a measure or legal decision). From neither the French text nor the English text, however, can it be clearly determined whether the moment at which the obligation is triggered is the moment of the *adoption* or the *application* of the measure.
>
> ...
>
> Accordingly, as the complainants indicate, Article 12.1(c) of the Agreement on Safeguards determines that the obligation is triggered upon taking a decision *to apply* the measure (in Spanish the word is *aplicar* and in French *d'appliquer*). The words *to apply* are similar in the three official language versions of this provision. Nevertheless, as mentioned, Article XIX:2 of the GATT 1994, read simultaneously in the three official language versions, does not clearly determine at which moment the obligation to notify is triggered. Consequently, the Panel considers that the clarity of the text of Article 12.1(c) of the Agreement on Safeguards in the three official language versions provides guidance and throws light on the time at which the obligation in GATT Article XIX:2 has to be observed. Article XIX:2 of the GATT 1994, therefore, read in conjunction with Article 12.1(c) of the Agreement on Safeguards, determines the obligation to notify a definitive measure before it is applied but not necessarily before it is adopted."[632]

[631] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.
[632] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.426-7.433.

I. GATS

1. Preamble

(a) General

283. In *China – Electronic Payment Services*, the Panel considered the Preamble in the context of addressing the object and purpose of the GATS:

> "The Panel begins its consideration of the object and purpose of the GATS and the WTO Agreement by noting one of the key objectives listed in the Preamble to the GATS, namely 'the establishment of a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of *transparency* and *progressive liberalization*' (emphasis added). We note that, in *US – Gambling*, the Appellate Body found that the purpose of transparency contained in the Preamble to the GATS supported the need for precision and clarity in scheduling GATS commitments, and underlined the importance of having schedules that are readily understandable by all other WTO Members, as well as by services suppliers and consumers.[633] In that dispute, the Appellate Body also recalled that:
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> > … the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement …. This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.[634]
>
> We also recall that, in examining the principle of progressive liberalization as an expression of the object and purpose of the GATS, the Appellate Body did not consider that this principle '… lends support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by WTO Members and by which they are bound.'[635] We are also aware that, in both *US – Gambling* and *China – Publications and Audiovisual Products*, the Appellate Body observed that the objectives of the GATS did not provide specific guidance as to the correct interpretation of the entries at stake.[636]
>
> We find that our interpretation of the scope of China's commitment under subsector (d) is consistent with the objective of transparency because it classifies under a single subsector services which, when combined together, result in a new and distinct service, the integrated service. This integrated service is supplied and consumed as such. Furthermore, by reconciling the classification of EPS with the commercial reality of those services, our interpretation reinforces the predictability, security and clarity of GATS specific commitments. For those same reasons, our

[633] (*footnote original*) Appellate Body Report, *US – Gambling*, para. 188.

[634] (*footnote original*) Ibid.

[635] (*footnote original*) Appellate Body Report, *China – Publications and Audiovisual Products*, para. 394.

[636] (*footnote original*) "None of the objectives listed in the GATS preamble provides specific guidance as to the correct interpretation to be given to China's GATS Schedule entry 'Sound recording distribution services'". Appellate Body Report, *China – Publications and Audiovisual Products*, para. 393. See also Appellate Body Report, *US – Gambling*, para. 189.

interpretation is also consistent with the objective of progressive liberalization contained in the Preamble to the GATS.

Hence, our conclusion that subsector (d) of China's Schedule encompasses EPS is consistent with the object and purpose of the GATS and the WTO Agreement."[637]

2. Article I: Scope and Definitions

(a) Article I:2 (modes of supply)

(i) The concept of a "service"

284. In *China – Electronic Payment Services*, the Panel considered the concept of a "service", in the context of payment and money transmission services. In the course of its analysis, the Panel stated:

> "The Panel observes that the GATS provides no definition of the word 'service', although it defines related concepts, such as the *supply* of a service and a service *supplier*. [638] Paragraph 5(a) of the GATS Annex on Financial Services defines a 'financial service' as 'any service of a financial nature offered by a financial service supplier of a Member', and contains a list of financial services that comprises 'all payment and money transmission services, including …' under subsector (viii).
>
> It is clear to the Panel that the *supply* of a 'payment service' is not the same thing as the act of paying for goods or services. Purchasers who, on their own account, pay merchants for goods or services received are not thereby providing a 'payment service' to these merchants. The payment in such case is what a purchaser gives in return for the good or service received, and not a separate service received by the merchant. Thus, 'payment services' in our view are supplied, if at all, by a person or entity other than the payer or payee. Typically, when payment instruments other than cash are used, a third party intervenes between the payer and the payee, in order to facilitate or make possible the 'act of paying'. The same can be said about 'money transmission services', since transmitting money normally involves the participation of an intermediary to ensure that the money is transferred from one party to another.
>
> We consider, therefore, that whoever supplies a 'payment service' does not 'pay', but makes the payment between payer and payee, for example by processing payment transactions involving the use of credit cards, debit cards, or other such instruments. Similarly, when it comes to 'money transmission services', the supplier of the service intervenes between the sender and the recipient (payer and payee) to ensure that the money is transmitted. In our view, a 'money transmission service' encompasses, among other situations, those where the supplier either transmits the funds from the payer's account to the payee's account (as in the three-party model) or connects the parties involved in a payment transaction, and ensures that payment instructions are executed and funds are transferred pursuant to the transaction (as in a four-party model). Hence, suppliers of 'payment and money transmission services' are providing a 'service' that facilitates and enables payments and money transmissions. For that reason, we agree with the United States that 'payment and money transmission

[637] Panel Report, *China – Electronic Payment Services*, paras. 7.196-7.199.

[638] (*footnote original*) Article XXVIII(b) of the GATS defines the "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service" and, pursuant to Article XXVIII(g) of the GATS, a service supplier means "any person that supplies a service".

services' include those services that 'manage', 'facilitate' or 'enable' the act, of paying, or transmitting money."[639]

(ii) The concept of an "integrated" service

285. In *China – Electronic Payment Services*, the Panel found that the measures at issue constituted an "integrated" service. In the course of its analysis, the Panel stated:

> "The Panel observes that the definition of the services at issue refers to a 'system' composed of several elements. Those elements could be considered, individually, as services in their own right, e.g. 'the process and coordination of approving or declining a transaction', 'the delivery of transaction information among participating entities', 'the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized', and 'the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.' In the Panel's view, all these elements show that 'electronic payment services for payment card transactions' are made up of different services that may be individually identified.
>
> The United States argues, however, that the various elements of the system are integrated and necessary to facilitate a payment card transaction and, as such, constitute a single service. In our view, all elements of the system, together, are necessary for the payment card transaction to materialize. None of the elements of the 'system', individually, would be sufficient to process a payment card transaction. Each of them must be integrated into a whole.[640] Indeed, we agree with the United States' argument that without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that is as widely accepted by merchants, and no acquirer could offer merchants a service that can deliver such a large number of card holders. From that perspective, considering the transaction from beginning to end, electronic payment services for payment card transactions constitute an integrated service.
>
> …
>
> We agree with the United States' view on this matter. How the supply of 'electronic payment services' is organized depends on different parameters (e.g. the business models adopted by the entities participating in the payment card transaction). On the one hand, global electronic payment services suppliers provide all the components of the 'system' identified by the United States, thus supplying a final product that looks like a 'single' service for the direct user (the issuing and acquiring institutions) and for the ultimate beneficiaries of these services (the card holder and the merchant), and that in many countries that is the case. On the other hand, there are jurisdictions where the different components of the 'system' are supplied by different service suppliers. Further, as we saw previously, third-party processors may also intervene in the processing of payment card transactions. In the Panel's view, therefore, the services at issue may as a factual matter be supplied by a single service supplier or by more than one service supplier acting in concert.

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[639] Panel Report, *China – Electronic Payment Services*, paras. 7.95-7.97.

[640] (*footnote original*) The *Shorter Oxford English Dictionary*, Vol. 1, p. 1402, defines "integrated" as: "1 Combined into a whole; united; individual, … c Uniting several components previously regarded as separate".

We conclude therefore that the services at issue include both the instances in which these services are supplied as a single service by a single service supplier, and those instances in which different elements of the 'system' described by the United States are supplied by different service suppliers."[641]

286. The Panel returned to this issue in its findings, and stated:

"We examine now whether the fact that different components of the EPS can be supplied by different suppliers means that these different components must be classified separately. We recall that, according to the United States, 'EPS for payment card transactions is a single, integrated service – one that is supplied and consumed as such'. China submits that different 'elements' or 'components' of the services at issue are routinely supplied as different services by different service suppliers. In particular, the network and authorization components of the services at issue are frequently supplied by entities other than the entities that provide clearing and settlement services for the same transactions. Hence, according to China, the United States' assertion that the services at issue are 'supplied and consumed as an integrated service' is incorrect.

The Panel observes that the manner in which the supply of integrated services such as the services at issue is organized depends on a number of parameters, including the business models adopted by specific companies, the regulatory framework in the country concerned, and how the direct users of payment services (e.g. issuing and acquiring institutions) organize their supply in specific jurisdictions. Some companies may provide the various components of the services at issue, thus supplying a final product as a 'package' for the direct users and for the ultimate beneficiaries of these services (i.e. the card holder, the issuer, the acquirer and the merchant). There may, however, be other circumstances where the different components are supplied by different suppliers. The evidence submitted by China indicates, for instance, that, in the case of France, the authorization process, on the one hand, and clearing and settlement, on the other hand, are provided by two different entities.

Thus, the evidence before us suggests that, in practice, the services essential to a payment card transaction to be completed may be supplied by one or more service supplier(s). As we have said, while some suppliers provide all the various components of that service in an integrated manner, other suppliers may specialize in one segment of that service. In our view, the fact that some component services may be supplied by different suppliers is not a sufficient basis for classifying each or some of these services under different subsectors. Indeed, as noted by the United States, '[i]t is the combination that enables the payment card transaction to occur'. Hence, the mere fact that separate suppliers provide one particular component of a service does not in itself imply that that component should be classified as a distinct service, or that the component is not part of an integrated service. In our view, what is relevant in relation to an integrated service is not whether it is supplied by a single supplier or by several suppliers, but rather whether the component services, when combined together, result in a new and distinct service, the integrated service."[642]

[641] Panel Report, *China – Electronic Payment Services*, paras. 7.58-7.62.
[642] Panel Report, *China – Electronic Payment Services*, paras. 7.182-7.184.

(iii) Absence of territorial limitation for Mode 3 / commercial presence

287. In *China – Electronic Payment Services*, the Panel found that in the absence of a specific Mode 3 limitation in China's Schedule that restricts the supply of EPS from within China into the territory of other WTO Members, China's commitment under Mode 3 covered not only the supply of EPS to clients within China, but also the supply of EPS to clients located in the territory of other WTO Members. In the course of its analysis, the Panel stated:

> "The issue arises whether the supply of services through commercial presence under China's mode 3 commitment includes the supply of services to all actors under these three scenarios, including actors located outside of China, in either Hong Kong or Macao. In assessing this issue, we note that the supply of a service through commercial presence (mode 3) is defined in Article I:2(c) of the GATS as the supply of a service 'by a service supplier of one Member, through commercial presence in the territory of any other Member'. 'Commercial presence' is defined in Article XXVIII, as follows:
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> …
>
> As the panel noted in its report in *Mexico – Telecoms*, this definition is silent with respect to any other territorial requirement (as is the case in cross-border supply under mode 1) or the nationality of the service recipient (as is the case in consumption abroad under mode 2). The definition of services supplied through commercial presence addresses only the location of the foreign service supplier, not that of the recipient of the relevant service, nor the nationality of the recipient. It indicates that for purposes of the GATS a service is supplied through mode 3 if a service supplier of a Member supplies its service through commercial presence in the territory of another Member.[643] The definition does not state that a foreign service supplier may supply its services only to recipients that are in the territory of the Member in which the service supplier has established a commercial presence and are nationals of that Member. Nor does the definition state that a foreign service supplier may not supply its services to recipients that are outside the territory of the Member in which the service supplier has established a commercial presence. Taking into account the absence of any territorial qualification as to the location of the recipient of a service, the panel in *Mexico – Telecoms* concluded that Mexico's commitment under mode 3 covered the supply of basic telecommunications services at issue both within Mexico and from Mexico into any other country.[644]
>
> We agree with the reasoning of the panel in *Mexico – Telecoms.* Nothing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the 'export' of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the 'exporting' Member's territory. A foreign service supplier may therefore, subject to any limitations set out in the Member's schedule, supply a

[643] (*footnote original*) Panel Report, *Mexico – Telecoms*, para. 7.375.

[644] (*footnote original*) In reaching this view, the panel in *Mexico – Telecoms* also took into account the fact that the Chairman's Note for Scheduling Basic Telecommunications Services Commitments makes specific reference to "local, long distance and international services", as well as the fact that Mexico did not exclude international services in the sector column, or elsewhere in its schedule, from the scope of services that commercial agencies may supply. The panel concluded that the Chairman's Note was an important part of the circumstances of the conclusion of the negotiations of the GATS, and should be given considerable weight in its assessment. See Panel Report, *Mexico – Telecoms*, paras. 7.376-7.377.

committed service to a foreign recipient wherever located, and of whatever nationality or origin.[645]"[646]

3. Article VI: Domestic Regulation

(a) General

288. In *China – Electronic Payment Services*, the Panel said the following regarding Article VI of the GATS:

> "China further appears to suggest that any interpretation of the term 'FFIs' that would cover institutions other than foreign banks and finance companies would mean that non-bank foreign service suppliers with little industry experience could enter the Chinese market and begin accepting deposits or making loans. That is not the case, however. As indicated above, in accordance with section C of China's mode 3 market access entry, China may impose prudential authorization criteria. Additionally, as confirmed by the preamble to the GATS, China retains the right to regulate, and to introduce new regulations on the supply of services to meet domestic policy objectives. Articles VI:1 and VI:5 of the GATS further confirm that even in sectors in which a WTO Member has undertaken specific commitments, that WTO Member may, subject to certain disciplines, apply measures of general application affecting trade in services, including e.g. non-discriminatory licensing, qualification and technical requirements. Finally, paragraph 2(a) of the GATS Annex on Financial Services provides that, notwithstanding any other provisions of the GATS, a WTO Member may take measures for prudential reasons, including for the protection of e.g. investors and depositors, or to ensure the integrity and stability of the financial system."[647]

4. Article XVI: Market Access

(a) Article XVI:1 (obligation to accord treatment provided for in Schedule)

(i) Relationship to Article XVI:2(a)

289. In *China – Electronic Payment Services*, the Panel considered that there was no need to offer additional findings under Article XVI:1, after having found a violation of Article XVI:2(a). The Panel explained:

> "We recall that the United States has raised claims in respect of both Articles XVI:1 and XVI:2(a) of the GATS. Several panels have discussed the relationship between Articles XVI:1 and XVI:2. The panel in *US – Gambling* found '[t]he ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article'.[648] On this basis, finding that the measures at issue were inconsistent with Articles XVI:2(a) and (c), the panel in that dispute did not consider it necessary to reach findings in respect of

[645] (*footnote original*) This means, for example, that a mode 3 commitment on data processing services would allow a foreign company established in the territory of a Member to supply data processing services to a consumer located in the territory of another Member. Similarly, a mode 3 commitment on "hotel services" would allow a foreign-owned hotel established in the territory of that Member to supply hotel services to foreign tourists.

[646] Panel Report, *China – Electronic Payment Services*, paras. 7.616-7.618.

[647] Panel Report, Panel Report, *China – Electronic Payment Services*, para. 7.569.

[648] (*footnote original*) Panel Report, *US – Gambling*, paras. 6.318, 6.298-6.299.

Article XVI:1 of the GATS. The Appellate Body in that dispute did not specifically address what is required to establish a violation of Article XVI:1.[649]

In *China – Publications and Audiovisual Products*, the panel concluded similarly to the panel in *US – Gambling*, as follows:

> Paragraph 1 of Article XVI sets out the general principle that a Member must accord to services and service suppliers of other Members treatment no less favourable than that specified under the 'terms, limitations and conditions' contained in its schedule. Paragraph 2 is more specific. It defines, in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain 'unless otherwise specified in its Schedule'. The six types of measures form a closed or exhaustive list, as indicated by the wording of the chapeau to paragraph 2 ('the measures … are defined as'). Under Article XVI, a Member undertakes a minimum standard of treatment, and is thus free to maintain a market access regime less restrictive than set out in its schedule, as confirmed in paragraph 1 which refers to a standard of 'no less favourable' treatment.[650]

Bearing the approaches of these panels in mind, we similarly do not consider it necessary to proceed in our analysis under Article XVI:1. We first recall our finding above that the issuer, terminal equipment and acquirer requirements are not among the measures which Article XVI:2 says a Member may not maintain, and more specifically that they do not constitute market access limitations within the meaning of Article XVI:2(a) of the GATS. That being so, as the United States has directed its arguments toward alleging a market access limitation of the type described in Article XVI:2(a), it is difficult to see how the relevant requirements could be subject to Article XVI:1. In any event, in the absence of any meaningful attempt by the United States to demonstrate that the issuer, terminal equipment and acquirer requirements, taken either individually or together, are separately inconsistent with Article XVI:1, we consider that the United States has failed to meet its burden to present a *prima facie* case in respect of its Article XVI:1 claim.

In addition, we recall our finding above that the Hong Kong/Macao requirements imposed by China pursuant to Document Nos. 8, 16 and 254 are inconsistent with Article XVI:2(a). In the light of this finding, there is in our view no need to offer additional findings on these requirements under Article XVI:1 and we therefore decline to consider this claim further."[651]

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[649] (*footnote original*) Appellate Body Report, *US – Gambling*, para. 256. On appeal, the Appellate Body noted that Antigua conditionally appealed whether the measures at stake were also inconsistent with Article XVI:1 of the GATS, "in the event the Appellate Body were to agree with the United States' argument that GATS Articles XVI:2(a) and (c) only apply to limitations that are in form specified exactly and expressly in terms of numerical quotas." Having upheld the panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, the Appellate Body decided to "leave the issue of the relationship between the first and the second paragraphs of Article XVI for another day" (Appellate Body Report, *US – Gambling*, para. 256).

[650] (*footnote original*) Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353.

[651] Panel Report, *China – Electronic Payment Services*, paras. 7.628-7.631. See also para. 7.748.

(b) Article XVI:2 (prohibited measures where commitments are undertaken)

(i) General

290. In *China – Electronic Payment Services*, the Panel found that certain requirements were inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) Mode 3 market access commitments, they maintain a limitation on the number of service suppliers in the form of a monopoly. However, the Panel found that the United States failed to demonstrate that any of the other requirements that it challenged violated Article XVI:2(a), in some cases because China had not undertaken a relevant market access commitment in its Schedule, and in other cases because they did not impose a limitation that falls within the scope of Article XVI:2(a).[652]

(ii) "monopolies" (Art. XVI:2(a))

291. In *China – Electronic Payment Services*, the Panel considered the distinction between a monopoly and an exclusive service supplier:

> "As a general textual matter, the definitions of the term 'monopoly' provided by the United States support the view that the notion of a monopoly service supplier may overlap with that of an exclusive service supplier. However, Article XVI:2(a) of the GATS draws a distinction between these two terms. We must give meaning to all terms and cannot therefore assume that the terms mean one or the same thing.[653] Taking into account the different meaning given to these terms in the text of the Articles VIII:5 and XXVIII(h) of the GATS, and the distinction made in Article XVI:2(a), we consider that a monopoly supplier is a sole supplier authorized or established formally or in effect by a Member, whereas an exclusive service supplier is one of a small number of suppliers in a situation where a Member authorizes or establishes a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers. We have not identified anything in the definitions provided by the parties, or elsewhere, that would lead us to conclude differently. Thus, for the purposes of Article XVI:2, we do not consider that a monopoly supplier is at the same time an exclusive service supplier.
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> Due to the formulation of the United States' panel request and its subsequent argumentation, we understand the United States to claim that, in the event that the Panel was to determine that CUP operates as the sole supplier in the Chinese market, then CUP constitutes a monopoly within the meaning of Article XVI:2(a). We note, in this respect, the United States alleges specifically that CUP is the 'sole supplier' of EPS for RMB bank card transactions. In the event that the Panel was to determine that CUP is one of a small number of EPS suppliers, then we understand it is the United States' view that CUP operates as an exclusive service supplier within the meaning of that provision. Thus, whether the requirements at issue establish CUP as the *sole* supplier of EPS services, or whether they establish CUP as one of a small number of EPS suppliers and substantially prevent competition, the United States considers that the requirements are inconsistent with Article XVI:2(a). We will assess the United States' claims with this understanding in mind."[654]

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[652] Panel Report, *China – Electronic Payment Services*, paras. 7.508-7.636.
[653] (*footnote original*) See Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at p. 29.
[654] Panel Report, *China – Electronic Payment Services*, paras. 7.587-7.588.

5. Article XVII: National Treatment

(a) General

292. In *China – Electronic Payment Services*, the Panel found that most of the challenged requirements were inconsistent with Article XVII of the GATS, insofar as these requirements failed to accord to services and service suppliers of other Members treatment no less favourable than China accorded to its own like services and service suppliers.[655] At the outset of its analysis, the Panel set out the elements that need to be proven to establish a violation of Article XVII:

> "As has been pointed out by the United States, the panel in *China – Publications and Audiovisual Products* effectively applied a three-part test to assess whether a Member's measure is inconsistent with Article XVII.[656] The United States suggests that we follow the same analytical approach. We find it appropriate to do so, noting also that China has not specifically opposed the United States' suggestion. Accordingly, in order to sustain its claim that China's measures are in breach of Article XVII, the United States as the complaining party needs to establish all of the following three elements:
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> (i) China has made a commitment on national treatment in the relevant sector and mode of supply, regard being had to any conditions and qualifications, or limitations[657], set out in its Schedule;
>
> (ii) China's measures are 'measures affecting the supply of services' in the relevant sector and mode of supply; and
>
> (iii) China's measures accord to services or service suppliers of any other Member treatment less favourable than that China accords to its own like services and service suppliers."[658]

(b) "like services"

293. In *China – Electronic Payment Services*, the Panel analysed the concept of "like services" in the context of Article XVII. In the course of its analysis, the Panel stated:

> "We address first the reference in Article XVII to 'like services'. As there is a particular framework for analyzing the 'likeness' of products in the context of Article III of the GATT 1994[659], we requested the parties to provide their views on any relevant criteria for establishing the 'likeness' of services in the context of Article XVII. Neither party provided the Panel with such criteria, however, or suggested a particular analytical framework. In approaching this matter, we do not

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[655] Panel Report, *China – Electronic Payment Services*, paras. 7.637-7.748.

[656] (*footnote original*) The panel in *China – Publications and Audiovisual Products* at one point in its report distinguished four elements. But elsewhere in its report, the panel combined two of the four elements into one, thus effectively applying a three-part test. See Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1272, 7.942 and 7.956.

[657] (*footnote original*) Regarding the term "limitations", we note that Article XX:1 of the GATS refers specifically to "terms, limitations and conditions" to market access, and "conditions and qualifications" to national treatment. This accords with the wording of Articles XVI:2 (on market access), XVII:1 (on national treatment) and XX:1(b) (on schedules of specific commitments). For simplicity, we adopt the term "limitations", which is used in the column headings in China's Schedule (and those of other Members), and throughout the 1993 and 2001 Scheduling Guidelines.

[658] Panel Report, *China – Electronic Payment Services*, para. 7.641.

[659] (*footnote original*) E.g. Appellate Body Report, *EC – Asbestos*, para. 102.

assume that without further analysis we may simply transpose to trade in services the criteria or analytical framework used to determine 'likeness' in the context of the multilateral agreements on trade in goods. We recognize important dissimilarities between the two areas of trade – notably the intangible nature of services, their supply through four different modes, and possible differences in how trade in services is conducted and regulated.

We thus begin our interpretative analysis by considering the ordinary meaning of 'like'. The dictionary defines the adjective 'like' as '[h]aving the same characteristics or qualities as some other person or thing; of approximately identical shape, size, etc., with something else; similar'.[660] To us, this range of meanings suggests that for services to be considered 'like', they need not necessarily be exactly the same, and that in view of the references to 'approximately' and 'similar', services could qualify as 'like' if they are essentially or generally the same.[661] The aforementioned definition highlights another point: something or someone is like in some respect, such as – in the terms of the definition – the 'shape, size, etc.' of a thing or person. To determine in what respect services need to be essentially the same for them to be 'like', we turn to consider the context of the phrase 'like services'.

We note that Article XVII:1 requires that a Member accord to services of another Member 'treatment no less favourable' than that it accords to its own like services. Article XVII:3 clarifies in relevant part that a Member would be deemed to provide less favourable treatment if it 'modifies the conditions of competition in favour of services … of [that] Member compared to like services … of any other Member'. We deduce from these provisions that Article XVII seeks to ensure equal competitive opportunities for like services of other Members. These provisions further suggest that like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market). Indeed, only if the foreign and domestic services in question are in such a relationship can a measure of a Member modify the conditions of competition in favour of one or other of these services.

Furthermore, we note that Article XVII is applicable to all services[662], in any sector, and that services – which are intangible – may be provided through any of the four modes of supply. As well, Article XVII refers to 'like services and service suppliers'. In the light of this complexity, 'like services and service suppliers' analyses should in our view take into account the particular circumstances of each case. In other words, we consider that determinations of 'like services', and 'like service suppliers', should be made on a case-by-case basis.[663]

In the light of the above, we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared.[664] As in goods cases where a panel assesses whether a particular

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[660] (*footnote original*) *Shorter Oxford English Dictionary*, Vol. 1, p. 1601.

[661] (*footnote original*) We note in this regard that another panel based a likeness determination on a finding that the services at issue were "virtually the same". Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322.

[662] (*footnote original*) Except for services supplied in the exercise of governmental authority. See Article I:3(b) of the GATS.

[663] (*footnote original*) For a similar view with regard to "like products" determinations in the context of Article III of the GATT 1994, see Appellate Body Reports, *EC – Asbestos*, para. 101; and *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, at p. 113.

[664] (*footnote original*) This is also consistent with the approach taken in the goods context. See Appellate Body Reports, *EC – Asbestos*, paras. 99 and 103; and *Philippines – Distilled Spirits*, fn. 211.

> product is a 'like product', the determination must be made on the basis of the evidence as a whole.[665] If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would, in our view, be 'like' for purposes of Article XVII."[666],[667]

(c) "like service suppliers"

294. In *China – Electronic Payment Services*, the Panel began its analysis of "like service suppliers":

> "Turning now to the issue of 'likeness' of service suppliers, we note that in a different dispute, a panel has found that entities may be considered like service suppliers if, and to the extent that, they provide like services.[668] We agree that the fact that service suppliers provide like services may in some cases raise a presumption that they are 'like' service suppliers. However, we consider that, in the specific circumstances of other cases, a separate inquiry into the 'likeness' of the suppliers may be called for. For this reason, we consider that 'like service suppliers' determinations should be made on a case-by-case basis."[669]

(d) "treatment no less favourable"

295. In *China – Electronic Payment Services*, the Panel began its analysis of "treatment no less favourable" by observing that:

> "[A]s regards the concept of 'less favourable treatment', Article XVII:3 provides useful clarification. It states that formally identical or different treatment is deemed less favourable 'if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member'. We deduce from this that, subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of service suppliers of another Member constitutes a breach of Article XVII:1 if and only if such treatment modifies the conditions of competition to their detriment."[670]

6. Article XX: Schedules of Specific Commitments

(a) Interpretation of Schedules

(i) General

296. In *China – Electronic Payment Services*, the Panel examined whether the services at issue — electronic payment services for payment card transactions — are covered under subsector 7.B(d) of China's GATS Schedule and decided in the affirmative.[671] The Panel rejected the United States' view that China's Schedule includes a market access commitment concerning subsector 7.B(d) to allow the cross-border (Mode 1) supply of EPS into China by foreign EPS suppliers. However, the Panel found

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[665] (*footnote original*) See Appellate Body Report, *EC – Asbestos*, para. 103.

[666] (*footnote original*) It is important to note that even if relevant services are determined to be "like" and a measure of a Member is found to result in less favourable treatment of "like" services of another Member, it may still be possible to justify that measure under one of the general exceptions set out in Article XIV of the GATS.

[667] Panel Report, *China – Electronic Payment Services*, paras. 7.698-7.702.

[668] (*footnote original*) Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322.

[669] Panel Report, *China – Electronic Payment Services*, para. 7.705.

[670] Panel Report, *China – Electronic Payment Services*, para. 7.687.

[671] Panel Report, *China – Electronic Payment Services*, paras. 7.63-7.207.

that China's Schedule includes a market access commitment that allows foreign EPS suppliers to supply their services through commercial presence in China, so long as a supplier meets certain qualifications requirements related to local (RMB) currency business. In addition, the Panel concluded that China's Schedule contains a full national treatment commitment for the cross-border (Mode 1) supply of EPS, as well as a national treatment commitment under Mode 3 that is also subject to certain qualifications requirements related to local (RMB) currency business.

(ii) Relevant of market and regulatory realities for the interpretation of GATS schedules of specific commitments

297. In *China – Electronic Payment Services*, the Panel stated the following in the context of interpreting China's GATS schedule of specific commitments:

> "Furthermore, we find convincing the arguments and factual evidence submitted by the United States that there are many practical differences between the systems used to clear and settle investment instruments of the kind referenced in subsector (xiv) and the systems used to clear and settle payment instruments, such as those mentioned in subsector (d). These differences relate to the following: (i) the financial instruments involved and the value of typical transactions; (ii) the market participants involved in the transaction and related processing; (iii) the infrastructure needs for such processes to occur safely and efficiently; and (iv) regulatory oversight and systemic risk to the financial system. The distinction between payment systems and securities infrastructure as distinct components of the market infrastructure is common in many countries, including in China.
>
> China does not contest the differences between clearing and settlement of payment instruments, on the one hand, and securities and derivatives, on the other hand. China argues, however, that these differences are not relevant to the interpretation of the term 'financial assets' and do not change the ordinary meaning of the term 'negotiable instruments'. We disagree. In our view, classification of services is not an abstract exercise; due regard should be had to market and regulatory realities. A classification approach reflecting, and in accord with, those realities contributes to the clarity and, therefore, security and predictability, of GATS specific commitments. Our reading of the scope of subsector (xiv) in the Annex and that of subsector (d) in China's Schedule is consistent with these considerations, because it takes due account of (i) the way payment systems are generally organized and regulated, as well as (ii) the essential differences between the settling and clearing of payment instruments and of securities and other negotiable instruments."[672]

(b) Article XX:2 (inscriptions for Article XVI and XVII)

298. In *China – Electronic Payment Services*, the Panel applied the rule in Article XX:2 to determine the scope of China's rights and obligations:

> "The Panel draws several inferences from the wording of Article XX:2. First, the provision confirms the basic point that measures exist that are inconsistent with both market access and national treatment obligations. In that sense, the scope of Article XVI and the scope of Article XVII are not mutually exclusive, as China appears to argue. Both provisions can apply to a single measure. As Article XX:2 makes clear, a single measure can contain or give rise to two simultaneous inconsistencies: one with respect to a market access obligation, the other with respect to a national treatment obligation. To maintain or introduce such a measure, the

[672] Panel Report, *China – Electronic Payment Services*, paras. 7.161-7.162.

normal rule for inscribing commitments in Article XX:1 might suggest that a Member needs to enter an explicit limitation in both the market access and national treatment columns. In such cases however, the special rule in Article XX:2 provides a simpler requirement: a Member need only make a single inscription of the measure under the market access column, which then provides an implicit limitation under national treatment.

Secondly, the Panel observes that the wording of Article XX:2 indicates that what is inscribed in the market access column is a 'measure' which, in the situation of conflict contemplated by Article XX:2, must encompass aspects that are inconsistent with both Articles XVI and XVII. In this way, a single inscription under Article XVI of a 'measure' will provide a limitation as well under Article XVII.

The United States argues that the term 'Unbound' cannot be viewed as the inscription of 'measures' and therefore cannot provide a condition or qualification to Article XVII through the operation of Article XX:2. In contrast, China says that the term 'Unbound' is 'simply a shorthand device for inscribing all measures, present or future' that are inconsistent with Article XVI:2. The Panel notes that Article XX:2 states that '*[m]easures* inconsistent with both Articles XVI and XVII shall be inscribed ...' (emphasis added). We see nothing in the text of Article XX:2 that would constrain the latitude of a Member to inscribe the 'measures' excluded from Article XVI:2 either individually or collectively. In our view, it would be incongruous if an inscription of 'Unbound' had an effect different from that of inscribing individually all possible measures within the six categories foreseen under Article XVI:2. To take a different interpretation would be to elevate form over substance. In our assessment, therefore, an inscription of the term 'Unbound' in the market access column should be viewed as an inscription of 'measures', specifically of all those defined in Article XVI:2, which a Member may not maintain or adopt, unless otherwise specified in its schedule. For this reason, we find that Article XX:2 does apply to situations where a Member has inscribed 'Unbound' in the market access column of its schedule. In the Panel's view, the inscription of 'Unbound' in the market access column of China's Schedule has the equivalent effect of an inscription of all possible measures falling within Article XVI:2.

Having found that the special scheduling rule in Article XX:2 applies to China's inscription of 'Unbound', the Panel must now consider what effect this has on the scope of China's national treatment commitment. The Panel recalls that Article XX:2 provides, in the case of measures inconsistent with both Articles XVI and XVII, that the measure inscribed in the market access column encompasses aspects inconsistent with *both* market access and national treatment obligations. Consequently, an 'Unbound' inscription in the market access column encompasses inconsistencies with Article XVII as well as those arising from Article XVI. The inscription of 'Unbound' will therefore, in the terms of Article XX:2, 'provide a condition or qualification to Article XVII as well', thus permitting China to maintain measures that are inconsistent with both Articles XVI and XVII. With an inscription of 'Unbound' for subsector (d) in mode 1 under Article XVI, and a corresponding 'None' for Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether discriminatory or not.

…

In the present case, we consider that our interpretation of the meaning of 'Unbound' when inscribed in the market access column of a schedule gives full meaning to that term. By inscribing 'Unbound' under market access, China reserves the right to

maintain any type of measure within the six categories falling under Article XVI:2, regardless of its inscription in the national treatment column. We observe, however, that our interpretation also gives meaning to the term 'None' in the national treatment column. Due to the inscription of 'None', China must grant national treatment with respect to any of the measures at issue that are not inconsistent with Article XVI:2. China's national treatment commitment could thus have practical application should China, for example, choose to allow in practice the supply of services from the territory of other WTO Members into its market, despite the fact that it has not undertaken any market access commitments in subsectors (a) to (f) of its Schedule.

We point out that our conclusion on the relationship of the inscription 'Unbound' under Article XVI with that of 'None' under Article XVII preserves the freedom of WTO Members, when taking services commitments, to choose the combination of market access and national treatment limitations, if any, that they wish to maintain. Our conclusion does not narrow the range of options available to WTO Members to limit their market access and national treatment commitments. It focuses solely on how to interpret through scheduling rules, notably Article XX:2, the inscriptions that a WTO Member has chosen to enter in its schedule. We emphasize as well that we do not find that either of Articles XVI or XVII is substantively subordinate to the other. We find simply that Article XX:2 establishes a certain *scheduling* primacy for entries in the market access column, in that a WTO Member not wishing to make any commitment under Article XVI, discriminatory or non-discriminatory, may do so by inscribing the term 'Unbound' in the market access column of its schedule."[673]

7. Article XXVIII: Definitions

(a) "sector" (Art. XXVIII(e))

299. In *China – Electronic Payment Services*, the Panel considered the concept of a "sector" under the GATS:

"In addressing this issue, the Panel must first examine the concept of 'sector' under the GATS. The Panel recalls that, in *US – Gambling*, the Appellate Body referred to the definition of "sector' of a service' contained in Article XXVIII(e) and explained that:

> … the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Second, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or Subsector within which that service falls, a specific service cannot fall within two different sectors or Subsectors. In other words, *the sectors and subsectors in a Member's Schedule must be mutually exclusive*.[674]

[673] Panel Report, *China – Electronic Payment Services*, paras. 7.658-7.661, 7.663-7.664.

[674] (*footnote original*) Appellate Body Report, *US – Gambling*, para. 180 (emphasis added). The Appellate Body further explained that "[i]f this were not the case [i.e. if sectors and subsectors were *not* mutually exclusive], and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other." Ibid. fn. 219.

We also recall that, when referring to Article XXVIII(e)(ii) of the GATS, the panel in *China – Publications and Audiovisual Products*, found that:

> A description of a service sector in a GATS schedule does not need to enumerate every activity that is included within the scope of that service, and is not meant to do so. A service sector or subsector in a GATS schedule thus includes not only every service activity specifically named within it, but also any service activity that falls within the scope of the definition of that sector or subsector referred to in the schedule.[675]

Hence, the definition of 'sector of a service' contained in the GATS and the finding of the Panel in *China – Publications and Audiovisual Products* confirm that a 'sector' may include 'any service activity that falls within the scope of the definition of that sector', whether or not these activities are explicitly enumerated in the definition of that sector or subsector.

The Panel observes that, when a card holder pays for a good or a service with a credit card and the merchant accepts that form of payment, both the card holder and the merchant naturally expect that the transaction for which that payment card is used will be completed. The completion of a transaction in which payment cards are used includes, at a minimum, what we referred to as 'front-end processing' (which serves to authenticate and authorize transactions) and 'back-end processing' (which essentially entails clearing and settlement of the transaction). In our view, there cannot be any 'payment service' and 'money transmission service' if the payment is not effected and the money not transferred from the customer's account to the merchant's account. In that sense and referring to the finding cited above, these activities, even though they are not explicitly listed in subsector (d), are necessarily included within the scope of the definition of that subsector because they must operate together for the payment and money transmission service to be supplied. The fact that they are not specifically listed under the subsector at issue does not matter, as stated by the panel in *China – Publications and Audiovisual Products.* Hence, we agree with the United States' characterization of subsector (d) as encompassing 'any service that is essential to 'payment and money transmission''. In the view of the Panel, the classification under a single entry, of a service made up of a combination of different services is not incompatible with the principle of mutual exclusivity when these combined services result in a distinct service, which is supplied and consumed as such.[676]

Finally, contrary to China's view, we consider that the fact that the United States switched from plural to singular when referring to 'EPS' is immaterial for the purposes of services classification. In our view, in a normal hierarchical classification scheme (like the CPC or the Annex on Financial Services), a service combining different services can be described simply as a 'service', or as 'services' in

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[675] (*footnote original*) Panel Report, *China – Publications and Audiovisual Products*, para. 7.1014.

[676] (*footnote original*) We note that our interpretation is supported by a rule of interpretation in the CPC prov.:

"1. When services are, *prima facie*, classifiable under two or more categories, classification shall be effected as follows, on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable: (a) The category that provides the most specific description shall be preferred to categories providing a more general description; (b) *Composite services consisting of a combination of different services which cannot be classified by reference to 1(a) shall be classified as if they consisted of the service which gives them their essential character, in so far as this criterion is applicable*." Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations (1991), p. 20 (emphasis added).

> the plural. In the latter case, 'services' refers to the sum of the different services classified by reference to the 'service'."[677]

8. Annex on Financial Services

(a) General

300. In *China – Electronic Payment Services*, the Panel treated the Annex on Financial Services as context for interpreting GATS commitments:

> "Article XXIX of the GATS (*Annexes*) states that '[t]he Annexes to this Agreement are an integral part of this Agreement'. Pursuant to that provision, the GATS Annex on Financial Services is treaty text. Moreover, it constitutes context for purposes of interpreting China's Schedule, which is itself an integral part of the GATS. Paragraph 5 (*Definitions*) of the Annex contains several definitions and a classification of financial services that WTO Members may use – and many of them did use – when scheduling their commitments on financial services. We recall that China stated that it scheduled its financial services commitments by reference to the definition of financial services set forth in the Annex. We shall therefore turn to the Annex as relevant context for the interpretation of China's Schedule."[678]

(b) Paragraph 2(a) (prudential measures)

301. In *China – Electronic Payment Services*, the Panel said the following regarding paragraph 2(a) of the Annex on Financial Services:

> "China further appears to suggest that any interpretation of the term 'FFIs' that would cover institutions other than foreign banks and finance companies would mean that non-bank foreign service suppliers with little industry experience could enter the Chinese market and begin accepting deposits or making loans. That is not the case, however. As indicated above, in accordance with section C of China's mode 3 market access entry, China may impose prudential authorization criteria. Additionally, as confirmed by the preamble to the GATS, China retains the right to regulate, and to introduce new regulations on the supply of services to meet domestic policy objectives. Articles VI:1 and VI:5 of the GATS further confirm that even in sectors in which a WTO Member has undertaken specific commitments, that WTO Member may, subject to certain disciplines, apply measures of general application affecting trade in services, including e.g. non-discriminatory licensing, qualification and technical requirements. Finally, paragraph 2(a) of the GATS Annex on Financial Services provides that, notwithstanding any other provisions of the GATS, a WTO Member may take measures for prudential reasons, including for the protection of e.g. investors and depositors, or to ensure the integrity and stability of the financial system."[679]

(c) Subsector xiv in paragraph 5(a) of the Annex

(i) "including"

302. In *China – Electronic Payment Services*, the Panel considered subsector xiv of paragraph 5(a) of the Annex on Financial Services. In the course of its analysis, the Panel stated:

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[677] Panel Report, *China – Electronic Payment Services*, paras. 7.177-7.181.
[678] Panel Report, *China – Electronic Payment Services*, para. 7.139.
[679] Panel Report, *China – Electronic Payment Services*, para. 7.569.

> "The Panel is of the view that the list contained in subsector (xiv) sheds light on the type of clearing and settlement services covered under that subsector. In this respect, we recall the view of the panel in *China – Publications and Audiovisual Products* that 'the word 'including' in ordinary usage indicates that what follows is not an exhaustive, but a partial, list of all covered items'.[680] We find this statement to be correct in the specific context of subsector (xiv), and so, like the parties, we regard the list as illustrative. Accordingly, we conclude that this illustrative list is a non-exhaustive enumeration of the kinds of 'financial assets', the clearing and settlement of which are classified under subsector (xiv)."[681]

J. DSU

1. Article 2: Administration

(a) Article 2.4 (DSB decisions by consensus)

(i) Initiation of the information-gathering procedure under Annex V of the SCM Agreement

303. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus.[682] The Appellate Body found that the Panel erred in denying various requests made by the European Communities with respect to the information-gathering procedure under Annex V of the SCM Agreement. However, the Appellate Body declined to make findings as to whether the conditions for an initiation of an Annex V procedure were fulfilled in this dispute. After reviewing various provisions of the SCM Agreement, the Appellate Body concluded that:

> "We are of the view that, taken together, the above considerations make clear that the first sentence of paragraph 2 of Annex V to the *SCM Agreement* must be understood as requiring the DSB to take action, and that such action occurs automatically when there is a request for initiation of an Annex V procedure and the DSB establishes a panel.[683] This provision does not conflict with Article 2.4 of the DSU; rather, it establishes the conditions which, when satisfied, necessarily result in the initiation of an Annex V procedure by the DSB."[684]

2. Article 3: General Provisions

(a) Article 3.10

(i) Good faith and representations made by a party

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[680] (*footnote original*) Panel Report, *China – Publications and Audiovisual Products*, para. 7.294.

[681] Panel Report, *China – Electronic Payment Services*, para. 7.150.

[682] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 480-549.

[683] (*footnote original*) One Member of the Division wishes to qualify this understanding of paragraph 2 of Annex V to the *SCM Agreement*. In the opinion of this Member, to initiate an Annex V procedure, an act of the DSB is required. The DSB's initiation of an Annex V procedure in the manner described above can occur only when the complaining Member's request for an Annex V procedure forms an integral part of that Member's request for the establishment of a panel.

[684] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 524.

304. In *China – GOES*, the Appellate Body indicated that a panel is entitled to rely on "representations" made before it by a party, and that if a party then wished to advance a different position on appeal, that party would have to explain why its statements are no longer to be relied upon.[685]

305. In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested that the Panel make a preliminary ruling that China's panel request did not comply with the requirements of Article 6.2 of the DSU. China subsequently represented that it did not intend to pursue some of the claims at issue. In these circumstances, the Panel decided that it was not necessary for it to rule on whether, insofar as those claims were concerned, the panel request complied with Article 6.2 of the DSU.[686] In the course of its reasoning, the Panel stated that:

> "We have determined above that we are entitled to rely on China's statement for purposes of making our preliminary ruling. However, any decision by this Panel to limit the scope of its preliminary ruling in reliance on China's statement would of necessity be subject to the condition that China acts in accordance with its statement. It is apposite to recall in this respect that Article 3.10 of the DSU commits all Members, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". Thus, it is clear to us that in situations where a complaining party abandons claims during a special preliminary ruling procedure, panels should not – save, perhaps, in extraordinary circumstances and subject to a well-substantiated explanation[687] – allow that party to resurrect those claims after the preliminary phase has run its course. Otherwise, a complaining party could circumvent a preliminary ruling covering these claims.
>
> Bearing in mind these additional observations informed by Article 3.10 of the DSU, we remain of the view that the Panel is entitled to act on China's statement for purposes of making its preliminary ruling. Given this, we conclude that we have sufficient reason at this time to consider that the Article 6.2 issue raised by the United States and pertaining to the abandoned claims is, and will remain, moot. In these circumstances, we find it appropriate to limit the scope of our preliminary ruling to take account of China's statement."[688]

3. Article 6: Establishment of Panels

(a) Article 6.2 (panel request requirements)

(i) Requirement to "identify the specific measures at issue"

306. In *EU – Footwear (China)*, the Panel rejected the respondent's contention that certain aspects of the panel request did not "identify the specific measures at issue" within the meaning of Article 6.2.[689]

307. In *US – COOL*, the Panel found that that the COOL statute, the 2009 Final Rule, the Interim Final Rule (AMS) and the Vilsack letter were identified in the panel request, but that the 2009 Final Rule (FSIS) was not, and therefore fell outside of its terms of reference by virtue of Article 6.2.[690]

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[685] Appellate Body Report, *China – GOES*, para. 195.

[686] See WT/DS449/4, paras. 3.1-3.16.

[687] (*footnote original*) It is noteworthy that, in *China – GOES*, the Appellate Body indicated along similar lines that in a case where a panel is entitled to rely on statements made before it by a party, and that party wishes to advance a different position on appeal, that party would have to explain why its statements are no longer to be relied upon. (See Appellate Body Report, *China – GOES*, para. 195).

[688] WT/DS449/4, paras. 3.13-3.14.

[689] Panel Report, *EU – Footwear (China)*, paras. 7.12-7.24, 7.50.

308. In *India – Agricultural Products*, the Panel ruled that the panel request adequately identified the specific measures at issue as required by Article 6.2 of the DSU; however, the panel considered that it was premature and potentially unnecessary to determine, at a preliminary stage, precisely which measures would be covered by the panel request and fall within the scope of the panel's terms of reference.[691]

(ii) Requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"

309. In *EU – Footwear (China)*, the Panel rejected the respondent's contention that certain aspects of the panel request did not comply requirement to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2.[692]

310. In *China – Raw Materials*, the Appellate Body found that the Panel erred under Article 6.2 in making findings regarding claims allegedly identified in Section III of the complainants' panel request.[693] More specifically, the Appellate Body considered that the complainants failed to provide sufficiently clear linkages between the broad range of obligations contained in Articles VIII:1(a), VIII:4, X:1, X:3(a), and XI:1 of the GATT 1994, Paragraphs 2(A)2, 5.1, 5.2, and 8.2 of Part I of China's Accession Protocol, and Paragraphs 83, 84, 162, and 165 of China's Accession Working Party Report, and the 37 challenged measures; the Appellate Body concluded that Section III of the complainants' panel requests did not satisfy the requirement in Article 6.2 to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". As a consequence, the Appellate Body declared moot and of no legal effect the Panel findings in respect of claims concerning export quota administration and allocation, export licensing requirements, a minimum export price requirement, and fees and formalities in connection with exportation. In the course of its analysis, the Appellate Body stated:

> "[W]hether a panel request challenging a number of measures on the basis of multiple WTO provisions sets out 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly' may depend on whether it is sufficiently clear which 'problem' is caused by which measure or group of measures. The Appellate Body has explained that, in order 'to present the problem clearly', a panel request must 'plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed'.[694] Furthermore, to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged.[695] In our view, a defective panel request may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU and, thus, may have implications for the prompt settlement of a dispute in accordance with Article 3.3 of the DSU. A complaining Member should therefore be particularly vigilant in preparing its panel request, especially when numerous measures are challenged under several different treaty provisions.
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> ...

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[690] Panel Reports, *US – COOL*, paras. 7.9-7.22.

[691] See WT/DS430/5, paras. 3.8-3.66.

[692] Panel Report, *EU – Footwear (China)*, paras. 7.12-7.24, 7.50.

[693] Appellate Body Reports, *China – Raw Materials*, paras. 211-235.

[694] (*footnote original*) Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

[695] (*footnote original*) See Appellate Body Report, *Korea – Dairy*, para. 124. See also Appellate Body Report, *EC – Fasteners (China)*, para. 598.

> As the Appellate Body has explained, a claim must be presented in a manner that presents the problem clearly within the meaning of Article 6.2. We do not consider this to have been the case here, where Section III of the complainants' panel requests refers generically to 'Additional Restraints Imposed on Exportation' and raises multiple problems stemming from several different obligations arising under various provisions of the GATT 1994, China's Accession Protocol, and China's Accession Working Party Report. Neither the titles of the measures nor the narrative paragraphs reveal the different groups of measures that are alleged to act collectively to cause each of the various violations, or whether certain of the measures is considered to act alone in causing a violation of one or more of the obligations.
>
> Like the Panel, we do not read Section III of the complainants' panel requests as advancing all claims, under all treaty provisions, with respect to all measures. Instead, it appears to us that the complainants were challenging some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations. In the present case, the combination of a wide-ranging list of obligations together with 37 legal instruments ranging from China's *Foreign Trade Law* to specific administrative measures applying to particular products is such that it does not allow the 'problem' or 'problems' to be discerned clearly from the panel requests. Because the complainants did not, in either the narrative paragraphs or in the final listing of the provisions of the covered agreements alleged to have been violated, provide the basis on which the Panel and China could determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures, they failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU."[696]

311. In *Dominican Republic – Safeguard Measures*, the Panel, as a consequence of its findings on certain claims, considered it unnecessary to rule on the respondent's objection that certain other claims developed by the complainants in their first written submission were allegedly not identified in the requests for the establishment of the panel.[697]

312. In *China – Electronic Payment Services*, the Panel rejected China's argument that the panel request failed to provide "a brief summary of the legal basis sufficient to present the problem clearly" within the meaning of Article 6.2.[698]

313. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel rejected the respondent's contention that the complainants' panel requests, by not identifying why or how the measures at issue constitute subsidies by reference to the elements of Article 1 of the SCM Agreement, failed to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" within the meaning of Article 6.2.[699]

314. In *US – Countervailing Measures (China)*, the Panel concluded that China was not required under Article 6.2 of the DSU to provide more precision about its challenge to the United States' use of and resort to facts available in order to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[700]

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[696] Appellate Body Reports, *China – Raw Materials*, paras. 220, 230-231.

[697] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.110-7.111, 7.151, 7.328, and 7.441.

[698] Panel Report, *China – Electronic Payment Services*, paras. 7.1-7.4.

[699] WT/DS412/8 and WT/DS426/7, paras. 17-25.

[700] See WT/DS437/4, paras. 4.1-4.20.

315. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel found that the panel request permitted sufficiently clear inferences as to the WTO obligations at issue, and therefore provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[701]

316. In *India – Agricultural Products*, the Panel ruled that the panel request did provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of the claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.[702]

(iii) Procedural aspects of preliminary rulings under Article 6.2

Timing of preliminary rulings under Article 6.2

317. In *China – Raw Materials*, the Panel issued a preliminary ruling in two phases, after deciding that it would reserve its decision on certain issues until after seeing the parties' first written submissions. The Appellate Body expressed its concern over the panel's approach:

> "We find it troubling therefore that the Panel, having correctly recognized that a deficient panel request cannot be cured by a complaining party's subsequent written submissions, nonetheless decided to "reserve its decision" on whether the panel requests complied with the requirements of Article 6.2 until after it had examined the parties' first written submissions and was "more able to take fully into account China's ability to defend itself".[703] The fact that China may have been able to defend itself does not mean that Section III of the complainants' panel requests in this dispute complied with Article 6.2 of the DSU. In any event, compliance with the due process objective of Article 6.2 cannot be inferred from a respondent's response to arguments and claims found in a complaining party's first written submission. Instead, it is reasonable to expect, in our view, that a rebuttal submission would address arguments contained in the complaining party's first written submission. We also find it troubling that the second phase of the Panel's preliminary ruling came only at an advanced stage in the proceedings, on 1 October 2010."[704]

318. Several subsequent panels, including *China – Electronic Payment Services*[705], *US – Countervailing Measures (China)*[706] and *US – Countervailing and Anti-Dumping Measures (China)*[707], granted the respondent's request for an early preliminary ruling, prior to the receipt of the complainants' first written submission, on whether the panel request complied with the requirements of Article 6.2. In *India – Agricultural Products*, the Panel issued a preliminary ruling under Article 6.2 on certain issues after receipt of the complainant's first written submission, but found that it was premature and potentially unnecessary to issue a preliminary ruling on certain other issues under Article 6.2.[708]

Public circulation of preliminary rulings under Article 6.2

319. Between October 2011 and July 2013, panels in the following disputes publicly circulated their preliminary rulings under Article 6.2 of the DSU: *Canada – Renewable Energy / Feed-In Tariff*

[701] See WT/DS449/4, paras. 3.17-3.52.
[702] See WT/DS430/5, paras. 3.67-3.141.
[703] Panel's preliminary ruling (first phase), para. 39.
[704] Appellate Body Reports, *China – Raw Materials*, para. 233.
[705] Panel Report, *China – Electronic Payment Services*, paras. 7.1-7.4.
[706] See WT/DS437/4, para. 1.2.
[707] See WT/DS449/4, para. 1.2.
[708] See WT/DS430/5, paras. 1.4-1.5.

Program[709], *US – Countervailing Measures (China)*[710], *US – Countervailing and Anti-Dumping Measures (China)*[711], and *India – Agricultural Products.*[712]

Third party participation with respect to preliminary rulings under Article 6.2

320. Third parties were given the opportunity to comment on preliminary ruling requests in *Canada – Renewable Energy / Feed-In Tariff Program*[713], *US – Countervailing Measures (China)*[714], *US – Countervailing and Anti-Dumping Measures (China)*[715], and *India – Agricultural Products.*[716]

Oral hearing as part of a preliminary ruling procedure under Article 6.2

321. In *India – Agricultural Products*, the respondent asked for an oral hearing on its preliminary ruling request. The Panel declined, and stated that "[i]n line with prior proceedings[717] and with a view to avoiding further delays, the Panel considers that it is not necessary to hold an oral hearing on India's preliminary objections".[718]

(iv) Whether several instruments may be treated as a single measure

322. In *US – COOL*, the Panel considered whether it should treat the instruments at issue that fall within its terms of reference as a single measure consisting of various components, or rather as a series of independent measures.[719] At the outset of its analysis, the Panel stated:

> "In considering whether to examine the instruments at issue as one single measure or several distinct measures, we recall the panel's statement in *Japan – Apples* regarding the *relevance* of the question of how to treat measures: the objective of findings by panels and the Appellate Body is to 'assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance, in order to ensure effective resolution of the dispute'.[720]
>
> Our decision here will also affect how they are examined – as one single measure or individual separate measures – in respect of the parties' substantive claims under the TBT Agreement and the GATT 1994. Therefore, a proper characterization of the measures at issue will enable us to make findings that can assist the DSB in making 'sufficiently precise recommendations and rulings' to ensure effective resolution of the dispute.
>
> Bearing the above in mind, we start our analysis by observing that questions relating to the characterization of measures have arisen in previous disputes. In particular, the complainants refer to disputes such as *Japan – Apples*, *EC – Asbestos*, and *US – Export Restraints*, where several legal requirements or legal provisions were treated as a single measure. The United States, on the other hand, refers to the disputes on

[709] See WT/DS412/8 and WT/DS426/7.
[710] See WT/DS437/4.
[711] See WT/DS449/4.
[712] See WT/DS430/5.
[713] See WT/DS412/8 and WT/DS426/7, paras. 12-16.
[714] See WT/DS437/4, para. 1.3
[715] See WT/DS449/4, para. 1.3.
[716] See WT/DS430/5, para. 1.4.
[717] (*footnote original*) Most recently, *US – Countervailing Measures (China)*, WTO/DS437/4, para. 1.4.
[718] See WT/DS430/5, para. 1.5.
[719] Panel Reports, *US – COOL*, paras. 7.44-7.63.
[720] (*footnote original*) Panel Report, *Japan – Apples*, para. 8.10, referring to the Appellate Body's statement in *Australia – Salmon* (para. 223).

Japan – Film and *Turkey – Rice* where several legal requirements were examined as separate individual measures.

Although the nature of the questions raised in these disputes was similar, namely whether to treat several requirements or provisions as a single or multiple measures, the facts specific to each dispute, examined in light of certain factors, led the panels and the Appellate Body to adopt different approaches to the examination of the measures.[721] Among the main factors considered by panels and the Appellate Body in relation to this question include the following: (i) the manner in which the complainant presented its claim(s) in respect of the concerned instruments[722]; (ii) the respondent's position; and (iii) the legal status of the requirements or instrument(s), including the operation of, and the relationship between, the requirements or instruments, namely whether a certain requirement or instrument has autonomous status.[723] We will consider the measures at issue in the present disputes in light of these factors."[724]

323. In *China – Electronic Payment Services*, the Panel stated that:

"The Panel notes that, in previous instances, panels and the Appellate Body have analysed measures or legal instruments not only on an individual basis, but have considered how certain measures or instruments operate collectively, in concert, or in

[721] (*footnote original*) For example, in *EC – Asbestos*, the issue before the Appellate Body was whether it was appropriate for the panel to consider the measure at issue in two parts (elements) in assessing the applicability of the TBT Agreement (i.e. technical regulations) to the measure. The Appellate Body found that "the proper character of the measure at issue [could not] be determined unless the measure [was] examined as a whole". (Appellate Body Report, *EC – Asbestos*, paras. 59-65). The facts of that dispute are slightly different from the current dispute in that the instruments at issue in this dispute are separate instruments, and not elements of the same instrument. See also Appellate Body Report, *Australia – Salmon*, paras. 103-104.

In *Turkey – Rice*, the United States claimed that the concerned measures were in violation of the covered agreements, both considered separately and in conjunction. As the panel found that the measures were each individually inconsistent with Turkey's obligations under covered agreements, it did not see the need to reach a separate conclusion on those measures considered jointly, for the resolution of that dispute. (Panel Report, *Turkey – Rice*, paras. 7.280-7.281).

[722] (*footnote original*) In *US – Export Restraints*, the panel describes Canada's, the complainant in that dispute, arguments as follows: "each of the elements that [Canada] cites (the statute, the SAA; the Preamble, and US practice) individually constitutes a measure that is susceptible to dispute settlement, and that, 'taken together' as well, these elements constitute a measure. Further, ... these measures individually *and* collectively require a particular treatment of export restraints". The United States, as the respondent, disagreed with Canada and argued that "it is dangerous for the Panel to seek to analyse an ill-defined 'measure' as a 'package'". In light of Canada's position, the Panel decided to first analyse each concerned measure separately and subsequently in light of other measures to the extent necessary. (Panel Report, *US – Export Restraints*, paras. 8.82-8.131)

In *Japan – Film*, the United States argued that Japan's application of the eight distribution "measures" encouraged and facilitated the creation of a market structure for photographic film and paper in Japan in which imports are excluded from traditional distribution channel. Japan was of the view that each measure must be examined on its own merit. The panel proceeded to examine each of the eight distribution measures individually. Regarding the United States' claim that certain measures in combination nullify or impair benefits accruing to the United States, the panel noted that for US theory to have factual relevance in that case, it must be based on a detailed justification and convincing evidence of record. But the panel considered that the United States failed to make such a showing. (Panel Report, *Japan – Film*, paras. 10.90-10.94, 10.350-10.367).

[723] (*footnote original*) Appellate Body Report, *EC – Asbestos*, para. 64; Panel Report, *US – Export Restraints*, para. 8.85. The panel in *US – Export Restraints* explains that "it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations". It then examined the status of each measure under US law to determine whether such measure is operational on its own.

[724] Panel Reports, *US – COOL*, paras. 7.47-7.50.

> combination, when evaluating the claims of a complainant.[725] We see no reason at the outset to decline to consider the United States' request to consider the requirements both individually and as they operate together. As in previous cases, the need to do so depends on the particular circumstances of the matter before the Panel, including the content of the particular measures before the Panel, the interrelationship of those measures, and the result of the Panel's assessment of the measures considered individually. In our evaluation here, we will assess both the content and interrelationship of those instruments before us."[726]

(v) Relationship between Articles 4.4 and 6.2

324. In *China – Broiler Products*, the Panel analyzed the connection between the claims set forth in a panel request and those identified in the request for consultations, observing that:

> "[A]t the very least, some connection must exist between the claims set forth in the panel request and those identified in the request for consultations in terms of either the provisions cited, the obligation at issue or issue in dispute, or the factual circumstances leading to the alleged violation".[727]

4. Article 7: Terms of Reference

(a) Terminated/repealed/amended/replaced measures

325. In *EU – Footwear (China)*, the Panel having accepted that certain measures had expired, concluded that there was no basis for a recommendation to bring those measures into conformity under Article 19.1 of the DSU.[728]

326. In *US – COOL*, the Panel decided that it would take two expired measures into account to the extent relevant to its analysis of the other measures, but would make no findings or recommendations in respect of these two measures because they were no longer in force.[729]

327. In *China – Raw Materials*, the Appellate Body found that Panel did not make findings on a "matter" that was not before it, and therefore dismissed China's claim that the Panel acted inconsistently with Article 7.1 of the DSU, as well as China's consequential claims under Article 11 and Article 19.1 of the DSU.[730] More specifically, China argued that although complainants asked the Panel to consider only the series of measures at issue as they existed in 2009, and to exclude certain 2010 replacement measures from the scope of the dispute, the Panel nonetheless proceeded to make a recommendation that extended to measures specifying export duty rates and quota amounts for 2010. China claimed that, in so doing, the Panel acted inconsistently with its terms of reference under Article 7.1 of the DSU. The Appellate Body found that, in the circumstances of that case, the Panel did not err in recommending that China bring its measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result. The Appellate Body did not consider that it was necessary for the complainants to include claims with regard to the specific export duty and quota measures applied in 2010, in addition to those that were in force when the Panel was established in 2009, in order to obtain a recommendation with prospective effect. Thus, the Appellate Body did not consider that the Panel's recommendation implied that the Panel made findings on a "matter" that was not before it.

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[725] See, e.g. Appellate Body Reports, *China – Raw Materials*, paras. 250-155; Panel Reports, *China – Raw Materials*, para. 7.68; *US – Tuna II (Mexico)*, paras. 7.16-7.26.

[726] Panel Report, *China – Electronic Payment Services*, para. 7.232.

[727] Panel Report, *China – Broiler Products*, para. 7.224.

[728] Panel Report, *EU – Footwear (China)*, paras. 8.6-8.8.

[729] Panel Reports, *US – COOL*, paras. 7.28-7.33.

[730] Appellate Body Reports, *China – Raw Materials*, paras. 236-269.

328. In *Dominican Republic – Safeguard Measures*, the Panel considered it unnecessary to make any separate findings on the provisional safeguard measure which had expired and been replaced by the definitive safeguard measure at the time of the establishment of the panel, given that the complainants' principal claims in respect of the expired provisional measure were the same claims made in respect of the definitive safeguard measure.[731]

329. In *China – Electronic Payment Services*, the Panel found that, in the circumstances of the case, it was not appropriate to take certain repealed or replaced legal instruments identified in the US panel request into account.[732]

(b) Measures/claims not specified in consultations request

330. In *EU – Footwear (China)*, the Panel rejected the respondent's contention that a claim fell outside of the panel's terms of reference because it had not been subject to consultations.[733]

331. In *Dominican Republic – Safeguard Measures*, the Panel, as a consequence of its findings on certain claims, considered it unnecessary to rule on the respondent's objections that certain other claims developed by the complainants in their first written submission allegedly were not identified in the requests for consultations.[734]

(c) Measures/claims not specified in panel request

332. See above, under Article 6.2 of the DSU.

(d) Claims under non-covered agreements

333. In *Dominican Republic – Safeguard Measures*, the Panel considered it unnecessary to rule on the respondent's request that the Panel decline jurisdiction in the present dispute on the grounds that the complainants were challenging the Dominican Republic's application of a tariff higher than the preferential tariff provided for in its regional free trade agreement with the complaining parties, in view of the subsequent statements by the parties clarifying their respective positions.[735]

5. Article 9: Procedures for Multiple Complaints

(a) Article 9.3 (more than one panel established to examine complaints related to the same matter)

334. In *Canada – Renewable Energy* and *Canada – Feed-In Tariff Program*, the Panels in the two disputes decided to harmonize their timetables to the greatest extent possible, in accordance with Article 9.3 of the DSU.[736]

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[731] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.22.
[732] Panel Report, *China – Electronic Payment Services*, paras. 7.221-7.229.
[733] Panel Report, *EU – Footwear (China)*, paras. 7.51-7.61.
[734] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.110-7.111, 7.151, 7.328, and 7.441.
[735] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.96-7.97.
[736] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 1.6-1.7.

6. Article 10: Third Parties

(a) General

(i) Enhanced third party rights

335. In *US – COOL*, the Panel granted a request for enhanced third party rights. The Panel explained:

> "Having carefully considered Australia's request and the parties' comments thereon, the Panel decided to grant the following enhanced rights to all third parties in these panel proceedings:
>
> (a) participation in the first and second substantive meetings of the Panel;
>
> (b) access to the parties' first and second written submissions; and
>
> (c) the right in both the first and second substantive meetings to ask questions to the parties and other third parties without any obligation to respond on the part of the parties and other third parties.
>
> The Panel's working procedures and the procedures for open hearings reflect these enhanced third party rights. In addition to the above-listed enhanced third party rights adopted on 18 June 2010, the Panel, after having consulted the parties, allowed the third parties to receive copies of the parties' written responses to the Panel's questions following the first substantive meeting. The Panel considered that this would facilitate the third parties' participation in the second substantive meeting with the parties. The third parties were not, however, invited to submit a written submission prior to the second substantive meeting."[737]

336. In *Dominican Republic – Safeguard Measures*, the Panel declined a request for enhanced third party rights. The Panel explained:

> "In its decision, the Panel took into consideration the following aspects: (i) Colombia was expressly excluded by the Dominican Republic from the application of the impugned measures, together with other developing country Members; (ii) in the Panel's view, Colombia did not make a case for the existence of any factual circumstance that would place it in a particular position with respect to the defendant compared with other third parties; (iii) in the Panel's view, Colombia also failed to make a case for the existence of reasons why its rights as a third party under the DSU and the working procedures adopted by the Panel would not be sufficient to enable it to protect its interests in the present dispute; (iv) the granting of additional rights could have led in the present case to delays in the timetable or the imposition of additional burdens on the parties to the dispute; (v) when consulted, none of the parties to the dispute supported Colombia's request for additional rights beyond those set out in the DSU and working procedures adopted by the Panel; (vi) none of the third parties expressed support for Colombia's request, other than to ask that if the Panel were to grant additional rights they should be extended to all third parties; and (vii) the Panel considered it important to avoid the risk that the granting of additional

[737] Panel Reports, *US – COOL*, paras. 2.7-2.8.

> rights to one or more third parties should unduly blur the distinction established in the DSU between the rights of the parties and the rights of third parties.[738],[739]

337. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel granted enhanced third party rights, at Canada's request and as accepted by the complaining parties. Third parties were permitted to attend the entirety of all substantive meetings with the parties, and receive the parties' second written submissions and responses to questions.[740]

(ii) Third party participation with respect to preliminary rulings

7. See paragraph 320 above.

8. Article 11: Function of Panels

(a) "objective assessment of the matter before it"

338. In *US – Shrimp and Sawblades*, the United States did not contest China's claims under Article 2.4.2 of the Anti-Dumping Agreement. The Panel recalled that several previous panels had been presented with a similar situation; the Panel indicated that it was, like those previous panels, bound by Article 11 to make an "objective assessment" of the matter.[741]

339. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel rejected the market benchmarks proposed by the complainants for the purpose of determining whether a "benefit" existed under Article 1.1(b) of the SCM Agreement. The Panel did not make findings under what it considered to be the appropriate market benchmark. The Appellate Body stated:

> "We note that, in making a claim, a complainant has the responsibility of providing evidence and arguments that the panel must objectively assess. While a panel cannot make the case for a complainant, it has the competence "freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration".[742] Panels also have broad fact-finding powers and may seek information from any source. We do not think that the Panel should have limited its analysis to the proposed benefit approach, and/or to the benchmarks that were part of the complainants' principal argument, in a situation where the evidence and the arguments presented by the complainants, and the arguments in response by Canada, may have allowed it to develop its own reasoning and to make findings based on a benchmark that took into account the government's definition of the energy supply-mix. Provided the complainants had presented relevant evidence and arguments to make a *prima facie* case, it was for the Panel to analyze the appropriate benchmark or proxy. We observe that arguments and evidence were presented before the Panel that could have been useful in identifying a benefit benchmark that took into account the Government of

[738](*footnote original*) The Panel took into account the earlier decisions of other panels in *EC – Export Subsidies on Sugar (Australia*), *EC – Export Subsidies on Sugar* (*Brazil*), *EC – Export Subsidies on Sugar* (*Thailand*), *US – Upland Cotton, EC – Tariff Preferences, US -1916 Act (EC), US -1916 Act (Japan), EC – Bananas III and US – Large Civil Aircraft (2nd complaint).*

[739] Panel Report, *Dominican Republic – Safeguard Measures*, para. 1.8.

[740] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 1.11.

[741] Panel Report, *US – Shrimp and Sawblades*, paras. 7.1-7.6.

[742] (*footnote original*) Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Report, *US – Certain EC Products*, para. 123.

Ontario's definition of the energy supply-mix, including wind- and solar PV-generated electricity."[743]

(b) "including an objective assessment of the facts of the case"

340. In *Philippines – Distilled Spirits*, the Appellate Body rejected claims that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts under Article III:2 of the GATT 1994, and in particular with respect to the products' physical characteristics[744], the Philippine market for distilled spirits[745], tariff classification[746], and the degree of substitutability between certain products.[747]

341. In *China – Raw Materials*, the Appellate Body rejected a claim that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts under Article XI:2(a) of the GATT 1994, and in particular with respect to whether the export quota on refractory-grade bauxite was temporarily applied to either prevent or relieve a critical shortage.[748]

342. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body addressed claims that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts in its assessment of the amount of USDOD R&D funding potentially relevant to large civil aircraft[749], and the knowledge and experience Boeing derived from aeronautics R&D subsidies.[750] The Appellate Body found that the Panel acted inconsistently with its obligation under Article 11 in failing to exercise its authority to seek out certain relevant information relating to USDOD aeronautics subsidies.[751]

343. In *US – Clove Cigarettes*, the Appellate Body rejected claims that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts under Article 2.1 of the TBT Agreement, in particular with respect to its assessment of consumer tastes and habits[752], and the treatment accorded to US producers/products.[753]

344. In *US – Tuna II (Mexico)*, the Appellate Body rejected a claim that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts under Article 2.1 of the TBT Agreement, in particular with respect to the risk to dolphin arising from different fishing methods.[754]

345. In *US – COOL*, the Appellate Body rejected claims that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts under Article 2.1 of the TBT Agreement, in particular with respect to segregation, commingling, and the price differential between imported and domestic livestock in the US market[755], and under Article 2.2 of the TBT Agreement, in particular with respect to the objective of the COOL measure.[756]

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[743] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.215.
[744] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 134-141.
[745] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 155-157.
[746] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 162-165.
[747] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 229-241.
[748] Appellate Body Reports, *China – Raw Materials*, paras. 338-344.
[749] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 711-723.
[750] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 990-996.
[751] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1128-1145.
[752] Appellate Body Report, *US – Clove Cigarettes*, paras. 146-155.
[753] Appellate Body Report, *US – Clove Cigarettes*, paras. 208-212, 227-232.
[754] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 253-281.
[755] Appellate Body Reports, *US – COOL*, paras. 299-310, 314-326.
[756] Appellate Body Reports, *US – COOL*, paras. 397-429.

346. In *China – GOES*, the Appellate Body rejected a claim that the Panel acted inconsistently with Article 11 by failing to conduct an "objective assessment" of the facts with respect the Panel's treatment of MOFCOM's analysis of price effects.[757]

347. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected a claim that the Panel engaged in a self-contradictory analysis and thereby failed to conduct an objective assessment of the facts with respect its analysis of "benefit" under Article 1.1(b) of the SCM Agreement.[758]

(c) "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements"

348. In *Philippines – Distilled Spirits*, the Appellate Body found that the Panel erred in characterizing the EU claim under the second sentence of Article III:2 of the GATT 1994 as being made in the "alternative" to its claim under the first sentence of Article III:2, and concluded that the Panel acted inconsistently with Article 11 of the DSU by failing to make a finding on this separate and independent claim.[759]

349. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the Panel erred in failing to provide a more comprehensive analysis of a legal issue before it, and stated:

> "By refusing to undertake a more comprehensive analysis of the legal issue of how the DSB is to initiate an Annex V procedure, the Panel deprived Members of the benefit of a 'a clear enunciation of the relevant WTO law' and failed to advance a key objective of WTO dispute settlement, namely, the resolution of disputes 'in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law'.[760] We also recall that, when a panel's findings provide 'only a partial resolution of the matter at issue', this amounts to 'false judicial economy' and an error of law.[761],[762]

350. In *US – Tuna II (Mexico)*, the Panel found no violation of Article 2.1 of the TBT Agreement, and proceeded to exercise judicial economy in respect of the complainant's claims under Articles I:1 and III:4 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.[763]

351. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the measure at issue was inconsistent with Article III:4 of the GATT 1994. The Panel based this finding on its conclusion that the measure was captured by the Illustrative List annexed to the TRIMs Agreement. Having reached that finding, the Panel exercised judicial economy with respect to Japan's additional,

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[757] Appellate Body Report, *China – GOES*, paras. 229-231.

[758] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.205-5.210.

[759] Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 185-193.

[760] (*footnote original*) Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213 (referring to Article 3.2 of the DSU).

[761] (*footnote original*) Appellate Body Report, *Australia – Salmon*, para. 223; see also paras. 224-226.

[762] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 500.

[763] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.

"stand-alone" claim under Article III:4. The Appellate Body saw no error in the Panel's approach.[764] In the course of its analysis, the Appellate Body stated that:

> "The question before us, therefore, is whether the Panel's exercise of judicial economy in this case was proper. Since panels have a margin of discretion with respect to the exercise of judicial economy, to succeed in its claim on appeal Japan has to demonstrate that the Panel exceeded this discretion. In accordance with Appellate Body jurisprudence, this means that Japan would have to show that the Panel provided only a "partial resolution of the matter at issue", or that an additional finding with respect to Japan's stand-alone Article III:4 claim "is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance"[765] by Canada with those recommendations and rulings."[766]

352. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel declined to make a finding on whether the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement, after finding that they constitute a "financial contribution" within the meaning of Article 1.1(a)(1). The Appellate Body rejected Japan's claim that, in so doing, the Panel exercised false judicial economy and acted inconsistently with Article 11 of the DSU.[767]

353. In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested that the Panel make a preliminary ruling that China's panel request did not comply with the requirements of Article 6.2 of the DSU. China subsequently represented that it did not intend to pursue some of the claims at issue. In these circumstances, the Panel decided that it was not necessary for it to rule on whether, insofar as those claims were concerned, the panel request complied with Article 6.2 of the DSU.[768] In the course of its reasoning, the Panel stated that:

> "[W]e note that other panels confronting issues that they determined were moot responded by not examining them further.[769] In the particular circumstances of this case, we consider that the aim of the WTO dispute settlement mechanism, which is to "secure a positive solution to a dispute", does not require us to rule on an Article 6.2 issue that we have determined is moot. Indeed, it appears futile to offer a ruling linked to claims that the complaining party no longer deems fruitful to pursue. We likewise consider that a ruling on the Article 6.2 issue that pertains to the abandoned claims is not necessary to "assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements. As explained, it follows from China's statement before this Panel that the abandoned claims will not result in DSB recommendations or rulings of any kind."[770]

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[764] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.86-5.105.

[765] (*footnote original*) Appellate Body Reports, *Australia – Salmon*, para. 223; and *EC – Export Subsidies on Sugar*, para. 331. See also Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 133; and *US – Upland Cotton*, para. 732.

[766] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.93.

[767] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.133-5.139.

[768] See WT/DS449/4, paras. 3.1-3.16.

[769] (*footnote original*) See, e.g. Panel Reports, *China — X-Ray Equipment*, para. 7.410; *US – Hot-Rolled Steel*, paras. 7.52 and 7.60; *US – Lamb*, para. 5.65; and *Guatemala – Cement II*, para. 8.171.

[770] WT/DS449/4, para. 3.10.

9. Article 12: Panel Procedures

(a) Article 12.11 (special and differential treatment)

(i) General

354. In *Dominican Republic – Safeguard Measures*, the Panel referred to Articles 12.10 and 12.11 of the DSU, and stated:

> "In the present proceedings, and except for the claim concerning Article 9.1 of the Agreement on Safeguards on which the Panel has already ruled, none of the parties, neither the complainants nor the defendant, has referred to any provision in the WTO Agreements on special and differential treatment for developing countries. In any event, the Panel has taken into account the status of the parties as developing country Members, particularly when preparing the timetable for the proceedings after having heard their respective views. There are no other provisions on differential and more favourable treatment for developing country Members that should be the subject of special consideration by the Panel."[771]

10. Article 13: Right to Seek Information

(a) Duty to seek information in certain circumstances

355. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that, in the circumstances of the dispute, the Panel acted inconsistently with its obligation under Article 11 of the DSU in failing to exercise its authority to seek out certain relevant information relating to USDOD aeronautics subsidies.[772] The Panel stated that:

> "Overall, we consider that the particular circumstances of this dispute demanded that the Panel assume an active role in pursuing a train of inquiry that would enable it to apply its predominance approach. In failing to seek additional information regarding the use of assistance instruments under all of the USDOD programmes, the Panel compromised its ability to assess properly whether the effects of all 23 RDT&E programmes, and not only ManTech & DUS&T, caused adverse effects to the interests of the European Communities. Had the Panel sought information from the United States regarding the extent to which each USDOD RDT&E programme was funded by assistance instruments, as opposed to procurement contracts, then it would have been able to determine the extent to which those programmes funded assistance instruments, as opposed to procurement contracts. The Panel could have done so either on the basis of information provided by the United States or, perhaps, in the event that such information was not forthcoming, on the basis of adverse inferences."[773]

(b) *Amicus curiae* briefs

356. Unsolicited *amicus curiae* briefs were received by the Panels in *US – COOL*[774] and *Canada – Renewable Energy / Feed-In Tariff Program*[775], by the Appellate Body in *US – Clove Cigarettes*[776], *US – Tuna II (Mexico)*[777], and *Canada – Renewable Energy / Feed-In Tariff Program*.[778]

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[771] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.44.
[772] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1128-1145.
[773] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1144.
[774] Panel Reports, *US – COOL*, paras. 2.9-2.10.
[775] Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 1.12-1.13.

(c) Other international intergovernmental organizations

357. In *US – Clove Cigarettes*, the Appellate Body declined an offer of technical assistance from the WHO:

> "On 25 January 2012, the Presiding Member of the Division received a letter from the Director-General of the World Health Organization (the 'WHO') expressing interest and offering technical assistance in this appeal in areas covered by the WHO's mandate. The Division thanked the WHO Director-General for her letter, and indicated that it would reflect on the need for such assistance. The Division asked the participants and third participants to comment on the letter from the WHO. Of the participants, the United States submitted comments, and of the third participants, the European Union commented. In the light of the fact that the parties had placed a considerable amount of materials regarding WHO legal instruments and the WHO's work in the area of tobacco control on the Panel record, and mindful of its mandate on appeal under Article 17.6 of the DSU, the Division did not deem it necessary to request assistance from the WHO."[779]

(d) Consultation with expert on translation issues

358. In *China – Electronic Payment Services*, the Panel appointed an independent expert to provide expert linguistic advice to assist with disputed translation issues:

> "Finally, as discussed in paragraph 1.10 and Annex H to this Report, we recall that the parties indicated their disagreement on the correct translation of a number of aspects of the identified legal instruments. As the complaining party, the United States provided its own English language versions of provisions of these instruments. China at times submitted its own English language versions of the same instruments. At the Panel's request, the parties undertook efforts to agree on a single translation. They succeeded in doing so in certain instances. For those occasions in which the parties were unable to agree on a single translation, the Panel, in consultation with the parties, appointed an independent translator – the United Nations Office at Geneva (UNOG) – to provide expert linguistic advice to assist the Panel in determining the correct translation. In general, we will refer to the complaining party's translation, unless the parties specifically agreed to a different translation, or if we elect to follow the advice of the UNOG translator. In all cases, however, we have reviewed both parties' translations. Where appropriate, we refer also to China's versions. Any citation to the United States' translation, or UNOG's suggested translation, of a particular aspect of Chinese law, should not be construed to imply that it is an authoritative translation of China's instruments."[780]

11. Article 14: Confidentiality

(a) Article 14.3: individual opinions

359. The following table provides information on individual opinions in panel reports and preliminary rulings over the period October 2011 to July 2013:

[776] Appellate Body Report, *US – Clove Cigarettes*, para. 10.
[777] Appellate Body Report, *US – Tuna II (Mexico)*, para. 8.
[778] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 1.30.
[779] Appellate Body Report, *US – Clove Cigarettes*, para. 11.
[780] Panel Report, *China – Electronic Payment Services*, para. 7.236.

DS No.	Description	Issue	Reference
DS412, DS426	Dissenting opinion	Whether complainants demonstrated that financial contribution conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement	Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 9.1-9.23
DS437	Dissenting opinion	Whether panel request complied with requirements of Article 6.2 of the DSU	Preliminary ruling (WT/DS437/4), *US – Countervailing Measures (China)*, paras. 6.1-6.18

12. Article 17: Appellate Review

(a) Article 17.5 (60-day period)

360. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body informed the Chair of the DSB that, due to the considerable size of the record and complexity of the appeal, the need to hold multiple sessions of the oral hearing, and the overall workload of the Appellate Body, the Appellate Body would not be able to circulate its Report by the expiration of the 60-day period provided under Article 17.5 of the DSU. The Chair of the DSB was also informed that the Appellate Body would hold a first session of the oral hearing in August and a second session in October 2011, and would provide thereafter an estimate for when its Report would be circulated.[781]

361. In *US – COOL*, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports within the 60-day period pursuant to Article 17.5 of the DSU, which would expire on 22 May 2012. In the same letter, the Chair of the Appellate Body also informed the Chair of the DSB that the Appellate Body would be unable to circulate its Reports within the 90-day period provided for under the same provision. The Chair of the Appellate Body explained that this was due in part to the size of this appeal, including the number and complexity of the issues raised by the participants. She added that this was also due to the Appellate Body's heavy caseload, scheduling difficulties resulting from the overlap in the composition of the Divisions hearing different appeals at the same time, as well as constraints resulting from the relocation of the Appellate Body and its Secretariat in the context of on-going renovation work at the Centre William Rappard. The Chair of the Appellate Body informed the Chair of the DSB that the Reports would be circulated no later than 29 June 2012.[782]

(b) Article 17.11 (individual opinions)

362. In *US – Large Civil Aircraft (2nd complaint)*, one member of the Appellate Body expressed an individual opinion "qualifying" the Appellate Body's understanding on whether the information-gathering procedure under Annex V of the SCM Agreement is initiated automatically upon the complainant's request.[783]

[781] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 30.
[782] Appellate Body Reports, *US – COOL*, para. 16.
[783] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, footnotes 1118 and 1130.

13. Article 18: Communications with the Panel or Appellate Body

(a) Article 18.2 (confidentiality)

(i) Additional procedures to protect business confidential information

363. In *US – COOL*, the Panel, at the request of the complainants (in consultation with the respondent), adopted additional procedures to protect business confidential information.[784]

364. In *Dominican Republic – Safeguard Measures*, at the request of the respondent, adopted additional working procedures relating to the protection of business confidential information that might be submitted during the procedure.[785]

(ii) Panel hearings opened to public observation

365. In *US – COOL*, the Panel agreed, in the light of the preference expressed by the parties, to have the meetings with the parties open to public viewing by means of simultaneous closed-circuit television broadcasting of the proceedings to a separate room.[786]

(iii) Appellate Body hearings opened to public observation

366. See below, under Rule 16(1) of the Working Procedures for Appellate Review.

14. Article 19: Panel and Appellate Body Recommendations

(a) "bring the measure into conformity"

(i) Terminated/repealed/amended/replaced measures

367. See above, under Article 7 of the DSU.

(b) "The Panel … may suggest ways in which the Member concerned could implement the recommendation"

368. In *EU – Footwear (China)*, the Panel declined China's request that it make a suggestion, under Article 19.2 of the DSU, on how the DSB recommendations and rulings could be implemented by the European Union.[787]

369. In *Dominican Republic – Safeguard Measures*, the Panel declined the complainants' request (made at the interim review stage) to make a suggestion on implementation:

> "Under Article 19.1 of the DSU, panels have the faculty to 'suggest ways in which the Member concerned could implement the recommendations', when they see fit, but are not obliged to do so. In the present case, it is true, as the complainants point out, that the findings of inconsistency made by the Panel refer to fundamental aspects of the determinations that led to the imposition of the impugned measures. In these circumstances, the withdrawal of the definitive measure is an obvious way in which the Dominican Republic could bring its measures into conformity with its obligations under the GATT 1994 and the Agreement on Safeguards. In any case, it is for the Dominican Republic in the first place to determine how it will implement the Panel's

[784] Panel Reports, *US – COOL*, para. 2.4.
[785] Panel Report, *Dominican Republic – Safeguard Measures*, para. 1.10.
[786] Panel Reports, *US – COOL*, paras. 1.10 and 2.5.
[787] Panel Report, *EU – Footwear (China)*, paras. 8.9-8.12.

recommendation. Taking the foregoing into account, the Panel does not consider it appropriate to suggest to the Dominican Republic the immediate withdrawal of the definitive measure."[788]

15. Article 21: Surveillance of Implementation of Recommendations and Rulings

(a) Article 21.2 (developing country interests)

370. The Arbitrator in *US – COOL (Article 21.3(c))* was not persuaded that Mexico's status as a developing country, and the importance of the cattle sector to its economy, should change the Arbitrator's final determination of the period of time within which the United States could complete domestic implementation of the recommendations and rulings adopted by the DSB. The reason was that the period of time granted to the United States to complete domestic implementation of the DSB's recommendations and rulings was, in the Arbitrator's view, the shortest period possible within the US legal system.[789]

(b) Article 21.3(c) (reasonable period of time determined through arbitration)

371. The Arbitrator in *US – COOL (Article 21.3(c))* concluded that the reasonable period of time under Article 21.3(c) was 10 months from the date of adoption of the Panel and Appellate Body Reports. In reaching this conclusion, the Arbitrator considered that this period of time should allow the United States to implement the recommendations and rulings of the DSB regardless of whether it decides to do so by regulatory action alone, or by legislative action followed by regulatory action.[790]

372. The Arbitrator in *China – GOES (Article 21.3(c))* concluded that the reasonable period of time under Article 21.3(c) was 8 months and 15 days from the date of adoption of the Panel and Appellate Body Reports.[791] The Arbitrator accepted China's assertion that, under its existing laws, there was no legal authority and mechanism allowing China to implement the DSB's recommendations and rulings in this dispute; however, the Arbitrator was not persuaded that China should be given extra time to fill this gap, the existence of which long pre-dated the DSB's recommendations and rulings in this dispute.[792] In addition, the Arbitrator was not convinced that conducting a redetermination in a shorter period of time than China proposes would, in the circumstances of this dispute, infringe upon the due process rights of interested parties.[793]

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[788] Panel Report, *Dominican Republic – Safeguard Measures*, para. 6.22.
[789] Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 99-100.
[790] Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 65-98.
[791] Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 4.1.
[792] Award of the Arbitrator, *China – GOES (Article 21.3(c))*, paras. 3.17-3.34.
[793] Award of the Arbitrator, *China – GOES (Article 21.3(c))*, paras. 3.35-3.47.

K. OTHER

1. Working Procedures for Appellate Review

(a) Rule 16(1) (special or additional procedures)

(i) Special procedure to protect business confidential information

373. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body adopt additional procedures to protect BCI and HSBI in the appellate proceedings.[794]

(ii) Special procedure for public observation of the oral hearing

374. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body granted the participants' joint request for opening the hearing to public observation via closed-circuit broadcasting and adopted Additional Procedures on the Conduct of the Oral Hearing, including the protection of certain sensitive information during the oral hearing.[795]

375. In *US – COOL*, the Appellate Body accepted a joint request by Canada and the United States (to which the other party, Mexico, did not object) to open the hearing to public observation and adopting additional procedures for the conduct of the hearing.[796]

376. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body accepted a joint request by the parties to open the hearing to public observation and adopted additional procedures for the conduct of the hearing.[797]

(b) Rule 16(2) (request to modify time-period)

377. In *US – Tuna II (Mexico)*, the Appellate Body considered a request to modify the date of the oral hearing.[798]

378. In *China – Raw Materials*, the Appellate Body considered a request by the complainants to extend certain time periods for filing submissions, pursuant to Rule 16(2).[799]

(c) Rule 18(1) (deadlines for submitting documents)

379. In *US – COOL*, the Appellate Body commented on the fact that certain filings were made outside of the deadlines prescribed in Rule 18(1):

> "Although India appears to have made its notification pursuant to Rule 24(2) of the *Working Procedures* by stating that it would not file a written submission but would appear at the oral hearing, the notification was not received before the 17:00 deadline specified in Rule 18(1) of the *Working Procedures*. Accordingly, the Division treated

[794] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 23-24, and Annex II to the Appellate Body Report.

[795] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para.31, and Annex IV to the Appellate Body Report.

[796] Appellate Body Reports, *US – COOL*, para. 12, and Annex IV to the Appellate Body Report.

[797] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 1.29, 1.31 and Annex 4.

[798] Appellate Body Report, *US – Tuna II (Mexico)*, para. 5.

[799] Appellate Body Reports, *China – Raw Materials*, para. 10.

> it as a notification and request to make an oral statement at the hearing made pursuant to Rule 24(4) of the *Working Procedures*.
>
> …
>
> In these appellate proceedings, certain filings were made outside of the deadlines prescribed by the *Working Procedures* or by the Division hearing this appeal.[58]The Appellate Body stresses the importance of all participants and third participants adhering to the time-limits for filing documents, in the interests of fairness and the orderly conduct of appellate proceedings.

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[58] (*footnote original*)The Appellate Body notes, for example, that the hard copy of Canada's other appellant's submission, and the electronic copies of Mexico's Notice of Other Appeal, other appellant's submission, and appellee's submission, were not received before the 17:00 deadline specified in Rule 18(1) of the *Working Procedures.*"[800]

(d) Rules 20(2)(d) and 23(2) (notice of appeal / other appeal requirements)

380. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the US Notice of Other Appeal sufficiently identified an allegation of error and, consequently, rejected the EU argument that the claim at issue was not properly within the scope of this appeal.[801] However, the Appellate Body stated that:

> "Nonetheless, we must caution that paragraph 3 of the Notice of Other Appeal is drafted at a level of vagueness and imprecision that makes it considerably difficult for the appellee, the third participants, and the Appellate Body to understand easily the full scope of the United States' claim. Understanding the full scope of an appellant's claim should not require such effort. Drafting the Notice of Appeal or Notice of Other Appeal with greater precision reduces the risk of procedural objections and possible dismissal of a claim because it does not comply with the requirements of Rule 20 or 23 of the *Working Procedures*."[802]

(e) Rule 24(4) (third participant notification of intention to appear at oral hearing)

381. In *Philippines – Distilled Spirits*, the Appellate Body noted that:

> "We note that Colombia, in its notification, expressed its intention to attend the oral hearing pursuant to Rule 24(2) of the *Working Procedures.* Colombia's notification was received on 17 October 2011 and, therefore, fell outside the 21-day time-limit stipulated in Rule 24(2) of the *Working Procedures*, which ended on 14 October 2011. Nevertheless, the Division hearing this appeal decided to accept Colombia's notification as a notification made pursuant to Rule 24(4) of the *Working Procedures.*
>
> On 20 October 2011, Thailand submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. Without prejudice to rulings the Appellate Body may make in future appeals, we have interpreted Thailand's action as a notification expressing its intention to attend the

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[800] Appellate Body Reports, *US – COOL*, footnote 55 and paragraph 13.
[801] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 679-688.
[802] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 686.

> oral hearing pursuant to Rule 24(4) of the *Working Procedures*. While we wish to emphasize that strict compliance with Rule 24(4) of the *Working Procedures* requires *written* notification to the Secretariat that expresses an intention to appear at the oral hearing, we are satisfied that, in this case, the lack of strict compliance with Rule 24(4) did not raise any due process concerns."[803]

(f) Rule 26 (working schedule)

382. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body decided to suspend the deadlines that would otherwise apply under the Working Procedures for the filing of a Notice of Other Appeal and for the filing of written submissions, pending its decision on whether to adopt additional procedures to protect business confidential information.[804]

383. Rule 28 (written responses)

384. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body invited the participants and third participants to submit additional written memoranda, pursuant to Rule 28.[805]

(g) Rule 30(1) (withdrawal of appeal)

385. In *US – Large Civil Aircraft (2nd complaint)*, the European Union notified the Appellate Body Division hearing this appeal, as well as the United States and the third participants, that, pursuant to Rule 30(1), it was withdrawing its appeal insofar as it related to subsidies contingent upon export, with immediate effect.[806]

2. Vienna Convention on the Law of Treaties

(a) Article 31: General Rule of Interpretation

(i) "ordinary meaning" (Article 31(1))

386. In *China – Electronic Payment Services*, the Panel considered the relevance of certain types of materials for the purpose of determining the ordinary meaning of treaty terms. With respect to industry usage and sources, the Panel stated that:

> "The Panel begins by assessing whether it is appropriate to examine industry sources in addition to dictionaries for the purpose of determining the ordinary meaning of a term appearing in a GATS schedule.[132] We acknowledge that, sometimes, industry sources may define a term in a way that might reflect self-interest and, thus, might be 'biased and self-serving', as argued by China. To that extent, we see some merit in China's concerns about relying on such sources, without more. Nevertheless, we see no basis to completely disregard industry sources as potential relevant evidence of an ordinary meaning of a specific term in a particular industry. Indeed, we see no reason why a panel's search for the ordinary meaning of any term should always be confined to regular dictionaries. A panel's initial task in interpreting treaty provisions is to determine the ordinary meaning of the words used. If industry sources can be shown to assist with this task in a particular dispute, we see no reason why a panel should not refer to them. As with a panel's consideration of dictionary definitions, however,

[803] Appellate Body Reports, *Philippines – Distilled Spirits*, footnote 18.
[804] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 26.
[805] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 33.
[806] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 28.

> panels must be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretive task accordingly.
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> [132] (*footnote original*)We observe that, pursuant to Article 31(4) of the Vienna Convention, '[a] special meaning shall be given to a term if it is established that the parties so intended'. In the present dispute, no party is relying on this provision. Hence, we shall not consider it."[807]

387. As regards the relevance of definitions contained in other trade agreements, the Panel observed:

> "China submitted a dictionary definition and legal definitions contained in certain free trade agreements to which the United States is a party, e.g. the North American Free Trade Agreement (NAFTA). Regarding the definitions provided in free trade agreements, we note that they are not applicable to all WTO Members or even the two parties to the present dispute. Moreover, they are definitions that were agreed on by the parties to that agreement. The parties' agreement need not necessarily accord with the ordinary meaning of the term 'financial institutions'."[808]

388. Finally, the Panel considered the relevance of definitions contained in the domestic laws and regulations of the disputing parties:

> "In considering the above-mentioned United States and Chinese legal documents, we observe that they emanate from, and reflect the particular objectives and needs of, the domestic legal systems of the United States and China. It is therefore important to be cautious when interpreting the treaty term 'FFIs' that we do not attribute undue weight to these documents for the purposes of our interpretative task. In particular, as regards the legal definitions provided in some of these documents, we consider that it would be inappropriate to draw, from these context-specific definitions, general conclusions as to the meaning and scope of the term 'FFIs' as it appears in China's Schedule."[809]

(ii) "subsequent agreement between the parties" (Article 31(3)(a))

389. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement, which, when interpreted in the context of Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, requires a minimum of six months between the publication and the entry into force of a technical regulation.[810] In reaching this conclusion, the Appellate Body found that in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, Paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement. However, the Appellate Body agreed with the Panel that Paragraph 5.2 of the Doha Ministerial Decision constitutes a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. In the course of its analysis, the Appellate Body discussed the elements of Article 31(3)(a):

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[807] Panel Report, *China – Electronic Payment Services*, para. 7.89.
[808] Panel Report, *China – Electronic Payment Services*, para. 7.552.
[809] Panel Report, *China – Electronic Payment Services*, para. 7.556.
[810] Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

"Based on the text of Article 31(3)(a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.

With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. Thus, it is beyond dispute that paragraph 5.2 of the Doha Ministerial Decision was adopted subsequent to the relevant WTO agreement at issue, the *TBT Agreement*. With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.

We recall that paragraph 5.2 of the Doha Ministerial Decision provides:

> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty.*'[811] Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.

Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term 'reasonable interval' in Article 2.12 of the *TBT Agreement* and defines this interval as 'normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued' by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 *other than* to interpret the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. We consider, therefore, that paragraph 5.2 *bears specifically* upon the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an 'agreement' among Members—within the meaning of Article 31(3)(a) of the *Vienna Convention*—on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.

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[811] (*footnote original*) Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390. (emphasis added)

> We note that the text of Article 31(3)(a) of the *Vienna Convention* does not establish a requirement as to the form which a 'subsequent agreement between the parties' should take. We consider, therefore, that the term 'agreement' in Article 31(3)(a) of the *Vienna Convention* refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the *Vienna Convention* provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement* is expressed by terms—'*shall be understood to mean*'—that cannot be considered as merely hortatory.
>
> For the foregoing reasons, we *uphold* the Panel's finding, in paragraph 7.576 of the Panel Report, that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.
>
> In the light of our characterization of paragraph 5.2 of the Doha Ministerial Decision as a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the *Vienna Convention*, we turn now to consider the meaning of Article 2.12 of the *TBT Agreement* in the light of the clarification of the term 'reasonable interval' provided by paragraph 5.2. We observe that, in its commentaries on the *Draft articles on the Law of Treaties*, the ILC states that a subsequent agreement between the parties within the meaning of Article 31(3)(a) 'must be read into the treaty for purposes of its interpretation'.[812] As we see it, while the terms of paragraph 5.2 must be 'read into' Article 2.12 for the purpose of interpreting that provision, this does not mean that the terms of paragraph 5.2 replace or override the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretative clarification to be taken into account in the interpretation of Article 2.12 of the *TBT Agreement*."[813]

390. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.[814] In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement, the definition of "international body or system" in Annex 1.4 to the TBT Agreement, as well as the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). The Appellate Body also relied on the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement, which it considered a "subsequent agreement between the parties" within the meaning

[812] (*footnote original*) *Draft articles on the Law of Treaties with commentaries*. Text adopted by the ILC at its eighteenth session, in 1966, and submitted to the United Nations General Assembly as a part of the Commission's report covering the work of that session (at para. 38). The ILC report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 1966*, Vol. II, p. 221, para. 14.

[813] Appellate Body Report, *US – Clove Cigarettes*, paras. 262-269.

[814] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. In the course of its analysis, the Appellate Body stated:

> "Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are to 'clarify' the provisions of the covered agreements 'in accordance with customary rules of interpretation of public international law'. This raises the question on what basis we can take into account the TBT Committee Decision in the interpretation and application of Article 2.4 of the *TBT Agreement*. In particular, the issue is whether the Decision can qualify as a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties* (the '*Vienna Convention*'). In this respect, we note that the Decision was adopted by the TBT Committee in the context of the Second Triennial Review of the Operation and Implementation of the *TBT Agreement*, which took place in the year 2000. It was thus adopted subsequent to the conclusion of the *TBT Agreement*. We further note that the membership of the TBT Committee comprises all WTO Members and that the Decision was adopted by consensus.
>
> With respect to the question of whether the terms and content of the Decision express an agreement between Members on the interpretation or application of a provision of WTO law, we note that the title of the Decision expressly refers to 'Principles for the Development of International Standards, Guides and Recommendations *with Relation to Articles 2, 5 and Annex 3 of the Agreement*'. We further note that the TBT Committee undertook the activities leading up to the adoption of the Decision '[w]ith a view to developing a better understanding of international standards within the Agreement' and decided to develop the principles contained in the Decision, *inter alia*, 'to ensure the effective application of the Agreement' and to 'clarify and strengthen the concept of international standards under the Agreement'. We therefore consider that the TBT Committee Decision can be considered as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the *Vienna Convention*. The extent to which this Decision will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case, however, will depend on the degree to which it 'bears specifically'[815] on the interpretation and application of the respective term or provision. In the present dispute, we consider that the TBT Committee Decision bears directly on the interpretation of the term 'open' in Annex 1.4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of 'recognized activities in standardization'."[816]

[815] (*footnote original*) ee Appellate Body Report, *US – Clove Cigarettes*, para. 265 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390).

[816] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 371-372.

(b) Article 33: multiple languages

391. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body rejected an interpretation that could not be read "harmoniously" with the French and Spanish versions of the text at issue.[817]

3. Understanding on Commitments on Financial Services

392. In *China – Electronic Payment Services*, the Panel concluded that paragraph 8 of the Understanding on Commitments in Financial Services was not relevant to its interpretation of the relevant entry in China's Schedule:

> "The United States additionally refers to paragraph 8 of the Understanding on Commitments in Financial Services in support of its view that a service may include elements of 'provision and transfer of financial information, and financial data processing'. According to the United States, this provision means that 'the provision and transfer of financial information and data processing is central to the supply of many different financial services, and, according to the Understanding, signatory WTO Members cannot frustrate their commitments by, for example, blocking the ability to communicate and process information.' We observe, first, that, as acknowledged by the United States, China is not a party to the Understanding. Hence, paragraph 8 of the Understanding is not applicable to China. Second, we do not question that, in many, if not most cases, 'transfers of information or the processing of financial information, including transfers of data by electronic means' may be an important part in the provision of financial services. However, even if paragraph 8 of the Understanding on Financial Services were relevant to this dispute, we do not see how this provision could detract from our interpretation, which is based on the text of the entry in the first hyphen and which led us to the conclusion that 'suppliers of other financial services' supply services that are separate and distinct from the services classifiable in subsectors (a)-(f)."[818]

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[817] Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.67 and footnote 512.

[818] Panel Report, *China – Electronic Payment Services*, para. 7.532.

II. OTHER DEVELOPMENTS IN WTO LAW AND PRACTICE

A. MEMBERSHIP AND OBSERVER STATUS

1. WTO accessions

(a) New WTO Members

(i) Montenegro

393. On 17 December 2011, the 8th Ministerial Conference approved the text of the Protocol of Accession of Montenegro to the WTO Agreement[819], and adopted the decision on Montenegro's WTO accession[820] and the accession working party report.[821] On the same day, Montenegro signed the Protocol, subject to ratification.[822]

394. After depositing its instrument of acceptance, Montenegro became a WTO Member on 29 April 2012.[823]

(ii) Samoa

395. On 17 December 2011, the 8th Ministerial Conference approved the text of the Protocol of Accession of Samoa to the WTO Agreement[824], and adopted the decision on Samoa's WTO accession[825] and the accession working party report.[826] On the same day, Samoa signed the Protocol, subject to ratification.[827]

396. After depositing its instrument of acceptance, Samoa became a WTO Member on 10 May 2012.[828]

(iii) Russian Federation

397. On 16 December 2011, the 8th Ministerial Conference approved the text of the Protocol of Accession of the Russian Federation to the WTO Agreement[829], and adopted the decision on the Russian Federation's WTO accession[830] and the accession working party report.[831] These acts were

[819] The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/28 and WT/L/841. The certified true copy of the Protocol was circulated in WT/Let/857 on 11 June 2012.

[820] WT/MIN(11)/28 and WT/L/841.

[821] WT/ACC/CGR/38, WT/MIN(11)/7, WT/ACC/CGR/38/Add.1, WT/MIN(11)/7/Add.1, WT/ACC/CGR/38/Add.2 and WT/MIN(11)/7/Add.2.

[822] WT/Let/842.

[823] WT/Let/857.

[824] The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/27 and WT/L/840. The certified true copy of the Protocol was circulated in WT/Let/856 on 8 June 2012.

[825] WT/MIN(11)/27 and WT/L/840.

[826] WT/ACC/SAM/30, WT/MIN(11)/1, WT/ACC/SAM/30/Add.1, WT/MIN(11)/1/Add.1, WT/ACC/SAM/30/Add.2 and WT/MIN(11)/1/Add.2.

[827] WT/Let/841.

[828] WT/Let/856.

[829] The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/24 and WT/L/839. The certified true copy of the Protocol was circulated in WT/Let/860 on 25 July 2012.

[830] WT/MIN(11)/24 and WT/L/839.

preceded by a statement of the Chair of the Ministerial Conference, according to which the working party report would be authentic in English only.[832]

398. On 16 December 2011, the Russian Federation signed the Protocol, subject to ratification.[833]

399. After depositing its instrument of acceptance, the Russian Federation became a WTO Member on 22 August 2012.[834]

400. On 15 December 2011, the United States[835] and the Russian Federation[836] each invoked Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the other.

401. On 21 December 2012, the United States[837] and the Russian Federation[838] each withdrew its earlier invocation of Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the other.

(iv) Vanuatu

402. On 26 October 2011, the General Council approved the text of the Protocol of Accession of Vanuatu to the WTO Agreement[839], and adopted the decision on Vanuatu's WTO accession[840] and the accession working party report.[841] On the same day, Vanuatu signed the Protocol, subject to ratification.[842]

403. On 26 July 2012, the General Council reopened the acceptance period of the Protocol for Vanuatu[843], as ratification had not taken place during the originally established period. After depositing its instrument of acceptance, Vanuatu became a WTO Member on 24 August 2012.[844]

(v) Lao People's Democratic Republic

404. On 26 October 2012, the General Council approved the text of the Protocol of Accession of the Lao People's Democratic Republic to the WTO Agreement[845], and adopted the decision on the

[831] WT/ACC/RUS/70, WT/MIN(11)/2, WT/ACC/RUS/70/Add.1, WT/MIN(11)/2/Add.1, WT/ACC/RUS/70/Add.2 and WT/MIN(11)/2/Add.2.

[832] "In adopting the Decision on the Accession of the Russian Federation, it is understood that only the Protocol on the Accession of the Russian Federation is authentic in the three official WTO languages, while the Report of the Working Party on the Accession of the Russian Federation and Schedules are authentic in English only." WT/MIN(11)/SR/3, para. 9.

[833] WT/Let/840.

[834] WT/Let/860.

[835] WT/L/837.

[836] WT/L/838.

[837] WT/L/877.

[838] WT/L/878.

[839] The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/823. The certified true copy of the Protocol was circulated in WT/Let/861 on 30 July 2012.

[840] WT/L/823.

[841] WT/ACC/VUT/17 and WT/ACC/VUT/17/Add.1 and WT/ACC/VUT/17/Add.2.

[842] WT/Let/836.

[843] WT/L/862.

[844] WT/Let/861.

[845] The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/865. The certified true copy of the Protocol was circulated in WT/Let/876 on 4 February 2013.

Lao People's Democratic Republic's WTO accession[846] and the accession working party report.[847] On the same day, the Lao People's Democratic Republic signed the Protocol, subject to ratification.[848]

405. Having deposited its instrument of acceptance on 3 January 2013, the LAO People's Democratic Republic became a WTO Member on 2 February 2013.[849]

(vi) Tajikistan

406. On 10 December 2012, the General Council approved the text of the Protocol of Accession of Tajikistan to the WTO Agreement[850], and adopted the decision on Tajikistan's WTO accession[851] and the working party report.[852] On the same day, Tajikistan signed its WTO accession protocol, subject to ratification.[853]

407. Prior to this, on 7 December 2012, the United States invoked Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to Tajikistan.[854]

408. Having deposited its instrument of acceptance on 31 January 2013, Tajikistan became the 159th WTO Member on 2 March 2013.[855]

(b) Withdrawal of the United States' Article XIII invocation with respect to the Republic of Moldova

409. On 21 December 2012, the United States withdrew its invocation[856] of Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the Republic of Moldova[857], which had acceded to the WTO Agreement on 26 July 2001.[858]

(c) China – Transitional review under Section 18.2 of the Protocol of Accession to the WTO Agreement

410. On 30 November 2011, the General Council conducted its final review of China's implementation of the WTO Agreement and the provisions of the Protocol of Accession. The General Council considered a communication from China that provided information required under Sections I and III of Annex 1A of the Protocol of Accession[859], as well as reports of the subsidiary bodies on their respective reviews[860].[861]

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[846] WT/L/865.
[847] WT/ACC/LAO/45 and WT/ACC/LAO/45/Add.1 and WT/ACC/LAO/45/Add.2.
[848] WT/Let/869.
[849] WT/Let/872.
[850] The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/872. The certified true copy of the Protocol was circulated in WT/Let/879 on 12 March 2013.
[851] WT/L/872.
[852] WT/ACC/TJK/30, WT/ACC/TJK/30/Add.1 and WT/ACC/TJK/30/Add.2.
[853] WT/Let/871.
[854] WT/L/871.
[855] WT/Let/878.
[856] WT/L/395.
[857] WT/L/879.
[858] WT/Let/399.
[859] WT/GC/136.
[860] G/L/977, S/C/37, IP/C/60, WT/BOP/R/103 and G/TBT/30. Other transitional reviews submitted to subsidiary bodies of the General Council include G/AG/25 and G/SPS/57.

411. The General Council took note of the statements and of the reports submitted by the subsidiary bodies on their respective reviews, and agreed that the final review by the General Council of China's implementation of the WTO Agreement and the provisions of its Protocol of Accession had been concluded.[862]

(d) General developments on WTO accessions

(i) LDC accessions

412. On 17 December 2011, the 8th Ministerial Conference adopted the following decision on the Accession of Least-Developed Countries:

> "We reaffirm the LDC accession guidelines adopted in 2002. Taking note of the accession proposal made by the LDCs, we direct the Sub-Committee on LDCs to develop recommendations to further strengthen, streamline and operationalize the 2002 guidelines by, *inter alia*, including benchmarks, in particular in the area of goods, which take into account the level of commitments undertaken by existing LDC Members. Benchmarks in the area of services should also be explored.
>
> We recognize that transparency in the accession negotiations should be enhanced, including by complementing bilateral market access negotiations with multilateral frameworks.
>
> We reiterate that S&D provisions, as stipulated in the 2002 guidelines, shall be applicable to all acceding LDCs, and that requests for additional transition periods will be considered taking into account individual development needs of acceding LDCs.
>
> We underline the need for enhanced technical assistance and capacity building to help acceding LDCs to complete their accession process, implement their commitments and to integrate them into the multilateral trading system. Appropriate tools should be developed to assess the needs and to ensure greater coordination in the delivery of technical assistance, making optimal use of all facilities, including the EIF.
>
> We instruct the Sub-Committee on LDCs to complete this work and make recommendations to the General Council no later than July 2012."[863]

413. On 25 July 2012, the General Council adopted a decision on the Accession of Least-Developed Countries[864] to strengthen, streamline and operationalize the 2002 LDC Accession Guidelines.[865] The 2012 General Council Decision addresses: (i) benchmarks on goods; (ii) benchmarks on services; (iii) transparency in accession negotiations; (iv) special and differential treatment and transition periods; and (v) technical assistance. It is an addendum to the 2002 LDC Accession Guidelines.[866]

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[861] WT/GC/M/134, paras. 1-18.
[862] WT/GC/M/134, para. 19.
[863] WT/L/846. See also WT/L/508.
[864] WT/L/508/Add.1.
[865] WT/L/508.
[866] WT/L/508/Add.1, para. 1.

2. Observership

(a) WTO observer requests

(i) Arab Group proposal on improving the Guidelines for granting observer status to intergovernmental organizations in the WTO

414. In November 2011, the General Council agreed that the Chair of the General Council start a process of consultations on improving the guidelines for granting observer status to intergovernmental organizations in the WTO, following a communication by the Arab Group on the same matter.[867] The Chair regularly reported to the General Council on the consultations undertaken, without however being able to report any change in the positions previously expressed.[868]

(ii) South Sudan

415. On 20 April 2012, the Republic of South Sudan submitted a request for obtaining observer status in the General Council and its subsidiary bodies.[869] The request specified that the Government of the South Sudan intends to prepare and initiate negotiations for accession to the WTO Agreement in the near future, within a maximum period of five years.

416. South Sudan's observer request was not addressed by the General Council.

(b) Observer participation at the 8th Ministerial Conference

(i) International intergovernmental organizations (IGOs)

IGOs in general

417. On 30 November 2011, the General Council took note[870] of the following statement by the Chair concerning the attendance of observers from IGOs:

> "[I]n line with Members' discussion at the 26 October meeting, the General Council had agreed to revert to this matter at its next meeting. In October, he had proposed that the General Council follow past practice with respect to the attendance of Observers from IGOs. From the consultations he had undertaken on this matter, it appeared that there was no consensus on this approach."[871]

League of Arab States

418. On 30 November 2011, the Chair of the General Council made a statement on the request by the League of Arab States for observer status at the 8th Ministerial Conference:

> "The Chairman recalled that at the General Council meeting on 26 October, he had informed delegations that a request by the League of Arab States (LAS) for observer status at MC8 had been received. He had then proposed that unless any objection was received by the Secretariat from any [WTO] Member by 15 November 2011, the LAS would be granted observer status at MC8, he would inform the General Council at its next meeting of the status of this request, and delegations

[867] WT/GC/W/643.
[868] See WT/GC/W/662, paras. 69-77, WT/GC/M/143, para. 5.1, WT/GC/M/145, para. 3.1 and WT/GC/M/146.
[869] WT/L/852.
[870] WT/GC/M/134, para. 228.
[871] WT/GC/M/134, para. 227.

> would have an opportunity at that meeting to engage in a discussion on this request. Since then, written communications had been received from two [WTO] Members stating that they were not in a position to agree to this request, as he had announced in a fax to all [WTO] Members on 16 November, and there was therefore no consensus to grant the request from the LAS at the present stage. In the interests of transparency of the process, he opened the floor."[872]

419. The General Council took note of the Chair's statement and of the statements made by WTO Members in that context.[873]

(ii) Non-governmental organizations

420. On 26 October 2011, the General Council Chair summarized the established practice of NGO participation at Ministerial Conferences as follows:

> "[F]or all previous Ministerial Conferences, attendance of Non-Governmental Organizations (NGOs) had been governed by a procedure which had been agreed by the General Council in July 1996. This procedure was as follows: (i) a limited number of accredited NGO representatives were allowed to attend only the Plenary Sessions of the Conference, without the right to speak; (ii) applications from NGOs to be registered were accepted on the basis of Article V, paragraph 2 of the WTO Agreement, i.e. NGOs 'concerned with matters related to those of the WTO'; and (iii) a deadline was established for the registration of NGOs that wished to attend the Conference. He proposed that the General Council continue to follow the procedure he had just read out, with a deadline for registration fixed at 11 November. Once the registration procedure was finalized, the Secretariat would circulate the list of registered NGOs to all [WTO] Members. He trusted this was acceptable to delegations. He proposed that the General Council take note of his statement and agree to follow the procedure he had outlined."[874]

421. The General Council agreed to follow this practice with regard to NGO participation at the 8th Ministerial Conference.[875]

(iii) Palestine

422. On 30 November 2011, the General Council agreed[876] to Palestine's request for observer status at the 8th Ministerial Conference.[877]

(c) Observer participation at the 9th Ministerial Conference

(i) Governments

423. At its meeting of 4 June 2013, the General Council agreed that past practice be repeated regarding the attendance of observers from Governments, namely to invite the Governments with Observer Status at MC8 to attend MC9.[878] As the Chair explained, this concerned the governments with regular observer status in the General Council – with the due adjustments related to the

[872] WT/GC/M/134, para. 229.
[873] WT/GC/M/134, para. 241.
[874] WT/GC/M/133, para. 72.
[875] WT/GC/M/133, para. 73.
[876] WT/GC/M/134, para. 225.
[877] WT/L/822.
[878] WT/GC/M/145, para. 4.5.

accessions since MC8 – plus six Governments which had previously been granted observer status only at Ministerial Conferences: Cook Islands, Eritrea, Niue, San Marino, Timor-Leste and Tuvalu.[879]

(ii) International intergovernmental organizations (IGOs) and the League of Arab States

424. Regarding the issue of the participation of IGOs at MC9, and the related request of the League of Arab States to attend the Conference, at the General Council meeting of 24-25 July 2013, the Chair stated that the request from the League of Arab States was not agreeable to some Members at that time, and there was no clarity on whether past practice could be repeated with regard to IGO Observers. He proposed to continue his consultations after the summer break.[880]

(iii) Non-governmental organizations

425. At its meeting of 4 June 2013, the General Council agreed to repeat past practice with regard to NGO participation[881] at the 9th Ministerial Conference, with a deadline for registration fixed at 13 October 2013.[882]

(iv) Palestine

426. On 29 May 2013, Palestine requested observer status at the 9th Ministerial Conference.[883] At the General Council meeting of 24-25 July 2013, the Chair stated that more time was needed for some Members to consider the request.[884]

(d) Observership at WTO subsidiary bodies

427. The issue of IGO observership has arisen in various WTO subsidiary bodies, including the Council for TRIPS, the Committee on Sanitary and Phytosanitary Measures and the Committee on Trade and Development.

(i) Council for TRIPS

428. At its meeting in November 2012, the Council for TRIPS agreed[885] to grant *ad hoc* observer status on a meeting-by-meeting basis to the Cooperation Council of the Arab States of the Gulf (GCC) and the European Free Trade Association (EFTA). Decisions on requests for observer status from 13 other international intergovernmental organizations are pending.[886] With regard to these organizations, in November 2012 the Council for TRIPS agreed to request that the Chair continue his consultations on the requests from the five IGOs that had recently provided updated information,

[879] WT/GC/M/145, para. 4.4. See also WT/MIN(09)/INF/6/REV.1, Category II.
[880] WT/GC/M/146.
[881] As the Chair recalled on 4 June 2013, "for all previous Ministerial Conferences, attendance of Non-Governmental Organizations (NGOs) had been governed by a procedure which had been agreed by the General Council in July 1996. This procedure was as follows: (i) A limited number of accredited NGO representatives were allowed to attend only the Plenary Sessions of the Conference, without the right to speak; (ii) applications from NGOs to be registered were accepted on the basis of Article V, paragraph 2 of the WTO Agreement, i.e. NGOs 'concerned with matters related to those of the WTO'; and (iii) a deadline was established for the registration of NGOs that wished to attend the Conference." WT/GC/M/145, para. 4.8.
[882] WT/GC/M/145, paras. 4.9-4.10.
[883] WT/L/884.
[884] WT/GC/M/146.
[885] IP/C/61, paras. 1 and 16.
[886] The organizations in question are listed in document IP/C/W/52/Rev.12.

as well as on the requests from the remaining eight organizations that had not yet updated their information.[887]

(ii) Committee on Sanitary and Phytosanitary Measures

429. At its July 2012 meeting, the Committee on Sanitary and Phytosanitary Measures agreed to grant observer status, on an *ad hoc*, meeting-by-meeting basis, to the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS/CEEAC), and the Gulf Co-operation Council Standardization Organization (GSO).[888]

430. At its meeting of October 2012, the Committee on Sanitary and Phytosanitary Measures agreed to invite the organizations with *ad hoc* observer status to participate in all of its meetings in 2013 – with the exception of any closed meetings such as with regard to observers – unless any Member raised an objection to the participation of any of these observers in advance of a meeting. The Committee also agreed that if for any one-year period an *ad hoc* observer organization did not attend meetings, the Committee could consider that its observer status had ceased only after the Secretariat had advised the observer organization and received confirmation that it was no longer interested in maintaining its observer status.[889]

431. At its March 2013 meeting, the Committee on Sanitary and Phytosanitary Measures agreed to grant *ad hoc* observer status to the Intergovernmental Authority on Development (IGAD).[890]

(iii) Committee on Trade and Development

432. In March 2013, the Committee on Trade and Development agreed to grant *ad hoc* observer status to the Economic Community of Central African States.[891]

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[887] IP/C/61, para. 16.
[888] G/SPS/R/67, para. 139.
[889] G/SPS/R/69, para. 171.
[890] G/SPS/R/70, para. 12.4.
[891] WT/COMTD/M/87, para 6. See WT/COMTD/W/22/Rev.7 for the updated list of CTD observers.

B. GOODS

1. Waivers[892]

(a) CARIBCAN

433. On 30 November 2011, the General Council adopted a waiver from Article I:1 of the GATT 1994 until 31 December 2013, to permit Canada to provide duty-free treatment to eligible imports of Commonwealth Caribbean countries benefiting from the provision of CARIBCAN, without being required to extend the same duty-free treatment to like products of any other WTO Member.[893]

(b) EU – Western Balkans

434. On 30 November 2011, the General Council further extended the waiver from Article I:1 of the GATT 1994 until 31 December 2016, to permit the European Union to afford duty-free or preferential treatment to eligible products originating in the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Kosovo[894], Montenegro and Serbia) without being required to extend the same duty-free or preferential treatment to like products of any other WTO Member.[895]

(c) Cuba – Article XV:6

435. On 14 February 2012, the General Council further extended the waiver from Article XV:6 of the GATT 1994 granted to Cuba by decision of 7 August 1964, as extended on 18 October 1996, 20 December 2001 and 15 December 2006, from 1 January 2012 to 31 December 2016.[896]

(d) EU – Pakistan

436. On 14 February 2012, the General Council adopted a waiver from Articles I:1 and XIII of the GATT 1994 from 1 January 2012 until 31 December 2013, to permit the European Union to afford unlimited duty-free or other preferential tariff treatment to products originating in Pakistan without being required to extend the same treatment to like products of any other WTO Member.[897]

(e) Kimberley Process Certification Scheme for Rough Diamonds

437. On 11 December 2012, the General Council adopted a decision extending the waiver from Articles I:1, XI:1 and XIII:1 of the GATT 1994 until 31 December 2018, with respect to the measures taken by certain Members necessary to prohibit the export of rough diamonds, consistent with the Kimberley Process Certification Scheme, to and from non-Participants in this Scheme.[898]

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[892] Waivers relating to the implementation of successive changes to the Harmonized System (HS) are referenced in section II.B.2 on the Harmonized System below.

[893] WT/L/835.

[894] Under United Nations Security Council Resolution 1244/99.

[895] WT/L/836. The General Council adopted the original waiver on 8 December 2000 until 31 December 2006 (WT/L/380), and extended the period of this waiver in 28 July 2006 until 31 December 2011 (WT/L/654).

[896] WT/L/850.

[897] WT/L/851.

[898] WT/L/876. See also WT/L/676 and WT/L/518.

(f) The Philippines' request for a waiver relating to special treatment for rice

438. In July 2012, the General Council agreed to allow the Council for Trade in Goods to continue consideration of the Philippines' request for a waiver relating to special treatment for the Philippines concerning rice[899], and to report back to the General Council once it had completed this work.[900]

2. Harmonized System

(a) HS2002

439. On 30 November 2011, the General Council adopted a waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2002 Changes into WTO Schedules of Tariff Concessions.[901]

440. On 11 December 2012, the General Council extended the waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2002 Changes into WTO Schedules of Tariff Concessions until 31 December 2013.[902]

(b) HS2007

441. On 30 November 2011, the General Council adopted a decision[903] on the Amendment to the Procedures Leading to the Certification of HS2007 Changes.[904] On the same day, the General Council adopted a waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2007 Changes into WTO Schedules of Tariff Concessions.[905]

442. On 11 December 2012, the General Council extended the waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2007 Changes into WTO Schedules of Tariff Concessions until 31 December 2013.[906]

(c) HS2012

443. On 30 November 2011, the General Council adopted a decision on the Procedure for the Introduction of Harmonized System 2012 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database.[907] On the same day, the General Council adopted a waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2012 Changes into WTO Schedules of Tariff Concessions until 31 December 2012.[908]

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[899] G/C/W/665. See also G/C/W/665/Rev.1.

[900] WT/GC/M/137, para. 169.

[901] WT/L/832. See also WT/L/511, WT/L/562, WT/L/598, WT/L/638, WT/L/674, WT/L/712, WT/L/744, WT/L/786 and WT/L/808.

[902] WT/L/873. See also WT/L/511, WT/L/562, WT/L/598, WT/L/638, WT/L/674, WT/L/712, WT/L/744, WT/L/786, WT/L/808 and WT/L/832.

[903] WT/L/830.

[904] WT/L/673.

[905] WT/L/833. See also WT/L/675, WT/L/675/Add.1, WT/L/675/Add.2, WT/L/675/Add.3, WT/L/675/Add.4, WT/L/713, WT/L/745, WT/L/787, WT/L/787/Add.1, WT/L/787/Add.2 and WT/L/809.

[906] WT/L/874. See also WT/L/675, WT/L/675/Add.1, WT/L/675/Add.2, WT/L/675/Add.3, WT/L/675/Add.4, WT/L/713, WT/L/745, WT/L/787, WT/L/787/Add.1, WT/L/787/Add.2, WT/L/809 and WT/L/833.

[907] WT/L/831.

[908] WT/L/834.

444. On 11 December 2012, the General Council extended the waiver from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2012 Changes into WTO Schedules of Tariff Concessions until 31 December 2013.[909]

445. On 17 June 2013, the Philippines notified the Committee on Market Access of its wish to be included in the Annex to the HS2012 Waiver Decision contained in document WT/L/875.[910]

3. Changes to goods schedules

446. The Director-General as depositary certified the following modifications and rectifications to individual WTO Members' goods schedules:

- modifications and rectifications to Schedule CXLI – Panama, effective 29 October 2011, certified on 1 November 2011[911];
- modifications and rectifications to Schedule XXXVIII – Japan, done and certified on 4 November 2011[912], effective 1 October 2012[913];
- modifications and rectifications to Schedule LXXXVIII – Guatemala, effective 22 February 2012, certified on 12 March 2012[914];
- modifications and rectifications to Schedule XXXVII – Turkey, effective 20 April 2012, certified on 26 April 2012[915];
- modifications and rectifications to Schedule LXXVII – Mexico, effective 20 July 2012, certified on 27 July 2012[916];
- modifications and rectifications to Schedule LXXVI – Colombia, effective 8 August 2012, certified on 15 August 2012[917];
- modifications and rectifications to Schedule CLXVI – Montenegro, effective 24 October 2012, certified on 25 October 2012[918];
- modifications and rectifications to Schedule XLIX – Senegal, effective 1 January 2013, certified on 16 January 2013[919];
- modifications and rectifications to Schedule III – Brazil, effective 8 January 2013, certified on 16 January 2013[920];
- modifications and rectifications to Schedule XLII – Israel, effective 11 March 2013, certified on 17 May 2013[921];
- modifications and rectifications to Schedule I – Australia, effective 8 April 2013, certified on 17 May 2013[922];
- modifications and rectifications to Schedule XII – India, effective 26 June 2013, certified on 25 July 2013[923]; and
- modifications and rectifications to Schedule XXXI – Uruguay, effective 26 June 2013, certified on 25 July 2013.[924]

[909] WT/L/875. See also WT/L/834.
[910] WT/L/875/Add.1.
[911] WT/Let/834.
[912] WT/Let/835.
[913] WT/Let/864.
[914] WT/Let/847.
[915] WT/Let/852.
[916] WT/Let/862.
[917] WT/Let/863.
[918] WT/Let/867.
[919] WT/Let/874.
[920] WT/Let/875.
[921] WT/Let/882.
[922] WT/Let/880 and WT/Let/881.
[923] WT/Let/886.

(a) Bananas

447. On 30 October 2012, the Director-General certified[925] the modifications, effective 27 October 2012, to Schedule CXL – European Communities, resulting from the Geneva Agreement on Trade in Bananas (GATB) circulated on 15 December 2009.[926]

448. The GATB sets forth annual reductions in the European Union's banana tariffs until 2017. Further, the GATB provides that upon certification, the pending disputes[927] and all claims filed to date by Latin American MFN banana suppliers under the procedures of Articles XXIV and XXVIII of the GATT 1994 with respect to the EU trading regime for bananas[928] shall be settled as of the date of certification. Within two weeks after certification, the relevant parties to this Agreement were to jointly notify the DSB that they have reached a mutually agreed solution through which they have agreed to end these disputes. Under the GATB, the settlement of these disputes does not affect any party's right to initiate a new dispute under the DSU, or future rights under the procedures of Articles XXIV and XXVIII of the GATT 1994.

449. Further, on 8 November 2012, Brazil, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela jointly notified a mutually agreed solution to disputes DS27, DS361, DS364, DS16, DS105, DS158, and the related arbitrations contained in WT/L/616 and WT/L/625.[929]

(b) European Union Enlargement: Procedures under Article XXVIII:3 of the GATT 1994

450. On 30 March and 26 November 2012, the Council for Trade in Goods agreed to the extension of the deadlines proposed by the European Union.[930]

(c) Ukraine's request to renegotiate concessions under Article XXVIII of the GATT 1994

451. On 12 September 2012, Ukraine made a request to renegotiate concessions under Article XXVIII of the GATT 1994.[931] Various WTO Members made statements on this request at the General Council on 3 October[932] and 11 December 2012[933], as well as on 25 February[934] and 24-25 July 2013.[935]

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[924] WT/Let/885.
[925] WT/Let/868.
[926] WT/L/784.
[927] WT/DS27, WT/DS361, WT/DS364, WT/DS16, WT/DS105, WT/DS158, WT/L/616 and WT/L/625.
[928] Including G/SECRET/22 item 0803.00.19 and G/SECRET/22/Add.1; G/SECRET/20 and G/SECRET/20/Add.1; and G/SECRET/26.
[929] WT/DS27/98, G/L/63/Add.1, G/LIC/D/2/Add.1, S/L/17/Add.1, G/AG/W/18/Add.1, G/TRIMS/4/Add.1. See also WT/DSB/M/325, item 7.
[930] G/L/695/Add.15; G/L/821/Add.10; G/L/695/Add.16; and G/L/821/Add.11.
[931] G/SECRET/34.
[932] WT/GC/M/138, paras. 111-131.
[933] WT/GC/M/141, item 6. See also WT/GC/150, WT/GC/151, para. 122 and G/C/W/678.
[934] WT/GC/M/143, item 4.
[935] WT/GC/M/146.

4. Notification requirements

(a) Notifications of quantitative restrictions

452. On 22 June 2012, the Council for Trade in Goods adopted[936] a Decision on Notification Procedures for Quantitative Restrictions.[937]

(b) Frequency of notifications of state trading enterprises under Article XVII of GATT 1994 and the Understanding on the Interpretation of Article XVII of GATT 1994

453. At its meeting on 22 June 2012, the Council for Trade in Goods took note of the statement sent to it by the Chair of the Working Party on State Trading Enterprises on the frequency of notifications.[938] The Council approved the recommendation adopted by the Working Party in document G/STR/8 on the indefinite extension of the current frequency of notifications.[939]

5. Review of the exemption provided under paragraph 3(a) of the language incorporating GATT 1947 and other instruments into the GATT 1994

454. Paragraph 3(a) of the language incorporating GATT 1947 and other instruments into the GATT 1994 provides an exemption from Part II of the GATT 1994 for measures under specific mandatory legislation – enacted by a Member before it becomes a contracting party to GATT 1947 – which prohibit the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or waters of an exclusive economic zone. On 20 December 1994, the United States invoked the provisions of paragraph 3(a) with respect to specific legislation that met the requirements of that paragraph. Paragraph 3(b) calls for a review of this exemption five years after the date of entry into force of the WTO Agreement – and thereafter every two years for as long as the exemption is in force – in order to examine whether the conditions which created the need for the exemption still prevail.

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[936] G/C/M/111, para. 2.5.

[937] Circulated as G/L/59/Rev.1

[938] "By way of background, on 11 November 2003 the Working Party on State Trading Enterprises adopted a recommendation contained in G/STR/5 regarding the frequency of notifications. This recommendation modified the frequency of state trading notifications to new and full notifications every two years rather than every three years. It also eliminated the need for updating notifications in the intervening years. This was an effort to reduce the notification burden on Members and therefore help Members improve compliance with their notification obligations in the Working Party. The recommendation took effect from 2004 and was implemented for an initial four-year trial period, until 30 June 2008. This frequency was extended by the Working Party in 2008 (document G/STR/6) and again in 2010 (document G/STR/7) until 30 June 2012.

Following informal consultations, Members indicated that they could agree on an indefinite extension of the current frequency. At its formal meeting on 8 June 2012, the Working Party adopted the recommendation in G/STR/8 to extend the current, less burdensome frequency of notifications on an indefinite basis.

Thereby, the Working Party recommends to the Goods Council that:

(a) This indefinite extension shall enter into force as of the year 2012, with the next new and full notification being due by 30 June 2014; and

(b) The guidelines for completing the Questionnaire on State Trading Enterprises are those contained in G/STR/3/Rev.1." G/C/M/111, para. 3.1.

[939] G/C/M/111, para. 3.3.

455. On 30 November 2011, the General Council agreed that the 2011 review would be based on the statements and questions submitted by Members as well as the responses provided by the United States in this context at the February 2011 meeting of the General Council.[940] It was also agreed that the 2011 review would draw upon the annual report provided by the United States under paragraph 3(c).[941] It was further agreed that for the purposes of the review, this matter would be on the agenda of subsequent General Council meetings in the course of 2011 as the Chair deemed appropriate, or at the request of any WTO Member.[942] The Chair drew attention to a questionnaire to the United States from Japan with regard to US legislation under this exemption[943] and to the United States' responses to Japan's questions.[944] The General Council took note of the statements made by Members in this context and that the subsequent review under the two-yearly cycle provided in paragraph 3(b) would normally be held in 2013.[945]

456. At its meeting of 25 February 2013[946], the General Council initiated the 2013 review based on the United States' notification.[947] The General Council agreed to revert to this item at a further meeting.[948]

6. Marrakesh Ministerial Decision on measures concerning the possible negative effects of the reform programme on least–developed and net food-importing developing countries (NFIDCs)

457. On 21 March 2012, the Committee on Agriculture expanded the WTO List of Net Food-Importing Developing Countries to include Antigua and Barbuda and El Salvador.[949]

7. Sanitary and phytosanitary (SPS) measures

458. At its meeting of October 2011, the Committee on Sanitary and Phytosanitary Measures adopted a decision on Joint Work by Codex, IPPC and OIE on Cross-Cutting Issues. In the decision, "[t]he Committee encourages joint work by two or all three of the relevant international organizations on cross-cutting issues such as, *inter alia*, certification, inspection, approval procedures and/or risk analysis."[950]

459. At its June 2013 meeting, the Committee on Sanitary and Phytosanitary Measures adopted its Fifteenth Annual Report under the Procedure to Monitor the Process of International Harmonization.[951]

460. At the same meeting, the Committee also considered the annual report on the implementation of Article 6 of the SPS Agreement (*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*).[952] The report contains information provided by Members concerning: (i) requests for recognition of pest- or disease-free areas or areas

[940] WT/GC/M/130, paras. 45-51.
[941] WT/L/810 and Corr.1
[942] WT/GC/M/134, para. 242.
[943] WT/GC/W/648.
[944] WT/GC/W/651.
[945] WT/GC/134, para. 251.
[946] WT/GC/M/143, item 3.
[947] WT/L/880.
[948] WT/GC/M/143, para. 3.11.
[949] G/AG/5/Rev.10.
[950] G/SPS/58.
[951] G/SPS/60. The previous fourteen annual reports are contained in G/SPS/13, G/SPS/16, G/SPS/18, G/SPS/21, G/SPS/28, G/SPS/31, G/SPS/37, G/SPS/42, G/SPS/45, G/SPS/49, G/SPS/51, G/SPS/54, G/SPS/56 and G/SPS/59.
[952] G/SPS/GEN/1245.

of low pest or disease prevalence; (ii) determinations on whether to recognize a pest- or disease-free area or area of low pest or disease prevalence; and/or (iii) Members' experiences in the implementation of Article 6 and the provision of relevant background information by Members on their decisions to other interested Members.

8. Technical barriers to trade (TBT)

9. Technical barriers to trade (TBT)

461. On 28 November 2012, the Committee on Technical Barriers to Trade concluded its Sixth Triennial Review of the operation and implementation of the TBT Agreement pursuant to Article 15.4 of the TBT Agreement.[953] The Committee reaffirmed all previous decisions and recommendations as contained in G/TBT/1/Rev.10.[954] In addition, the Committee set out new work in the areas of good regulatory practice, conformity assessment procedures, standards, transparency, technical assistance, special and differential treatment and the operation of the Committee.[955]

462. With respect to **good regulatory practice**, the Committee agreed to identify a non-exhaustive list of voluntary mechanisms and related principles, which will help guide Members in the efficient and effective implementation of the TBT Agreement across the regulatory lifecycle.[956]

463. Regarding **conformity assessment procedures**, the Committee organized its future work into three thematic areas: approaches to conformity assessment; use of relevant international standards, guides or recommendations; and facilitating the recognition of conformity assessment results.[957] Within each of these areas, the Committee agreed to exchange information on specific topics in order to advance its work.

464. The Committee agreed to further work in three areas as regards **standards:**

(a) With respect to the *Code of Good Practice*, the Committee reiterated the recommendations made at the Fifth Triennial Review[958], and agreed to exchange information and experiences on reasonable measures taken by Members to ensure that local government and non-governmental standardizing bodies involved in the development of standards within their territories, accept and comply with the Code of Good Practice.[959]

(b) As regards *international standards*, the Committee agreed to information exchange on efforts to promote the full application of the Six Principles set out in the 2000 Committee Decision[960], and for this purpose would consider inviting relevant bodies involved in the development of international standards, guides or recommendations to share their experiences with the use of these same principles.[961]

[953] G/TBT/32.
[954] G/TBT/32, para. 2.
[955] G/TBT/32.
[956] G/TBT/32, para 4.
[957] G/TBT/32, para 5.
[958] The three recommendations contained in G/TBT/26, para. 26(a)–(c).
[959] G/TBT/32, para. 7.
[960] In 2000, the TBT Committee adopted a Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement. These principles include: (1) transparency; (2) openness; (3) impartiality and consensus; (4) effectiveness and relevance; (5) coherence; and (6) the development dimension. The full text of this Decision is contained in Annex B of G/TBT/1/Rev.10 (pp. 46-48).
[961] G/TBT/32, para. 8.

The Committee agreed to give particular attention to how the "development dimension" was taken into consideration in discussions of the Six Principles.[962]

(c) Concerning *transparency in standard-setting*, the Committee agreed to exchange information on how relevant bodies involved in the development of standards – whether at the national, regional or international level – provided opportunity for public comment.[963]

465. Concerning **transparency** in relation to the TBT Agreement in general, the Committee reiterated the importance of the full implementation of existing decisions and recommendations, and agreed to:

- encourage Members to notify draft technical regulations and conformity assessment procedures even in situations when it is difficult to establish if such measures may have a "significant effect on trade of other Members" in the context of Articles 2.9 and 5.6 of the TBT Agreement;
- encourage Members to provide access, when notifying, to assessment documents (e.g. regulatory impact assessments) on the possible effects of draft measures;
- encourage Members to establish mechanisms at a national level to ensure that proposed technical regulations and conformity assessment procedures of local governments are notified in accordance with Article 3.2 and 7.2 of the TBT Agreement;
- exchange information on Members' practices and experiences in the use of notification formats;
- discuss means to improving the functioning of TBT enquiry points, including with respect to building support among interested stakeholders in the private sector for the services of the enquiry points; and
- request enhancement of WTO information technology tools for TBT, including online submission of notifications.[964]

466. On **special and differential treatment**, the Committee agreed to exchange views and explore ideas on the implementation of Article 12 of the TBT Agreement with respect to the preparation of technical regulations, standards and conformity assessment procedures, and the enhancement of the effective operation of Article 12, in coordination with the WTO Committee on Trade and Development.[965]

[962] G/TBT/32, para. 8.
[963] G/TBT/32, para. 9.
[964] G/TBT/32, paras. 10-18.
[965] G/TBT/32, para. 22.

C. SERVICES

1. LDC waiver

467. On 17 December 2011, the 8th Ministerial Conference adopted the a waiver from Article II:1 of the GATS for the Preferential Treatment to Services and Service Suppliers of Least-Developed Countries.[966] In general, the waiver applies for 15 years from the date of its adoption.[967] However, as regards preferential treatment granted to services and service suppliers of any particular LDC, the waiver shall terminate when that country graduates from the United Nations' list of least-developed countries.[968]

2. Fifth Protocol to the General Agreement on Trade in Services

468. On 5 October 2012, the Council for Trade in Services reopened the Fifth Services Protocol[969] for acceptance by Jamaica until 4 December 2012.[970] On 16 October 2012, Jamaica accepted the Protocol, and the Protocol entered into force for Jamaica on the same day.[971]

[966] WT/L/847.
[967] WT/L/847, para. 7.
[968] WT/L/847, para. 8.
[969] S/L/45.
[970] S/L/395.
[971] WT/Let/866.

D. INTELLECTUAL PROPERTY

1. Protocol amending the TRIPS Agreement

469. On 30 November 2011, the General Council adopted a decision on the Third Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement.[972] The decision further extends the acceptance period until 31 December 2013 or such later date as may be decided by the Ministerial Conference.

470. Since October 2011[973], the following Members have deposited instruments of acceptance for the Protocol Amending the TRIPS Agreement:

- Argentina on 20 October 2011[974];
- Indonesia on 20 October 2011[975];
- New Zealand on 21 October 2011[976];
- Cambodia on 1 November 2011[977];
- Panama on 24 November 2011[978];
- Costa Rica on 8 December 2011[979];
- Honduras on 16 December 2011[980];
- Rwanda on 12 December 2011[981];
- Togo on 13 March 2012[982];
- Kingdom of Saudi Arabia on 29 May 2012[983];
- Chinese Taipei on 31 July 2012[984];
- Dominican Republic on 23 May 2013[985]; and
- Chile on 26 July 2013.[986]

[972] WT/L/829. See also WT/L/641.
[973] A complete list of acceptances since the adoption of the Protocol on 6 December 2005 is available in the latest revision of IP/C/W/490.
[974] WT/Let/830.
[975] WT/Let/831.
[976] WT/Let/832.
[977] WT/Let/833.
[978] WT/Let/837.
[979] WT/Let/838.
[980] WT/Let/843.
[981] WT/Let/839.
[982] WT/Let/848.
[983] WT/Let/855.
[984] WT/Let/870.
[985] WT/Let/884.

471. The Protocol has not yet entered into force.[987]

2. TRIPS non-violation and situation complaints

472. On 17 December 2011, the 8th Ministerial Conference adopted the following decision on TRIPS non-violation and situation complaints:

> "We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to our Decision of 2 December 2009 on 'TRIPS Non-Violation and Situation Complaints' (WT/L/783), and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session, which we have decided to hold in 2013. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement."[988]

3. Transition period for LDCs under Article 66.1 of the TRIPS Agreement

473. On 17 December 2011, the 8th Ministerial Conference adopted the following decision concerning the transition period for least-developed countries under Article 66.1 of the TRIPS Agreement:

> "We invite the TRIPS Council to give full consideration to a duly motivated request from Least-Developed Country Members for an extension of their transition period under Article 66.1 of the TRIPS Agreement, and report thereon to the WTO Ninth Ministerial Conference."[989]

474. On 5 November 2012, least-developed WTO Members submitted a request for an extension of the transitional period that ends on 1 July 2013[990] for as long as the WTO Member in question remains a least-developed country.[991]

475. On 11 June 2013, the TRIPS Council agreed to extend the transitional period by eight years until 1 July 2021, recognizing least-developed WTO Members' right to seek further extensions:

> "1. Least developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until 1 July 2021, or until such a date on which they cease to be a least developed country Member, whichever date is earlier.
>
> 2. Recognizing the progress that least developed country Members have already made towards implementing the TRIPS Agreement, including in accordance with paragraph 5 of IP/C/40, least developed country Members express their determination to preserve and continue the progress towards implementation of the TRIPS Agreement. Nothing in this decision shall prevent least developed country Members from making full use of the flexibilities provided by the Agreement to address their needs, including to create a sound and viable technological base and to overcome their capacity constraints supported by, among other steps, implementation of Article 66.2 by developed country Members.

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[986] WT/Let/888.
[987] The certified true copy of the Protocol was circulated in WT/Let/508 on 12 January 2006.
[988] WT/L/842.
[989] WT/L/845.
[990] IP/C/40. See also IP/C/25.
[991] IP/C/W/583.

3. This Decision is without prejudice to the Decision of the Council for TRIPS of 27 June 2002 on 'Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with respect to Pharmaceutical Products' (IP/C/25), and to the right of least developed country Members to seek further extensions of the period provided for in paragraph 1 of Article 66 of the Agreement."[992]

[992] IP/C/64.

E. DISPUTE SETTLEMENT

1. Appointment of Appellate Body members

476. At the DSB meeting of 24 May 2011, the Chair submitted a proposal regarding the procedures for selecting two new Appellate Body members. The proposal contained the following elements: (i) to launch as from 24 May 2011 the selection process for appointment of two new members of the Appellate Body; (ii) to set a deadline of 31 August 2011 for WTO Members' nominations of candidates for the two positions; (iii) to agree to establish a Selection Committee, based on the procedure set out in document WT/DSB/1, which would consist of the Director-General and the 2011 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, which would be presided by the 2011 DSB Chairperson; (iv) to request the Selection Committee to conduct interviews with candidates and to hear views of WTO Members in September/October, and to make recommendations to the DSB by no later than 10 November 2011, so that the DSB could take a final decision on this matter at the latest at its regular meeting on 21 November 2011.[993] The DSB agreed to the Chairperson's proposal regarding the selection process for the appointment of two new Appellate Body members.[994]

477. On 18 November 2011, the DSB appointed Mr Ujal Singh Bhatia of India and Mr Thomas Graham of the United States as members of the Appellate Body for four years beginning on 11 December 2011.[995]

478. On 22 February 2012, the DSB agreed to the Chair's proposal regarding the procedure for the selection of a new Appellate Body member and the process of consultations on the possible reappointment of one member. The proposal contained the following six elements: (i) to agree to launch as from 22 February 2012 the selection process for appointment of a new member of the Appellate Body for the position currently held by Mr Shotaro Oshima; (ii) to agree that the new member be appointed for a four-year term beginning 1 June 2012 or as soon thereafter as possible; (iii) to agree to set a deadline of 30 March 2012 for WTO Members' nominations of candidates for Mr Oshima's position; (iv) to agree to establish a Selection Committee based on the procedures set forth in document WT/DSB/1, which would consist of the Director-General and the 2012 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council and the DSB, and which would be chaired by the 2012 Chair of the DSB; (v) to request the Selection Committee to conduct interviews with candidates in April 2012, to hear the views of WTO Members in the first half of May 2012, and to make its recommendation to the DSB by 11 May 2012, if possible, so that the DSB could take a decision at its regular meeting on 24 May 2012; and (vi) to ask the DSB Chair to carry out consultations on the possible reappointment of Ms Yuejiao Zhang, who was eligible for reappointment for a second four-year term beginning on 1 June 2012, and who had expressed her interest and willingness to be reappointed.[996]

479. On 24 May 2012, the DSB agreed to appoint Mr Seung Wha Chang of Korea as a member of the Appellate Body for four years beginning on 1 June 2012. Furthermore, the DSB agreed to reappoint Ms Yuejiao Zhang of China for a second four-year term beginning 1 June 2012.[997]

480. On 26 March 2013, the DSB reappointed Mr. Ricardo Ramírez for a second four-year term of office, starting on 1 July 2013.[998]

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[993] WT/DSB/M/296, para. 61.
[994] WT/DSB/M/296, para. 64.
[995] WT/DSB/M/307, para. 3.
[996] WT/DSB/M/312, paras. 126-127.
[997] WT/DSB/M/316, paras. 4 and 6.

481. On 24 May 2013, the DSB adopted a decision:

> "(1) to launch a selection process for one position in the Appellate Body, currently held by Mr. David Unterhalter;
>
> (2) to establish a Selection Committee, consistent with the procedures set out in document WT/DSB/1 and with previous selection processes, comprising the Director-General and the 2013 Chairpersons of the General Council, Goods Council, Services Council, the TRIPS Council and the DSB, to be chaired by the DSB Chair;
>
> (3) to set a deadline of 30 August 2013 for Members' nominations of candidates for the position currently held by Mr. Unterhalter, while encouraging Members to submit nominations as early as possible and to use best efforts to submit nominations by 31 July 2013, to facilitate due consideration of such candidates;
>
> (4) that the Selection Committee shall carry out its work, including conducting interviews with candidates and hearing the views of delegations during September/October 2013, in order to make its recommendations to the DSB by no later than 7 November 2013, so that the DSB can take a final decision on this matter at the latest at its regular meeting on 20 November 2013; and,
>
> (5) to request the DSB Chair to carry out consultations on the possible reappointment of Mr. Peter Van den Bossche."[999]

2. Election of the Chair of the Appellate Body

482. Pursuant to Rule 5.1 of the *Working Procedures for Appellate Review*, in December 2011 the Members of the Appellate Body elected Ms. Yuejiao Zhang to serve as Chair for the period 11 December 2011 to 31 May 2012. In June 2012 the Members of the Appellate Body re-elected Mrs. Yuejiao Zhang to serve as Chair for the period 1 June 2012 to 31 December 2012.[1000]

483. In February 2013, pursuant to Rule 5.1 of the *Working Procedures for Appellate Review*, the Members of the Appellate Body elected Mr Ricardo Ramírez Hernández to serve as Chair of the Appellate Body as of 1 January 2013.[1001]

3. Article 16.4 of the DSU: 60-day deadline for adopting/appealing panel reports

484. In several disputes, the DSB has continued to agree, at the joint request of the parties to the dispute, to extend the 60-day deadline set forth in Article 16.4 of the DSU. In each case, the parties' request made reference to the "workload of the Appellate Body".[1002]

485. In *US – Tuna II (Mexico)*, "[t]he DSB agree[d] that, upon a request by Mexico or the United States, the DSB shall, no later than 20 January 2012, adopt the Report of the Panel in the dispute: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, contained in document WT/DS381/R, unless (i) the DSB decides by consensus not to

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[998] WT/DSB/M/330, para. 4.2.
[999] WT/DSB/60.
[1000] WT/DSB/57.
[1001] WT/DSB/59.
[1002] WT/DS381/9, WT/DS405/5, WT/DS384/11 and WT/DS386/10.

do so or (ii) either party to the dispute notified the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."[1003]

486. Likewise, in *EU – Footwear (China)*, "[t]he DSB agree[d] that, upon a request by China or the European Union, the DSB shall, no later than 22 February 2012, adopt the Report of the Panel in the dispute: *European Union – Anti-Dumping Measures on Certain Footwear from China*, contained in document WT/DS405/R, unless (i) the DSB decides by consensus not to do so or (ii) China or the European Union notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."[1004]

487. In *US – COOL*, "[t]he DSB agree[d] that, upon a request by [Canada/Mexico] or the United States, the DSB shall, no later than 23 March 2012, adopt the Report of the Panel in the dispute: *United States – Certain Country of Origin Labelling (COOL) Requirements*, contained in document WT/DS384/R, unless (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."[1005]

4. Indicative list of governmental and non-governmental panelists

488. The DSB approved the additional names contained in documents WT/DSB/W/473[1006], 478[1007], 480[1008], 483[1009], 492[1010], 495[1011], 497[1012], 500[1013] and 503[1014] proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU.

[1003] WT/DSB/M/306, paras. 6-7.
[1004] WT/DSB/M/308, paras. 100-101.
[1005] WT/DSB/M/310, paras. 9-12.
[1006] WT/DSB/M/311, paras. 95-96.
[1007] WT/DSB/M/315, paras. 81-82.
[1008] WT/DSB/M/316, paras. 87-88.
[1009] WT/DSB/M/318, paras. 96-97.
[1010] WT/DSB/M/325, paras. 6.1-6.2.
[1011] WT/DSB/M/327, paras. 10.1-10.2.
[1012] WT/DSB/M/328, paras. 8.1-8.2.
[1013] WT/DSB/M/330, paras. 5.1-5.2.
[1014] WT/DSB/M/332, paras. 10.1-10.2.

F. TRADE POLICY REVIEW

489. On 17 December 2011, the 8th Ministerial Conference adopted the following decision on the Trade Policy Review Mechanism:

> "We recognize the regular work undertaken by the TPRB on the monitoring exercise of trade and trade-related measures in fulfilling its mandate. We take note of the work initially done in the context of the global financial and economic crisis, and direct it to be continued and strengthened. We therefore invite the Director-General to continue presenting his trade monitoring reports on a regular basis, and ask the TPRB to consider these monitoring reports in addition to its meeting to undertake the Annual Overview of Developments in the International Trading Environment. We also take note of the WTO's reports on its specific monitoring of G-20 measures. We commit to duly comply with the existing transparency obligations and reporting requirements needed for the preparation of these monitoring reports, and to continue to support and cooperate with the WTO Secretariat in a constructive fashion. We call upon the TPRB to continue discussing the strengthening of the monitoring exercise of trade and trade-related measures on the basis of Members' inputs."[1015]

490. The draft of this decision was presented to the 8th Ministerial Conference as part of the Fourth Appraisal of the Trade Policy Review Mechanism[1016], conducted on the basis of Paragraph F of the Trade Policy Review Mechanism and a specific conclusion of the Third Appraisal.[1017]

[1015] WT/L/848.
[1016] WT/MIN(11)/6, para. 43.
[1017] WT/TPR/229.

G. REGIONAL TRADE AGREEMENTS

1. Transparency Mechanism for Regional Trade Agreements[1018]

491. From October 2011 to August 2013, 31 Regional Trade Agreements (RTAs) were considered under the Transparency Mechanism, based on factual presentations by the WTO Secretariat.[1019] In the same period, 16 early announcements were received from Members – six for newly signed RTAs and ten for RTAs under negotiation. Of these 16 early announced RTAs, four were subsequently notified – two under Article XXIV of the GATT 1994 and two under both Article XXIV of the GATT 1994 and Article V of the GATS.

492. From October 2011 to August 2013, changes to nine RTAs under Article XXIV of the GATT 1994 were notified pursuant to paragraph 14 of the Transparency Mechanism. No reports due at the end of the RTAs' implementation period were submitted pursuant to paragraph 15 of the Transparency Mechanism. As of August 2013, all factual abstracts have been made available in the RTA Database.

493. As of August 2013, there is a backlog of 126 RTAs (81 RTAs under Article XXIV of the GATT, 34 under Article V of the GATS and 11 under the Enabling Clause), including five RTAs for which the factual presentation is temporarily on hold.[1020]

REGIONAL TRADE AGREEMENTS IN FORCE
NOTIFIED BETWEEN OCTOBER 2011 AND AUGUST 2013

(in alphabetical order by RTA name/parties)

RTA name/parties	Notification date	Entry into force	Notified under
Canada - Colombia	7 Oct 2011	15 Aug 2011	GATT Art. XXIV & GATS Art. V
Canada - Jordan	10 Apr 2013	1 Oct 2012	GATT Art. XXIV
Canada - Panama	10 Apr 2013	1 Apr 2013	GATT Art. XXIV & GATS Art. V
Chile - Guatemala (Chile - Central America)	30 Mar 2012	23 Mar 2010	GATT Art. XXIV & GATS Art. V
Chile - Honduras (Chile - Central America)	28 Nov 2011	19 Jul 2008	GATT Art. XXIV & GATS Art. V
Chile - Malaysia	12 Feb 2013	25 Feb 2012	GATT Art. XXIV
Chile - Nicaragua (Chile - Central America)	14 Jun 2013	19 Oct 2012	GATT Art. XXIV & GATS Art. V
China - Costa Rica	27 Feb 2012	1 Aug 2011	GATT Art. XXIV & GATS Art. V
Colombia - Northern Triangle	31 Aug 2012	12 Nov 2009	GATT Art. XXIV & GATS Art. V
Costa Rica - Peru	5 Jun 2013	1 Jun 2013	GATT Art. XXIV & GATS Art. V
Dominican Republic- Central America	6 Jan 2012	4 Oct 2001	GATT Art. XXIV & GATS Art. V
East African Community (EAC)	1 Aug 2012	1 Jul 2010	GATS Art. V
East African Community (EAC) – Accession of Burundi and Rwanda	1 Aug 2012	1 Jul 2007	Enabling Clause

[1018] Updated information on regional trade agreements is available on the WTO website (http://rtais.wto.org).

[1019] 18 have been considered in the Committee on Regional Trade Agreements under Article XXIV of the GATT 1994 and 13 under Article V of the GATS.

[1020] An RTA is placed "on hold" if it is an agreement on trade in services for which liberalization commitments have not yet been agreed by the parties. Once the RTA enters into force for all parties, or liberalization commitments are agreed upon, the RTA is automatically scheduled for consideration.

RTA name/parties	Notification date	Entry into force	Notified under
EFTA - Hong Kong, China	27 Sep 2012	1 Oct 2012	GATT Art. XXIV & GATS Art. V
EFTA - Montenegro	24 Oct 2012	1 Sep 2012	GATT Art. XXIV
EFTA - Ukraine	18 Jun 2012	1 Jun 2012	GATT Art. XXIV & GATS Art. V
European Union - Central America	26 Feb 2013	*	GATT Art. XXIV & GATS Art. V
European Union - Colombia and Peru	26 Feb 2013	1 Mar 2013**	GATT Art. XXIV & GATS Art. V
European Union (28) Enlargement	25 Apr 2013	1 Jul 2013	GATT Art. XXIV & GATS Art. V
European Union - Eastern and Southern Africa States Interim EPA	9 Feb 2012	14 May 2012	GATT Art. XXIV
European Union - Papua New Guinea / Fiji	18 Oct 2011	20 Dec 2009	GATT Art. XXIV
Japan - Peru	24 Feb 2012	1 Mar 2012	GATT Art. XXIV & GATS Art. V
Malaysia - Australia	13 May 2013	1 Jan 2013	GATT Art. XXIV & GATS Art. V
Mexico - Uruguay	28 Jun 2013	15 Jul 2004	GATT Art. XXIV & GATS Art. V
New Zealand - Malaysia	7 Feb 2012	1 Aug 2010	GATT Art. XXIV & GATS Art. V
Panama – Guatemala (Panama - Central America)	22 Apr 2013	20 Jun 2009	GATT Art. XXIV & GATS Art. V
Panama – Nicaragua (Panama - Central America)	25 Feb 2013	21 Nov 2009	GATT Art. XXIV & GATS Art. V
Peru - Chile	29 Nov 2011	1 Mar 2009	GATT Art. XXIV & GATS Art. V
Peru - Mexico	22 Feb 2012	1 Feb 2012	GATT Art. XXIV & GATS Art. V
Peru - Panama	23 Apr 2012	1 May 2012	GATT Art. XXIV & GATS Art. V
Republic of Korea - Turkey	30 Apr 2013	1 May 2013	GATT Art. XXIV
Russian Federation - Azerbaijan	13 Sep 2012	17 Feb 1993	GATT Art. XXIV
Russian Federation - Belarus	13 Sep 2012	20 Apr 1993	GATT Art. XXIV
Russian Federation - Belarus - Kazakhstan	21 Dec 2012	3 Dec 1997	GATT Art. XXIV
Russian Federation - Kazakhstan	13 Sep 2012	7 Jun 1993	GATT Art. XXIV
Russian Federation - Republic of Moldova	13 Sep 2012	30 Mar 1993	GATT Art. XXIV
Russian Federation - Serbia	21 Dec 2012	3 Jun 2006	GATT Art. XXIV
Russian Federation - Tajikistan	13 Sep 2012	8 Apr 1993	GATT Art. XXIV
Russian Federation - Turkmenistan	18 Jan 2013	6 Apr 1993	GATT Art. XXIV
Russian Federation - Uzbekistan	18 Jan 2013	25 Mar 1993	GATT Art. XXIV
Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS)	6 Jun 2013	20 Sep 2012	GATT Art. XXIV
Turkey - Mauritius	30 May 2013	1 Jun 2013	GATT Art. XXIV
Ukraine - Montenegro	25 Apr 2013	1 Jan 2013	GATT Art. XXIV & GATS Art. V
United States - Colombia	8 May 2012	15 May 2012	GATT Art. XXIV & GATS Art. V
United States - Panama	29 Oct 2012	31 Oct 2012	GATT Art. XXIV & GATS Art. V
United States - Republic of Korea	15 Mar 2012	15 Mar 2012	GATT Art. XXIV & GATS Art. V

* Provisional application of the Agreement by all signatory parties is expected in the course of the second quarter 2013.

** Provisional application of the Agreement between the EU and Peru: 1 March 2013; while the provisional application between the EU and Colombia is expected to start in the second semester of 2013.

2. Other activities of the Committee on Regional Trade Agreements

494. To encourage RTA notifications, from September 2011 the Chairman of the Committee on Regional Trade Agreements prepared a list of non-notified RTAs which appeared in factual

presentations as being in force.[1021] This list is regularly updated and circulated in advance of meetings of the Committee, and is subject to verification by the RTA parties.

495. In March 2012, the Committee on Regional Trade Agreements launched discussions on the requirement to provide RTA implementation reports pursuant to paragraph 15 of the Transparency Mechanism. As of August 2013, these discussions were on-going.[1022]

496. Following the request of one Member, discussions were held on some staff working papers relating to RTAs cross-cutting issues which had been made available at the WTO website.[1023] Also during 2012, Members exchanged views on issues of relevance for the CRTA that were raised at the 8th Ministerial Conference.[1024]

3. Activities of the Committee on Trade and Development relating to RTAs

497. Between October 2011 and August 2013, discussions relating to RTA notifications concerning the Gulf Cooperation Council and other RTAs notified under both the Enabling Clause and Article XXIV of the GATT 1994 remained on the agenda of the Committee on Trade and Development.[1025]

498. In April 2012, the question of implementation reports under paragraph 15 of the Transparency Mechanism for RTAs was brought to the Committee on Trade and Development. The Committee postponed its discussion on this issue until after a similar discussion in the Committee on Regional Trade Agreements is completed[1026], so that similar procedures could be followed in the two Committees.[1027]

499. In respect of the notification concerning the accession of Rwanda and Burundi to the Protocol on the Establishment of the EAC Customs Union, at the meeting of the Committee on Trade and Development in November 2012, reference was made to the proper legal basis and notification of customs unions.[1028]

4. Activities of the Council for Trade in Services relating to RTAs

500. At the meetings of the Council for Trade in Services in June and October 2012, questions were raised on the Korea-United States and Colombia-United States RTAs, to which the delegations concerned provided answers.[1029] Subsequently, questions relating to other agreements as well as issues of a more systemic nature relating to terms and mechanisms used in certain economic integration agreements were also addressed.[1030] All RTAs notified under Article V of the GATS in the period under review were transferred for consideration to the Committee on Regional Trade Agreements, as foreseen by the Transparency Mechanism.

[1021] WT/REG/W/62, 66, 68-70 and 72.

[1022] To assist the discussions, the Secretariat prepared informal background notes and a list of RTAs notified under both Article XXIV of the GATT 1994 and Article V of the GATS, with the date of the end of the implementation period for each RTA. See JOB/REG/1, 3 and 4.

[1023] See WT/REG/M/67 and 68.

[1024] See WT/REG/M/64, 66 and 67.

[1025] See WT/COMTD/M/83, 84, 85, 86, 87 and 88.

[1026] See WT/COMTD/M/84, 85 and 86.

[1027] At the outset, the Committee was presented with an informal list of RTAs notified under the Enabling Clause, with the date of the end of the implementation period for each RTA.

[1028] See WT/COMTD/M/86, para. 74.

[1029] See S/C/M/110 and 111.

[1030] See S/C/M/112 and 113.

H. OTHER MULTILATERAL TRADE DEVELOPMENTS

1. Guidelines for appointment of officers to WTO bodies

501. On 14 February 2012, the General Council agreed[1031] that the incoming General Council Chair would initiate a process of consultations to review the Guidelines for Appointment of Officers to WTO Bodies adopted by the General Council in December 2002.[1032]

502. At the meeting of the General Council on 25-26 July 2012, the Chair recalled the mandate for reviewing the Guidelines for Appointment of Officers to WTO Bodies, and set out the points of convergence which had emerged from her consultations.[1033]

503. At the meeting of the General Council on 11 December 2013, the Chair recalled these practical points of convergence[1034] to improve the implementation of the Guidelines, and outlined the steps for initiating the the consultations for the appointment of officers in early 2013.[1035]

504. At its meeting of 25 February 2013[1036], the General Council appointed the officers of WTO bodies for 2013, following the Guidelines[1037] and the practical points of convergence to improve their implementation.[1038]

2. Election of officers for the 9th Ministerial Conference

505. In line with the Rules of Procedure for the Ministerial Conference, at its meeting of 24-25 July 2013, the General Council elected the Minister of Trade of Indonesia as Chairman of MC9, and the three Vice-Chairs**:** the Minister of Trade and Industry of Rwanda, the Minister of Trade and Investment of the UK, and the Minister of Foreign Trade and Tourism of Peru.[1039] This decision followed the agreement reached at the General Council meeting of 4 June 2013 that the General Council follow the customary practice in this regard.[1040]

3. Coherence in global economic policy-making

506. In the context of the 1994 Ministerial Declaration on the Contribution of the WTO in Achieving Greater Policy Coherence in Economic Policy-Making, and in accordance with paragraph 2 of the General Council Decision on "Agreements between the WTO, the IMF and the

[1031] WT/GC/M/135, paras. 64-65.
[1032] WT/L/510.
[1033] WT/GC/M/137, paras. 186-189. The Chair's statement was circulated subsequently in JOB/GC/22.
[1034] JOB/GC/22.
[1035] WT/GC/M/141, item 15.
[1036] WT/GC/M/143, item 6.
[1037] WT/L/510.
[1038] JOB/GC/22.
[1039] WT/GC/M/146.
[1040] WT/GC/M/145, para. 4.3. As the Chair explained on 4 June 2013, customary practice had always been that a representative of the Government hosting a Ministerial Conference outside Geneva, normally the Trade Minister, was elected as Chair, and the three vice-chairmanships were shared across the other broad groupings of Members. According to the Chair, since the Chair of the 9th Ministerial Conference would come from Asia, he invited the representatives of the other three broad groupings – Latin America and the Caribbean, Africa and developed countries – to consult with their constituents. WT/GC/M/145, para. 4.2.

World Bank"[1041], the Director-General prepared a report on Coherence in Global Economic Policy-Making to the 8th Ministerial Conference.[1042]

4. Work Programme on LDCs

507. At its meeting of 28 June 2013, the Sub-Committee on LDCs adopted the revised Work Programme on LDCs.[1043] At its meeting of 24 July 2013, the General Council took note of the revised Work Programme.

5. Electronic commerce

508. On 17 December 2011, the 8th Ministerial Conference recalled the "Work Programme on Electronic Commerce" adopted in September 1998[1044], and the mandate assigned by Members at the 7th Ministerial Conference to intensively reinvigorate that work with a view to the adoption of decisions on that subject at its next session, to be held in 2011.[1045] Accordingly, the 8th Ministerial Conference adopted the following decision on the Work Programme on Electronic Commerce:

> "To continue the reinvigoration of the Work Programme on Electronic Commerce, based on its existing mandate and guidelines and on the basis of proposals submitted by Members, including the development-related issues under the Work Programme and the discussions on the trade treatment, *inter alia*, of electronically delivered software, and to adhere to the basic principles of the WTO, including non-discrimination, predictability and transparency, in order to enhance internet connectivity and access to all information and telecommunications technologies and public internet sites, for the growth of electronic commerce, with special consideration in developing countries, and particularly in least-developed country Members. The Work Programme shall also examine access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers,
>
> To instruct the General Council to emphasize and reinvigorate the development dimension in the Work Programme particularly through the CTD to examine and monitor development-related issues such as technical assistance, capacity building, and the facilitation of access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers, of developing countries and particularly of least-developed country Members. Further, any relevant body of the Work Programme may explore appropriate mechanisms to address the relationship between electronic commerce and development in a focused and comprehensive manner,
>
> To further instruct the General Council to hold periodic reviews in its sessions of July and December 2012 and July 2013, based on the reports submitted by the WTO bodies entrusted with the implementation of the Work Programme, to assess its progress and consider any recommendations on possible measures related to electronic commerce in the next session of the Ministerial Conference,

[1041] WT/L/194.
[1042] WT/MIN(11)/8 and WT/TF/COH/S/16.
[1043] Subsequently circulated as WT/COMTD/LDC/11/Rev.1
[1044] WT/L/274.
[1045] WT/L/782.

> We decide that Members will maintain the current practice of not imposing customs duties on electronic transmissions until our next session, which we have decided to hold in 2013."[1046]

509. In its Annual Report for 2012, the General Council reported the following developments under the above decision:

> "At the July [2012] General Council meeting, Deputy Director-General Singh, who had been dealing with the Work Programme on behalf of the General Council Chair and her predecessors since 2005, said that since the beginning of the year, work had continued in the Council for Trade in Services, Council for Trade in Goods and the Committee on Trade and Development. The DDG also reported on an informal consultation he had held, on behalf of the General Council Chair, on 2 July [2012] to consider the follow-up to Ministers' 2011 Decision on E-Commerce.
>
> The Chair drew attention to the reports of the Chairs of the Council for Trade in Services and of the Goods Council, contained in documents S/C/38 and G/C/49, respectively.
>
> The Chairman of the Committee on Trade and Development said that work in the CTD was taking place in the context of the 2011 Decision on E-Commerce. Cuba and Ecuador had submitted a proposal for a 'Workshop on E-Commerce, Development and SMEs' (WT/COMTD/W/189), with a particular focus on issues related to 'access and facilitation of access to e-commerce by small and medium-sized enterprises, including small producers and suppliers'. The CTD was making steady progress on other fronts in the effort to comply with instructions from MC8 to make the CTD a focal point on development issues in the WTO.
>
> […] The General Council took note of the reports by the Deputy Director-General and by the Chairmen of the subsidiary bodies and of the statements.
>
> At the 11 December General Council, Deputy Director-General Singh, reported on work under the Work Programme since the Council's last review of progress in this area. He reported on activities in the Council for Trade in Services, the Council for Trade in Goods and the Committee on Trade and Development. He also reported on an informal meeting of the Dedicated Discussion on E-Commerce Cross-Cutting Issues under the auspices of the General Council, held on 30 November 2012. There had been no activity under the Work Programme in the Council for TRIPS.
>
> Deputy Director-General Singh also read out a report on behalf of the Chairman of the CTD. The report focused on a proposal by Cuba and Ecuador (WT/COMTD/W/189) to organize a workshop on 'E-commerce, Development and SMEs'. At the 86th Session of the CTD held on 19 November 2012, it had been agreed that the workshop would be held on 8 and 9 April 2013.
>
> The Chair drew attention to the reports of the Chairs of the Council for Trade in Services and of the Goods Council in documents S/C/40 and G/C/50, respectively.
>
> […] The General Council took note of the reports by the Deputy Director-General and by the Chairs of the subsidiary bodies, and of the statements."[1047]

[1046] WT/L/843.
[1047] WT/GC/151, paras. 25-32.

510. On 24 July 2013, the General Council took note of a report by DDG Singh concerning a number of developments on E-commerce in the Committee on Trade and Development, the Council for Trade in Services[1048] and the Council for Trade in Goods.[1049]

6. Small economies

511. On 17 December 2011, the 8th Ministerial Conference adopted the following decision on the Work Programme on Small Economies:

> "We reaffirm our commitment to the Work Programme on Small Economies and take note of all the work conducted to date and duly reflected in document WT/COMTD/SE/W/22/Rev.6 and its previous revisions. We instruct the CTD to continue its work in Dedicated Sessions under the overall responsibility of the General Council. Furthermore, it shall consider in further detail the proposals contained in the various submissions that have been received to date, examine any additional proposals that Members might wish to submit and, where possible, and within its mandate, make recommendations to the General Council, on any of these proposals. We instruct the General Council to direct relevant subsidiary bodies to frame responses to the trade-related issues identified by the CTD with a view to making recommendations for action and instruct the WTO Secretariat to provide relevant information and factual analysis for discussion among Members in the CTD Dedicated Session, *inter alia*, in the areas identified in item k of paragraph 2 of the Work Programme on Small Economies, and on the identification and effects of non-tariff measures on Small Economies. We instruct the CTD in Dedicated Session to continue monitoring the progress of the SVE proposals in WTO bodies and negotiating groups with the aim of providing responses, as soon as possible, to the trade-related issues identified for the fuller integration of small, vulnerable economies in an appropriate manner in the multilateral trading system. We instruct the General Council to report on progress and action taken, together with any further recommendations as appropriate, to our next Session."[1050]

512. At the General Council meetings of 25 February and 4 June 2013, the Chair read out reports of the Chair of the Dedicated Session of the Committee for Trade and Development on work under the Work Programme on Small Economies.[1051]

7. Director-General Selection Process

513. In keeping with the Procedures for the Appointment of Directors-General adopted in December 2002[1052], the process for the appointment of the next Director-General started in October 2012 when delegations were provided with information on the nomination phase of the process. At a special meeting on 14 May 2013, the General Council approved the appointment of Ambassador Roberto Carvalho de Azevêdo (Brazil) as the next Director-General of the WTO, with his term of office to begin on 1 September 2013.[1053]

[1048] The General Council took note of the report in S/C/41.

[1049] The General Council took note of the report in G/C/53. The General Council also heard an oral report by the CTD Chair on the CTD's workshop on E-Commerce, Development and SMEs held in April 2013 for which a Secretariat background document had been prepared titled, "E-commerce in Developing Countries – Opportunities and Challenges for Small and Medium-sized Enterprises". WT/COMTD/W/193. A summary report of the workshop is available in WT/COMTD/W/193.

[1050] WT/L/844.

[1051] WT/GC/M/143, item 2 and WT/GC/M/145, item 2.

[1052] WT/L/509.

[1053] WT/GC/M/144, para. 1.10.

8. Derestriction of some GATT 1947 historical bilateral negotiating documentation

514. At its meeting of 25 July 2013, the General Council decided to derestrict, as of 1 August 2013, the historical bilateral negotiating documentation listed in the annex to document G/MA/285.[1054]

[1054] WT/L/892.

I. PLURILATERAL TRADE AGREEMENTS

1. Agreement on Government Procurement

(a) GPA amendment

515. On 15 December 2011, the Committee on Government Procurement adopted a decision at the Ministerial level on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement.[1055]

516. In line with this decision, on 30 March 2012 the Committee on Government Procurement adopted[1056] the Protocol Amending the Agreement on Government Procurement, as contained in document GPA/W/316, with the following "understandings" noted by the Chair before gavelling the decision[1057]:

- "Following deposit of the required instruments of acceptance, the schedules of the Parties, circulated in document GPA/W/316 of 27 March 2012, would need to be reformatted. At that stage, the titles that appeared over each Party's Appendix I offer or Appendix I future commitments in that document would be deleted in favour of a simple reference to the name of the relevant Party. Furthermore, the content of Appendices II-IV, which each Party was required to submit, at the latest, at the time of deposit of its instrument of acceptance, would be filled in. These changes would, in due course, need to be certified by the Director-General. Parties would be kept informed throughout the process."[1058]; and

- "With regard to the offer of Armenia, the text relating to Armenia's offer that could be found on page 38 of document GPA/W/316 of 27 March 2012 under the heading "Final Appendix I Offer of the Republic of Armenia" would be replaced by the updated offer that had just been circulated, in document GPA/O/RFO/ARM/1 of 30 March 2012."[1059]

517. On 2 May 2013, Liechtenstein became the first WTO member to deposit its instrument of acceptance for the Protocol Amending the Agreement on Government Procurement.[1060]

(b) Modifications to GPA schedules

518. The Director-General as depositary certified the following modifications and rectifications to individual Members' GPA schedules:

- modifications to pages 1/5 and 3/5 of Annex 3 to Appendix I of Japan, effective 5 October 2011, certified on 10 October 2011[1061];

[1055] GPA/112.
[1056] GPA/M/46, para. 7.
[1057] A numbering error in the French version of the Protocol was rectified on 4 June 2012 (WT/Let/854). The certified (and rectified) true copy of the Protocol was circulated in WT/Let/858 on 12 June 2012. The package adopted by the Committee on 30 March 2012 was also reproduced in three separate language versions in GPA/113.
[1058] GPA/M/46, para. 4.
[1059] GPA/M/46, para. 5.
[1060] WT/Let/883.
[1061] WT/Let/829.

- modifications to page 2/5 of Annex 1 to Appendix I of the United States, effective 16 December 2011, certified on 19 December 2011[1062];

- modifications to pages 3/5 and 5/5 of Annex 3 to Appendix I of Japan, effective 8 January 2012, certified on 12 January 2012[1063];

- modifications to page 1/3 of Annex 1 to Appendix I of Japan, effective 15 March 2012, certified on 19 March 2012[1064];

- modifications to pages 2/5 and 4/5 of Annex 3 to Appendix I of Japan, effective 8 April 2012, certified on 15 April 2012[1065];

- modifications to pages 1/5 and 3/5 of Annex 3 to Appendix I of Japan, effective 13 June 2012, certified on 20 June 2012[1066];

- modifications to pages 1/3 of Annex 1 to Appendix I of Singapore, effective 20 December 2012, certified on 11 January 2013[1067]; and

- modifications to pages 1/3 and 2/3 of Annex 1 and to pages 1/5 to 5/5 of Annex 3 to Appendix I of Japan, effective 18 January 2013, certified on 29 January 2013.[1068]

519. On 27 June 2013, the Committee on Government Procurement adopted a decision[1069] approving a modification to the European Union's GPA schedules to extend the coverage of the Agreement on Government Procurement to Croatia effective 1 July 2013, the date of Croatia's EU accession.[1070]

(c) Observership and accessions

520. On 28 September 2012, New Zealand applied for accession to the Agreement on Government Procurement.[1071] On 9 August 2013, Panama announced its decision not to pursue its negotiations on accession to the GPA.[1072]

521. The Committee on Government Procurement approved the following requests for observer status:

- the observer request by Malaysia[1073] on 18 July 2012[1074];

- the observer requests by the Indonesia[1075] and Montenegro[1076] on 31 October 2012[1077];

[1062] WT/Let/844.
[1063] WT/Let/845.
[1064] WT/Let/846.
[1065] WT/Let/851.
[1066] WT/Let/859.
[1067] WT/Let/873.
[1068] WT/Let/877 and WT/Let/877/Corr.1
[1069] GPA/118.
[1070] GPA/M/52, para. 3.3. See also WT/Let/887.
[1071] GPA/115.
[1072] GPA/ACC/PAN/1.
[1073] GPA/W/318.
[1074] GPA/M/47, para. 13.
[1075] GPA/W/320.
[1076] GPA/W/319.

- the observer request by Viet Nam[1078] on 5 December 2012;[1079]
- the observer request by the Russian Federation[1080] on 29 May 2013[1081]; and
- the observer request by the Former Yugoslav Republic of Macedonia[1082] on 27 June 2013.[1083]

2. Agreement on Trade in Civil Aircraft

(a) Accession of Montenegro

522. In its accession working party report, which was incorporated by reference into its WTO accession protocol, Montenegro committed to "becom[ing] a signatory to the WTO Agreement on Trade in Civil Aircraft, without exemptions or transitional periods, from the date of accession to the WTO."[1084]

523. Following deposit of an instrument of accession, on 10 November 2012 Montenegro acceded to the Agreement on Trade in Civil Aircraft, done at Geneva on 12 April 1979, as subsequently modified, rectified or amended. At the same time, Montenegro also explicitly accepted Protocol Amending the Annex to the Agreement on Trade in Civil Aircraft, done at Geneva on 6 June 2001.[1085]

[1077] GPA/M/48, para. 5.
[1078] GPA/W/321.
[1079] GPA/M/49, para. 6.
[1080] GPA/W/322.
[1081] GPA/M/51, para. 1.2.
[1082] GPA/W/323.
[1083] GPA/M/52, para. 2.2
[1084] WT/ACC/CGR/38 and WT/MIN(11)/7, para. 193.
[1085] WT/Let/865.