WORLD TRADE ORGANIZATION

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APPELLATE BODY

ANNUAL REPORT FOR 2012

9 APRIL 2013

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ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the DSB on 3 December 1996, WT/DSB/RC/1
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

FOREWORD

2012 was the year of the dragon – according to Chinese tradition, a powerful sign of energy, enthusiasm, and moving forward. Unsurprisingly, therefore, in this year of spirit and vigour, the value of a rule-based system has proved its worth. Significantly, the Members of the WTO have continued to adhere to their commitments to the WTO, and thereby provided much needed stability.

The dispute settlement system is an integral part of the WTO. A rule-based system cannot survive if its rules are not capable of being interpreted and adjudicated. This is the institutional contribution of the Appellate Body, within the scheme of the Dispute Settlement Understanding. And here too, the system has continued to function smoothly, resolving disputes by recourse to the rule of law.

2012 was a year in which the Appellate Body's workload remained intense. The Appellate Body circulated reports in six disputes and one of our former Appellate Body members was Arbitrator in an Article 21.3(c) arbitration concerning the reasonable period of time for implementation.

Two of the disputes for which reports were circulated in 2012 concerned appeals filed in 2011. At the beginning of the year, the Appellate Body circulated its reports in *China – Raw Materials*, which concerned China's Accession Protocol and the obligations contained therein. Subsequently, in March 2012, the Appellate Body issued its report in *US – Large Civil Aircraft*, closing a chapter in the long-running trade dispute over government subsidies to the aircraft industry between the United States and the European Union. Indeed, it appears that this will be a story with many chapters as Article 21.5 proceedings were initiated in this dispute, as well as in the case of *EC and certain member States – Large Civil Aircraft*, during the course of 2012. The Airbus and Boeing dispute cases have undoubtedly been the largest, most challenging, and most costly legal disputes in the WTO's history. Both the Appellate Body report in *US – Large Civil Aircraft* and the earlier report in *EC and certain member States – Large Civil Aircraft* addressed important issues arising under the SCM Agreement.

In a rare course of events, three disputes regarding technical barriers to trade (*US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*) were appealed in succession in 2012, and required the Appellate Body to address several provisions of the TBT Agreement that had not previously been addressed in appellate proceedings. The Appellate Body was thus faced with novel, challenging issues, which needed to be resolved in a coherent and harmonious manner across the three cases. These three disputes concerned technical regulations adopted by the United States and each case raised complex issues relating to allegations of discriminatory treatment and the necessity of the challenged measures. Notably, the parties in *US – Tuna II (Mexico)* and *US – COOL* are also parties to the NAFTA (that is, Canada, Mexico, and the United States), but nonetheless chose to bring the disputes to the WTO. This once again confirms that WTO Members continue to value the WTO's dispute settlement mechanism and the role it plays in providing security and predictability to the multilateral trading system.

The last report circulated by the Appellate Body in 2012 was *China – GOES*, involving the Anti-Dumping and the SCM Agreements, which remain two of the WTO covered agreements that are most frequently the subject of disputes.

Also, in December 2012, Giorgio Sacerdoti, a former Appellate Body colleague, issued an Award in the Article 21.3(c) arbitration to determine the reasonable period of time for implementation for the United States in the *US – COOL* dispute.

2012 saw the departure of an esteemed colleague, Shotaro Oshima, who resigned from the Appellate Body for personal reasons in April 2012. Shotaro was a respected Member, with whom it was a great privilege and honour to serve on the Appellate Body. Following a rigorous selection process, Seung Wha Chang of Korea was appointed by the Dispute Settlement Body to serve for four years as Appellate Body Member, commencing 1 June 2012. Seung Wha was sworn in on 13 June 2012, and we are delighted to welcome him to the Appellate Body.

Currently Professor of Law at Seoul National University, Seung Wha teaches international trade law and international arbitrations. He has served on several WTO dispute settlement panels, as well as on several arbitral tribunals dealing with commercial matters. In 2009, he was appointed by the International Chamber of Commerce (ICC) as a member of the International Court of Arbitration.

It is our great fortune that Shotaro has been replaced by a new Member who is equally distinguished and whose contribution to the Appellate Body will surely be instrumental.

My colleagues, Ujal Singh Bhatia and Thomas R. Graham, recently completed their first full year as Appellate Body Members. Their dedication, knowledge, and previous experience have been invaluable to the task before us. Since the membership of the Appellate Body has changed significantly over the last two years, the seven Members met on several occasions during 2012 to exchange views on various legal issues and past case law and to discuss future challenges for the Appellate Body.

The workload at the panel stage is currently heavy. Panels are resolving complex disputes. The Appellate Body should expect intense appeal activity in the upcoming years. Even if fewer appeals are brought this year, 2013 is likely to be challenging in terms of legal issues involved in the disputes.

The selection process for the new Member of the Appellate Body and adoption of the Appellate Body reports were carried out with the utmost efficiency and propriety by the Dispute Settlement Body. For this I wish to recognize the leadership of Ambassadors Johansen and Bashir as Chairs of the DSB, the contribution of the Director-General, Pascal Lamy, and the support provided to the process by all WTO Members. Indeed, the Appellate Body and the WTO dispute settlement system more generally have been able to function effectively thanks to the support of WTO Members and of many individuals in the WTO Secretariat.

All the energy and enthusiasm that Chinese tradition foresaw for 2012 will hopefully remain, for the Appellate Body, through 2013, the year of the snake – the "little dragon".

Yuejiao Zhang
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

ANNUAL REPORT FOR 2012

1 INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2012.

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

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

Proceedings under the DSU take place in stages. In the first stage, Members are required to hold consultations with a view to reaching a mutually agreed solution to the matter in dispute.[7] If these consultations fail to realize a mutually agreed solution, the dispute may advance to the adjudicative stage in which the complaining Member requests that the DSB establish a panel to examine the matter.[8] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[9] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[10] Panels shall be composed of well-qualified governmental and/or non-governmental individuals with expertise in international trade law or policy.[11] In discharging its adjudicative function, a panel is required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[12] The panel process includes written submissions by the

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

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

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

Any party to a dispute, other than third parties, may appeal a panel report to the Appellate Body. WTO Members that were third parties at the panel stage may also participate and make written and oral submissions in the appellate proceedings, but they may not appeal the panel report. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings are conducted in accordance with the procedures established in the DSU and the Working Procedures for Appellate Review[14] (Working Procedures), drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General of the WTO, and communicated to WTO Members for their information. Proceedings involve the filing of written submissions by the participants and the third participants, as well as an oral hearing. The Appellate Body report is to be circulated to WTO Members in the three official languages within 90 days of the date when the appeal was initiated, and is posted on the WTO website immediately upon circulation to Members. In its report, the Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.

Panel and Appellate Body reports must be adopted by WTO Members acting collectively through the DSB. Under the reverse consensus rule, a report is adopted by the DSB unless all WTO Members present at the meeting formally object to its adoption.[15] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding upon the parties.

Following the adoption by the DSB of a panel or Appellate Body report that includes a finding of inconsistency of a measure of the responding Member with its WTO obligations, Article 21.3 of the DSU provides that the responding Member should, in principle, comply immediately. However, where immediate compliance is "impracticable", the responding Member shall have a reasonable period of time to implement the DSB's recommendations and rulings. The "reasonable period of time" may be determined by the DSB, by agreement between the parties, or through arbitration pursuant to Article 21.3(c) of the DSU. In such arbitration, a guideline for the arbitrator is that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. Arbitrators have indicated that the reasonable period of time shall be the shortest time possible in the

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

[14] Working Procedures for Appellate Review, WT/AB/WP/6.

[15] Articles 16.4 and 17.14 of the DSU.

implementing Member's legal system. To date, arbitrations pursuant to Article 21.3(c) of the DSU have been conducted by current or former Appellate Body Members acting in an individual capacity.

Where the parties disagree "as to existence or consistency with a covered agreement of measures taken to comply", the matter may be referred to the original panel in what is known as "Article 21.5 compliance proceedings". The report of the panel in the Article 21.5 compliance proceedings may be appealed. Upon their adoption by the DSB, panel and Appellate Body reports in Article 21.5 compliance proceedings become binding on the parties.

If the responding Member does not bring its WTO-inconsistent measure into compliance with its obligations under the covered agreements within the reasonable period of time, the complaining Member may request negotiations with the responding Member with a view to finding mutually acceptable compensation as a temporary and voluntary alternative to full compliance. Compensation is subject to acceptance by the complaining Member, and must be consistent with the WTO agreements. If no satisfactory compensation is agreed upon, the complaining Member may request authorization from the DSB, pursuant to Article 22 of the DSU, to suspend the application of concessions or other obligations under the WTO agreements to the responding Member. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment resulting from non-compliance with the DSB recommendations and rulings. The responding Member may request arbitration under Article 22.6 of the DSU if it objects to the level of suspension proposed or considers that the principles and procedures concerning the sector or covered agreement to which the suspension may apply have not been followed. In principle, the suspension of concessions or other obligations must relate to the same trade sector or agreement as the measure found to be inconsistent. However, if this is impracticable or ineffective for the complaining Member, and if circumstances are serious enough, the complaining party may seek authorization to suspend concessions with respect to other sectors or agreements. The arbitration under Article 22.6 shall be carried out by the original panel, if its members are available. Compensation and the suspension of concessions or other obligations are temporary measures; neither is to be preferred to full implementation.[16]

A party to a dispute may request good offices, conciliation, or mediation as alternative methods of dispute resolution at any stage of dispute settlement proceedings.[17] In addition, under Article 25 of the DSU, WTO Members may have recourse to arbitration as an alternative to the regular procedures set out in the DSU.[18] Recourse to arbitration, including the procedures to be followed in such arbitration proceedings, is subject to mutual agreement of the parties.[19]

2 COMPOSITION OF THE APPELLATE BODY

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

On 7 January 2012, Mr. Shotaro Oshima expressed his intention to resign for personal reasons from the office of Member of the Appellate Body.[20] Pursuant to Rule 14 of the Working Procedures, Mr. Oshima's resignation took effect 90 days from the date of his letter of resignation, that is, 6 April 2012. As originally Mr. Oshima's term of office was due to expire on 31 May 2012, it was agreed that the replacement for Mr. Oshima be appointed for a four-year term beginning 1 June 2012 or as soon thereafter as possible.[21]

The selection process for appointment of a new Member to replace Mr. Oshima was launched on 22 February 2012. On the same day, and based on the procedures set forth in document WT/DSB/1, the DSB established a Selection Committee consisting of the Director-General and the

[16] Article 22.1 of the DSU.
[17] Article 5 of the DSU.
[18] There has been only one recourse to Article 25 of the DSU and it was not in lieu of panel or Appellate Body proceedings. Rather, the purpose of that arbitration was to set an amount of compensation pending full compliance by the responding Member. (See Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*)
[19] Articles 21 and 22 of the DSU apply *mutatis mutandis* to decisions by arbitrators.
[20] WT/DSB/56.
[21] WT/DSB/M/312.

2012 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council, and the DSB.[22]

A deadline was set of 30 March 2012 for Members to nominate candidates for this position. Five candidates were proposed by four Members, namely, Japan (two candidates), Kenya, Korea, and Thailand. Subsequently, Kenya informed Members of its decision to withdraw its candidate.[23]

The Selection Committee conducted interviews with the remaining four candidates in April 2012. Based on the recommendations of the Selection Committee, at its meeting on 24 May 2012, the DSB decided to appoint Mr. Seung Wha Chang (Korea) to serve for four years as Appellate Body Member commencing on 1 June 2012.[24] Mr. Chang was sworn in on 13 June 2012.

The first four-year term of Ms. Yuejiao Zhang expired on 31 May 2012. Ms. Zhang expressed her interest and willingness to be reappointed for a second four-year term. No Member expressed any reservations regarding the reappointment of Ms. Zhang during consultations conducted by the Chair of the DSB. In light of this, the DSB reappointed Ms. Zhang for a second four-year term beginning on 1 June 2012.[25]

The composition of the Appellate Body in 2012 and the respective terms of office of its Members are set out in Tables 1A and 1B.

Table 1A: Composition of the Appellate Body 1 January to 31 May 2012

Name	Nationality	Term(s) of office
Ujal Singh Bhatia	India	2011–2015
Thomas R. Graham	United States	2011–2015
Shotaro Oshima*	Japan	2008–2012
Ricardo Ramírez-Hernández	Mexico	2009–2013
David Unterhalter	South Africa	2006–2009 2009–2013
Peter Van den Bossche	Belgium	2009–2013
Yuejiao Zhang	China	2008–2012

* As noted above, Mr. Oshima's resignation became effective on 6 April 2012.

Table 1B: Composition of the Appellate Body as of 1 June 2012

Name	Nationality	Term(s) of office
Ujal Singh Bhatia	India	2011–2015
Seung Wha Chang	Korea	2012–2016
Thomas Graham	United States	2011–2015
Ricardo Ramírez-Hernández	Mexico	2009–2013
David Unterhalter	South Africa	2006–2009 2009–2013
Peter Van den Bossche	Belgium	2009–2013
Yuejiao Zhang	China	2008–2012 2012–2016

[22] WT/DSB/M/312.
[23] JOB/DSB/CV12/1/Rev.1.
[24] WT/DSB/M/316.
[25] WT/DSB/M/316.

Pursuant to Rule 5.1 of the Working Procedures, the Members of the Appellate Body elected Ms. Yuejiao Zhang to serve as Chair of the Appellate Body for the period 11 December 2011 to 31 May 2012.[26] Ms. Zhang was subsequently re-elected by Appellate Body Members to serve as Chair for the period 1 June to 31 December 2012.[27]

Biographical information about the Members of the Appellate Body is provided in Annex 1A. A list of former Appellate Body Members and Chairpersons is provided in Annex 2.

The Appellate Body receives legal and administrative support from the Appellate Body Secretariat, in accordance with Article 17.7 of the DSU. The Secretariat currently comprises a Director and eleven lawyers, one administrative assistant, and three support staff. Werner Zdouc has been the Director of the Appellate Body Secretariat since 2006.

3 APPEALS

Under Rule 20(1) of the Working Procedures, and in accordance with Article 16(4) of the DSU, an appeal is commenced by giving notice in writing to the DSB and filing a Notice of Appeal with the Appellate Body Secretariat. Rule 23(1) of the Working Procedures allows a party to the dispute other than the initial appellant to join the appeal, or appeal on the basis of other alleged errors, by filing a Notice of Other Appeal within 5 days of the filing of the Notice of Appeal.

Five appeals were filed in 2012. Three of the appeals included an "other appeal". All five appeals related to original proceedings. Further information regarding the five appeals filed in 2012 is provided in Table 2.

Table 2: Appeals filed in 2012

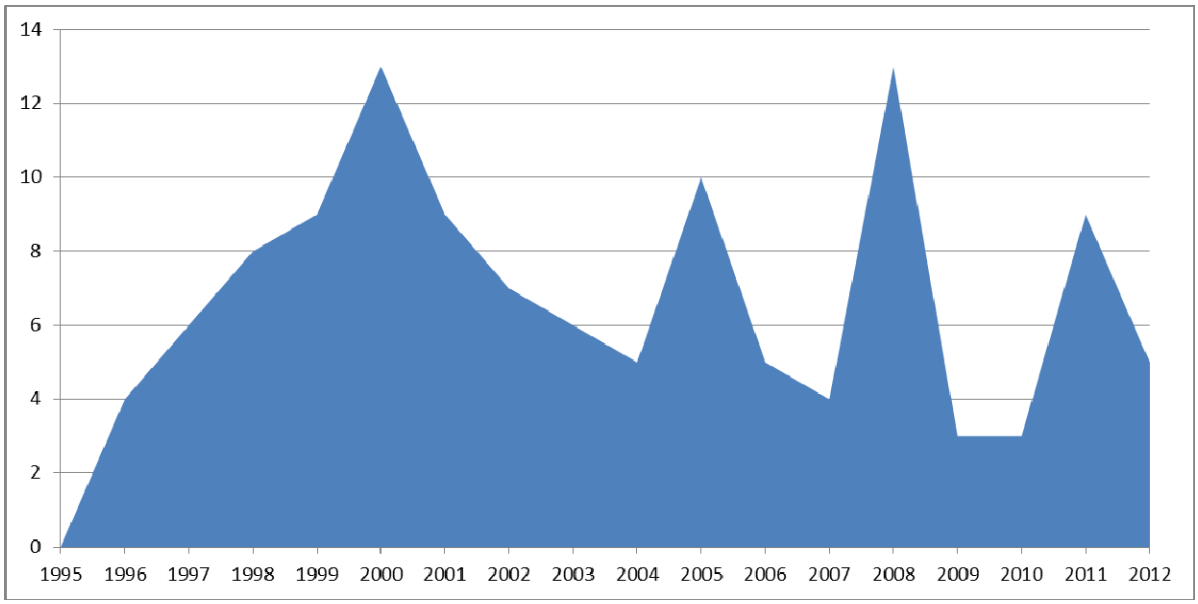
Panel report appealed	Date of appeal	Appellant [a]	Document symbol	Other appellant [b]	Document symbol
US – Clove Cigarettes	5 January 2012	United States	WT/DS406/6	- - -	- - -
US – Tuna II (Mexico)	20 January 2012	United States	WT/DS381/10	Mexico	WT/DS381/11
US – COOL (Canada)	23 March 2012	United States	WT/DS384/12	Canada	WT/DS384/13
US – COOL (Mexico)	23 March 2012	United States	WT/DS386/11	Mexico	WT/DS386/12
China – GOES	20 July 2012	China	WT/DS414/5	- - -	- - -

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

Information on the number of appeals filed each year since 1995 is provided in Annex 3. Chart 1, overleaf, shows the number of appeals filed each year between 1995 and 2012.

[26] WT/DSB/55.
[27] WT/DSB/57.

Chart 1: Total number of appeals 1995-2012



It should be noted that, due to the heavy workload facing the Appellate Body and in order to provide greater flexibility in scheduling any possible appeals, for four panel reports circulated in 2011 the DSB adopted decisions to extend the 60-day period in Article 16.4 of the DSU to adopt or appeal the panel report. In particular, in *US – Clove Cigarettes*[28], the DSB extended the 60-day period until 20 January 2012 and the panel report was appealed on 5 January 2012; in *US – Tuna II (Mexico)*[29], the DSB extended the 60-day period until 20 January 2012 and the panel report was appealed on 5 January 2012; and, finally, in *US – COOL (Canada)*[30] and *US – COOL (Mexico)*[31], the DSB extended the 60-day period until 23 March 2012 and the panel reports were subsequently appealed on 23 March 2012. Nine panel reports were circulated during 2012.[32] The deadline to appeal two of these panel reports did not expire until 2013.[33] Six of the panel reports circulated in 2012 were adopted by the DSB without being appealed.[34] Thus, five out of the 11 panel reports for which the 60-day deadline expired in 2012 were appealed, yielding an appeal rate of 45% for the year 2012.

The overall average of panel reports that have been appealed from 1995 to 2012 is 70%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 4.

4 APPELLATE BODY REPORTS

Nine Appellate Body reports were circulated during 2012, the details of which are summarized in Table 3. As of the end of 2012, the Appellate Body has circulated a total of 117 reports.

[28] See WT/DS406/5 and WT/DSB/M/303.
[29] See WT/DS381/9 and WT/DSB/M/306.
[30] See WT/DS384/11 and WT/DSB/M/310.
[31] See WT/DS386/10 and WT/DSB/M/310.
[32] These reports were: *Dominican Republic – Safeguard Measures*; *US – Shrimp and Sawblades*; *China – GOES*; *China – Electronic Payment Services*; *Canada – Feed-In Tariff Program*; and *Canada – Renewable Energy*. We have not counted the Panel Report in *Korea – Bovine Meat (Canada)* because the parties reached a mutually agreed solution before the Panel circulated its report on 3 July 2012. The circulated report only outlines the procedural background of the dispute.
[33] Although the panel reports in *Canada – Feed-In Tariff Program* and *Canada – Renewable Energy* were circulated in 2012, the 60-day deadline for adoption or appeal of these reports did not expire until 2013.
[34] The panel reports in *Dominican Republic – Safeguard Measures*, *US – Shrimp and Sawblades*, and *China – Electronic Payment Services* were adopted by the DSB on 22 February, 23 July, and 31 August 2012, respectively.

Table 3: Appellate Body reports circulated in 2012

Case Title	Document symbol	Date circulated	Date adopted by the DSB
*China – Raw Materials (United States)**	WT/DS394/AB/R	30 January 2012	22 February 2012
*China – Raw Materials (European Union)**	WT/DS395/AB/R	30 January 2012	22 February 2012
*China – Raw Materials (Mexico)**	WT/DS398/AB/R	30 January 2012	22 February 2012
US – Large Civil Aircraft (2nd complaint)	WT/DS353/AB/R	12 March 2012	23 March 2012
US – Clove Cigarettes	WT/DS406/AB/R	4 April 2012	24 April 2012
US – Tuna II (Mexico)	WT/DS381/AB/R	16 May 2012	13 June 2012
*US – COOL (Canada)***	WT/DS384/AB/R	29 June 2012	23 July 2012
*US – COOL (Mexico)***	WT/DS386/AB/R	29 June 2012	23 July 2012
China – GOES	WT/DS414/AB/R	18 October 2012	16 November 2012

* These three Appellate Body reports were circulated in a single document.
** These two Appellate Body reports were circulated in a single document.

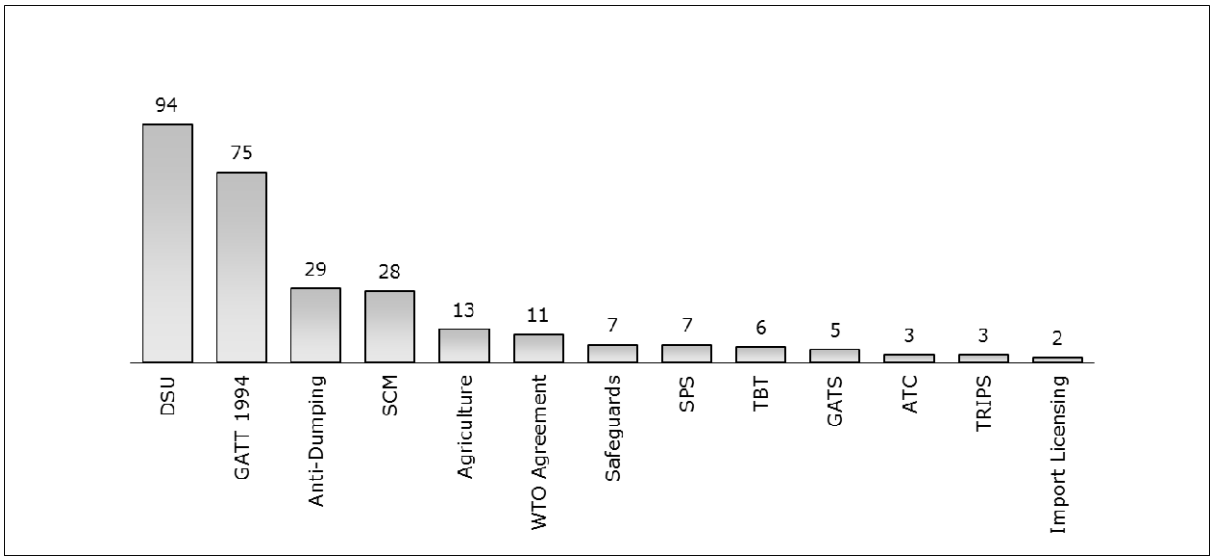
The following table shows which WTO agreements were addressed in the Appellate Body reports circulated in 2012.

Table 4: WTO Agreements addressed in Appellate Body reports circulated in 2012

Case	Document symbol	WTO agreements covered
China – Raw Materials (United States)	WT/DS394/AB/R	China's Accession Protocol GATT 1994 DSU
China – Raw Materials (European Union)	WT/DS395/AB/R	China's Accession Protocol GATT 1994 DSU
China – Raw Materials (Mexico)	WT/DS398/AB/R	China's Accession Protocol GATT 1994 DSU
US – Large Civil Aircraft (2nd complaint)	WT/DS353/AB/R	SCM Agreement DSU
US – Clove Cigarettes	WT/DS406/AB/R	TBT Agreement GATT 1994 DSU
US – Tuna II (Mexico)	WT/DS381/AB/R	TBT Agreement GATT 1994 DSU
US – COOL (Canada)	WT/DS384/AB/R	TBT Agreement GATT 1994 DSU
US – COOL (Mexico)	WT/DS386/AB/R	TBT Agreement GATT 1994 DSU
China – GOES	WT/DS414/AB/R	Anti-Dumping Agreement SCM Agreement DSU

Chart 2 shows the number of times specific WTO agreements have been addressed in the 117 Appellate Body reports circulated from 1996 through 2012.

Chart 2: WTO agreements addressed in appeals 1996-2012



Annex 5 contains a breakdown by year of the frequency with which the specific WTO agreements have been addressed in appeals from 1996 through 2012.

The Appellate Body's findings and conclusions in the Appellate Body reports circulated in 2012 are summarized below.

4.1 Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R

This dispute concerned various measures imposed by China on the export of certain raw materials including bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. China is a leading producer of these raw materials, and also uses them domestically in a number of applications, including the production of steel, aluminium, and a variety of chemicals, which are in turn used in the production of various consumer goods and technology products.

4.1.1 The Panel's terms of reference

The Appellate Body began by examining China's appeal of the Panel's finding that Section III of the complainants' panel requests, entitled "Additional Restraints Imposed on Exportation", provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required under Article 6.2 of the DSU. China requested the Appellate Body to reverse this finding, and to find instead that Section III of the panel requests did not comply with Article 6.2 of the DSU, with the exception of one claim under Article X:1 of the GATT 1994 regarding the non-publication of measures relating to the zinc export quota.

The Appellate Body recalled that, in order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize carefully the language used in the panel request. The Appellate Body added that 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.

Turning to the panel requests at issue in this dispute, the Appellate Body noted that, whereas Sections I and II of the panel requests each addressed a single form of export restriction,

Section III covered a wider set of allegations directed at what was referred to in the title of Section III as "Additional Restraints Imposed on Exportation". The Appellate Body further noted that Section III contained a number of narrative paragraphs with several allegations of violation, a bullet point list of 37 legal instruments, and a final paragraph consisting of a list of 13 treaty provisions allegedly breached. In particular, the complainants – the United States, the European Union, and Mexico – stated in Section III of the panel requests that these measures were inconsistent with Articles VIII:1(a) and VIII:4, Articles X:1 and X:3(a), and Article XI:1 of the GATT 1994 and Paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of China's Accession Protocol, as well as China's obligations under the provisions of Paragraph 1.2 of Part I of the Accession Protocol.

The Appellate Body found that Section III of the panel requests did not make clear which allegations of error pertained to which particular measure or set of measures identified in the panel requests. Furthermore, the Appellate Body noted that it was unclear whether each of the listed measures related to one specific allegation described in the narrative paragraphs, or to several or even all of these allegations, and whether each of the listed measures allegedly violated one specific provision of the covered agreements, or several of them.

In the light of 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 failure to provide sufficiently clear linkages between the 37 challenged measures and the 13 treaty provisions allegedly violated, the Appellate Body found that Section III of the complainants' panel requests did not satisfy the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

Consequently, the Appellate Body found that the Panel erred in making findings regarding claims allegedly identified in Section III of the complainants' panel requests. The Appellate Body therefore declared moot and of no legal effect the Panel's findings in paragraphs 8.4(a)-(d), 8.11(a)-(e), and 8.18(a)-(d) of the Panel Reports in respect of claims concerning export quota administration and allocation; paragraphs 8.5(a)-(b), 8.12(a)-(b), and 8.19(a)-(b) in respect of claims concerning export licensing requirements; paragraphs 8.6(a)-(b), 8.13(a)-(b), and 8.20(a)-(b) in respect of claims concerning a minimum export price requirement; and paragraphs 8.4(e) and 8.18(e) in respect of claims concerning fees and formalities in connection with exportation.

4.1.2 The Panel's recommendations

The Appellate Body then turned to address China's appeal regarding the Panel's recommendations concerning export duties and export quotas. China sought review of the Panel's recommendations "to the extent that they apply to annual replacement measures" adopted after the establishment of the Panel on 21 December 2009. China argued that the complainants had excluded such measures from the scope of the dispute and, hence, by making recommendations extending to such measures, the Panel acted inconsistently with its obligations under Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and made recommendations on measures that are not part of the matter, inconsistently with Article 19.1 of the DSU.

In the final section of these reports, the Panel concluded that "[i]n respect of findings concerning export duties and export quotas, the Panel found that the series of measures operating collectively has resulted in the imposition of export duties or export quotas that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the 'series of measures' does not operate to bring about a WTO-inconsistent result".

The Appellate Body referred, as did the Panel, to the groups of measures challenged by the complainants as a whole, and in force at the time of the Panel's establishment, as the various "series of measures". The Appellate Body specified that it would use the term "series of measures" to describe, collectively, the entire hierarchy of legal instruments, that is, the framework legislation, the regulations implementing this legislation, and the specific legal instrument or instruments identifying the individual quotas or duties imposed on each product in 2009. The Appellate Body noted that, while the framework legislation and implementing regulations remained

in effect, certain of the legal instruments setting out an export quota amount or an export duty rate identified by the complainants in their panel requests had expired or been replaced during the course of the Panel proceedings.

The Appellate Body found that the Panel correctly described the object of the complainants' challenge as one with respect to the measures through which export duties and quotas were imposed on particular raw materials at the time of the establishment of the Panel in 2009. Thus, the Appellate Body did not consider that the Panel erred in setting out to make recommendations on the "series of measures" imposing export duties or export quotas in force at the date of the Panel's establishment. Moreover, in the light of the Panel's express statement that it would make recommendations on measures "in force at the date of the Panel's establishment", and that it would not make findings on the measures imposing specific duty rates and quota levels for 2010, the Appellate Body considered that the Panel made no express recommendations regarding measures excluded from the Panel's terms of reference by the complainants.

Subsequently, the Appellate Body addressed whether the recommendations that the Panel made regarding the "series of measures" in force in 2009 had consequences for the measures imposing specific duty rates and quota levels for 2010, or indeed any measures imposing export duties or quotas on these products in the future. In this regard, the Appellate Body did not consider that a finding that was made with respect to a "series of measures" as it existed at the time the Panel was established could not have consequences for measures adopted in 2010 or thereafter through the effect of the recommendation made by a panel or the Appellate Body after adoption by the DSB. The Appellate Body explained that, while a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB.

The Appellate Body noted that, in making its recommendations, the Panel appeared to be concerned about making recommendations on what it viewed to be "expired" measures. The Appellate Body recalled that it had previously indicated that the fact that a measure has expired "may affect" what recommendation a panel may make, but does not mean that a panel is precluded from making a recommendation on such a measure in a particular case. The Appellate Body added that when a challenge is brought against a group or "series of measures" comprised of basic framework legislation and implementing regulations, which had not expired, and specific measures imposing export duty rates or export quota amounts for particular products on an annual or time-bound basis, a failure by a panel to make recommendations would effectively mean that a finding of inconsistency involving such measures would not result in implementation obligations for a responding Member, and in that sense would merely be declaratory.

For these reasons, the Appellate Body did not agree with China that the Panel acted inconsistently with its obligations under Article 7.1, Article 11 of the DSU, and Article 19.1 of the DSU in recommending that the DSB request China "to bring its measures into conformity with its WTO obligations such that the 'series of measures' does not operate to bring about a WTO-inconsistent result".

4.1.3 Conditional other appeals of the United States, Mexico, and the European Union

In their other appeals, the United States and Mexico submitted a conditional appeal in the event that the Appellate Body were to reverse the Panel's recommendations in paragraphs 8.8, 8.15, and 8.22 of the Panel Reports and find that no recommendation should have been made on the "series of measures" as they existed on the date of Panel establishment. The European Union also submitted a conditional appeal in the event the Appellate Body were to accept the relevant ground of appeal raised by China, and also reject the relevant other appeals submitted by the United States and Mexico.

As the condition on which the United States and Mexico's request was premised was not met, the Appellate Body refrained from addressing these conditional appeals.

4.1.4 Applicability of Article XX of the GATT 1994

China claimed that Article XX of the GATT 1994 was available as a defence to China in relation to export duties found to be inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol.

The Appellate Body explained that, by its terms, Paragraph 11.3 of China's Accession Protocol requires China to "eliminate all taxes and charges applied to exports" unless one of the following conditions is satisfied: (i) such taxes and charges are "specifically provided for in Annex 6 of [China's Accession] Protocol"; or (ii) such taxes and charges are "applied in conformity with the provisions of Article VIII of the GATT 1994".

The Appellate Body noted, first, that Annex 6 of China's Accession Protocol, "specifically provides for" maximum export duty levels on 84 listed products. The Note to Annex 6 further clarifies that the maximum rates set out in Annex 6 "will not be exceeded" and that China will "not increase the presently applied rates, except under exceptional circumstances". The Appellate Body considered that this language cannot be read as indicating that China can have recourse to the provisions of Article XX of the GATT 1994 either to justify the imposition of export duties on products that are *not* listed in Annex 6 or to justify the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6.

Regarding Article VIII of the GATT 1994, China submitted that the reference to this provision in Paragraph 11.3 confirms the availability of Article XX of the GATT 1994. The Appellate Body noted that, although Article VIII covers "all fees and charges of whatever character" imposed by WTO Members "on or in connection with importation or exportation", it expressly excludes export duties, which were at issue in the dispute. The Appellate Body found therefore that export duties cannot be "applied in conformity" with Article VIII; nor can they be found to be inconsistent with Article VIII of the GATT 1994. For the Appellate Body, therefore, the fact that Article XX may be invoked to justify those fees and charges regulated under Article VIII did not mean that it could also be invoked to justify export duties, which are not regulated under Article VIII.

The Appellate Body then turned to examine the context of Paragraph 11.3 of China's Accession Protocol. The Appellate Body noted that Paragraphs 11.1 and 11.2 of the Protocol contain the phrase "in conformity with the GATT 1994", but that this is not the case for Paragraph 11.3. The Appellate Body also noted that Paragraph 11.1 refers to "customs fees and or charges" in general, and that Paragraph 11.2 refers in turn to "internal taxes and charges", while Paragraph 11.3 refers specifically to the elimination of "taxes and charges applied to exports". Given the references to the GATT 1994 in Paragraphs 11.1 and 11.2, and the differences in the subject matter and nature of the obligation covered by these provisions, the Appellate Body considered that the absence of a reference to the GATT 1994 in Paragraph 11.3 further supported its interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3. Moreover, as China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, and not from the GATT 1994, the Appellate Body considered it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol.

In addressing China's argument that Paragraph 170 of China's Accession Working Party Report shows that China assumed a "qualified" obligation to eliminate export duties, the Appellate Body observed that Paragraph 170 is concerned with "internal policies" affecting "all fees, charges or taxes levied on imports and exports" and sets out China's commitment in response to the concern expressed by WTO Members at the time of China's accession regarding "the application of VAT and additional charges levied by sub-national governments on imports." The Appellate Body therefore found Paragraph 170 of China's Accession Working Party Report to be of limited relevance in interpreting Paragraph 11.3 of China's Accession Protocol. By contrast, the Appellate Body noted that Paragraphs 155 and 156 of China's Accession Working Party Report deal with China's commitments with respect to the elimination of export duties (as does Paragraph 11.3 of China's Accession Protocol). The Appellate Body added that Paragraphs 155 and 156 do not make reference to the availability of an Article XX defence for the commitments contained therein. The Appellate Body found this fact to further support the interpretation that China does not have recourse to Article XX of the GATT 1994 to justify export duties found to be inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol.

The Appellate Body further noted, 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". In this regard, the Appellate Body attached 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.

The Appellate Body observed that the preamble of the WTO Agreement lists various objectives, but that none of these overall objectives provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol. Moreover, the preamble of the WTO Agreement states that WTO Members "[r]esolved, therefore, to develop an integrated, more viable and durable multilateral trading system". Based on this language, the Appellate Body considered that the WTO Agreement, *as a whole*, reflects the balance struck by WTO Members between trade and non-trade-related concerns. In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any direct or indirect textual reference to Article XX of the GATT 1994 in that provision, the Appellate Body saw no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3.

The Appellate Body concluded that a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994 to justify export duties that are found to be inconsistent with China's obligations under Paragraph 11.3. Consequently, 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 the Accession Protocol." **The Appellate Body therefore upheld the Panel's conclusion that China may 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.**

4.1.5 Article XI:2(a) of the GATT 1994

The Appellate Body turned next to address China's appeal of 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". China alleged that the Panel erred in interpreting and applying the term "temporarily" and in interpreting the term "critical shortages" in Article XI:2(a), and acted inconsistently with Article 11 of the DSU.

The Appellate Body began by observing that 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. The Appellate Body further noted 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". The Appellate Body considered, therefore, that if a restriction does not fall within the scope of Article XI:1, Article XI:2 will not apply to it either.

The Appellate Body then turned to interpret the main elements contained in Article XI:2(a) – "temporarily applied", "to prevent or relieve" "critical shortages", and "foodstuffs or other products essential".

First, the Appellate Body noted 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". 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". The Appellate Body concluded that "supply[ing] a passing need" suggests that Article XI:2(a) refers to measures that are applied in the interim. Thus, a restriction or prohibition in the sense of Article XI:2(a) must be of a limited duration and not indefinite. The Appellate Body disagreed with the Panel that "temporary" must always connote a time-limit fixed in advance. Instead, the Appellate Body found 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. The Appellate Body indicated that the Panel's use of the terms "long-term application" and "long-term measures" provided little value in elucidating the meaning of the term "temporary", because what is "long-term" would appear to depend on the facts of the particular case.

The Appellate Body read the terms "prevent or relieve" in 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 preempt an imminent critical shortage.

With respect to the meaning of the term "critical shortage", the Appellate Body found that this term 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. The Appellate Body then noted that the shortage, in turn, must relate to "foodstuffs or other essential products". "Foodstuff" is defined as "an item of food, a substance used as food". The term "essential" is defined as "absolutely indispensable or necessary". The Appellate Body found, therefore, that Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products.

China argued that the Panel erroneously found that Article XI:2(a) and Article XX(g) are mutually exclusive, and that this finding was the basis for the Panel's erroneous interpretation of the term "temporarily" in Article XI:2(a). The Appellate Body was of the view that the Panel had not found that Article XI:2(a) and Article XX(g) are mutually exclusive and that the Panel's interpretation of the term "temporarily" in Article XI:2(a) was not based on such a finding.

The Appellate Body did not share 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." The Appellate Body clarified that Members can resort to 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 prohibition of quantitative restrictions in Article XI:1 *shall not extend to* the items listed under subparagraphs (a) to (c) of that provision. This language indicates that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). For the Appellate Body, therefore, 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.

The Appellate Body also addressed China's two separate claims that the Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU. First, China alleged that the Panel failed properly to assess evidence that China's export restriction is annually reviewed and renewed, and that the Panel's failure to consider this evidence has a bearing on the objectivity of the Panel's factual assessment. The Appellate Body, however, found that the Panel's finding was not, as China alleged, based on a mere "assumption" that the restriction would remain in effect until depletion of the reserves. Instead, the Panel considered evidence indicating that the measure had been in place for at least a decade and China did not contest the Panel's finding that this was the case.

Next, China claimed that the Panel employed internally inconsistent or incoherent reasoning in stating, on the one hand, that "there is no possibility for an existing shortage [of an exhaustible natural resource] ever to cease to exist" such that "it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis". On the other hand, the Panel acknowledged that "advances in reserve detection or extraction techniques", or the availability of "additional capacity", could "alleviate or eliminate" a shortage of an exhaustible natural resource, or that "new technology or conditions" might "lessen demand" for the resource. The Appellate Body disagreed that the Panel had made such a finding and noted that the Panel's statement to which China referred contained a hypothetical and did not, as China alleged, show that the Panel had failed to make an objective assessment under Article 11 of the DSU.

On this basis, the Appellate Body upheld the Panel's conclusion that China did not demonstrate 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". It also dismissed China's claim that the Panel acted

inconsistently with its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU.

4.1.6 Article XX(g) of the GATT 1994

China alleged that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) to mean that restrictions on domestic production or consumption must "be applied jointly with the challenged export restrictions", and that "the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions".

The Appellate Body began by recalling that Article XX of the GATT 1994 contemplates a two-tiered analysis of a measure for which justification under that provision is sought. A respondent must first demonstrate that the challenged measure falls within the scope of one of the subparagraphs of Article XX. Where this is the case, a respondent must then establish that the measure at issue satisfies the requirements of the chapeau of Article XX.

The Appellate Body further noted that, in order to fall within the ambit of subparagraph (g), 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". The Appellate Body recalled that it had previously found, in *US – Shrimp*, 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. The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".

Subsequently, the Appellate Body observed that Article XX(g) further requires that conservation measures be "made effective in conjunction with restrictions on domestic production or consumption". The word "effective" in relation to a legal instrument is defined as "in operation at a given time". The Appellate Body considered that the term "made effective" describes measures brought into operation, adopted, or applied. The term "in conjunction" is defined as "together, jointly (with)". Accordingly, the trade restriction must operate jointly with the restrictions on domestic production or consumption.

The Appellate Body recalled that, in *US – Gasoline*, 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" and found no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption.

In the present dispute, the Appellate Body therefore considered that the text of Article XX(g) did not 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.

The Appellate Body concluded that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to require a separate showing that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption. Accordingly, the Appellate Body reversed this interpretation by the Panel.

4.2 Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R

This dispute concerned a challenge brought by the European Communities against a broad array of subsidies allegedly provided by the United States to The Boeing Company ("Boeing") in relation to the manufacture of large civil aircraft ("LCA"). In particular, the European Communities challenged subsidies allegedly provided by: the US Federal Government, including the United States National

Aeronautics and Space Administration ("NASA"), the United States Department of Defense ("USDOD"), the United States Department of Commerce ("USDOC"), and the United States Department of Labor ("USDOL"); the States of Washington, Kansas, and Illinois; the counties of Snohomish (Washington) and Cook (Illinois); and the cities of Everett (Washington), Wichita (Kansas), and Chicago (Illinois).

4.2.1 Annex V to the SCM Agreement

4.2.1.1 Background to and summary of the Panel's findings

In its request for the establishment of a panel, the European Communities requested that the DSB initiate a procedure for gathering information concerning serious prejudice under Annex V to the SCM Agreement ("Annex V procedure") and designate Mr. Mateo Diego-Fernández as its representative for the purpose of facilitating such procedure. At the meeting when the DSB established the Panel, as well as at four subsequent DSB meetings in 2006, the European Communities sought initiation of an Annex V procedure, expressing its view that the DSB must initiate such a procedure upon request, unless there is a consensus *not* to do so. The United States indicated that it could not agree to the proposed initiation. Although the DSB "took note" of the statements made at each meeting, no Annex V procedure ensued.

As soon as the Panel was composed, the European Communities submitted a request for various preliminary rulings in connection with the gathering of information relating to serious prejudice. The European Communities sought to have the Panel find, *inter alia*: that an Annex V procedure had been initiated, on the basis that this occurs automatically upon request unless there is a consensus at the DSB against initiation; that a facilitator had been effectively designated; and that the United States was under an obligation to cooperate in the information-gathering procedure. The European Communities requested, alternatively, that the Panel exercise its powers under Article 13 of the DSU and request the United States to provide certain information.

The Panel issued a Preliminary Ruling denying the European Communities' request to find that an Annex V procedure had been initiated, and all dependent requests. The Panel interpreted the phrase "the DSB shall, upon request, initiate the procedure" in paragraph 2 of Annex V to mean that some form of action by the DSB is required for the initiation of an Annex V procedure, even though "it may well be" that such initiation is not a "decision" that is subject to positive consensus. Because, however, it was "clear" from the minutes of the relevant DSB meetings that the DSB never took any action to initiate an Annex V procedure or to designate a DSB representative pursuant to paragraph 4 of Annex V, the Panel considered itself unable to rule that such a procedure had been initiated.

4.2.1.2 Claims and arguments on appeal

On appeal, the European Union sought reversal of the Panel's Preliminary Ruling on the grounds that the Panel failed to make an objective assessment of the matter within the meaning of Article 11 of the DSU and/or falsely exercised judicial economy, and/or erred in the interpretation and application of Article 7.4 and paragraph 2 of Annex V to the SCM Agreement. The European Union also requested the Appellate Body to complete the analysis and, in that regard, to make four specific findings (each referred to below). Independently from these requests, the European Union also made two additional requests (referred to below).

The United States urged the Appellate Body to reject the European Union's claims on the ground that the Panel had correctly found that the initiation of an Annex V procedure requires an affirmative act or decision by the DSB – irrespective of whether by positive or negative consensus – and that the DSB had taken no such step.

4.2.1.3 Appellate Body's analysis and findings

Annex V to the SCM Agreement contains procedures for developing information in disputes in which there is a claim of serious prejudice. Paragraph 2 of Annex V provides:

> In cases where matters are referred to the DSB under paragraph 4 of Article 7, *the DSB shall, upon request, initiate the procedure* to obtain

> such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product. This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII. (emphasis added; footnotes omitted)

4.2.1.3.1 European Union's request for reversal of the Panel's preliminary ruling

The Appellate Body began its analysis by observing that, while in its request for preliminary rulings the European Communities had asked the Panel to rule that an Annex V procedure had been initiated, this was but one part of its request. At the outset of its communication to the Panel, the European Communities had underscored the "key legal issue" put before the Panel as being how the DSB is to initiate an Annex V procedure. Nevertheless, the Panel did not engage with the extensive arguments put forward by the European Communities in support of its view that the initiation of an Annex V procedure is not a DSB decision subject to positive consensus, but rather an action that is automatically taken upon request, or at least taken unless there is negative consensus not to take the action.

The Appellate Body noted the Panel's perfunctory examination of a single phrase within paragraph 2 of Annex V ("the DSB shall, upon request, initiate the procedure") without considering the significance of the other language set out in that provision or analyzing any relevant context. The only other step in the Panel's reasoning consisted of a review of the minutes of the relevant DSB meetings, en route to its determination that it was "clear" from such minutes that the DSB did not take any action to initiate an Annex V procedure.

The Appellate Body viewed the Panel's approach – of reducing the issue put before it to the factual question of *whether* the DSB had taken action to initiate an Annex V procedure – as an effective refusal to tackle the issue of law that it was asked to rule on, namely, *how* the relevant provisions of the covered agreements provide for an Annex V procedure to be initiated. For the Appellate Body, therefore, the Panel's findings did not adequately resolve the legal issues presented. The Panel failed to advance a key objective of WTO dispute settlement: the resolution of disputes in a manner that preserves the rights and obligations of Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation. The Appellate Body also recalled 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.

For these reasons, the Appellate Body found that, in denying the various requests made by the European Communities with respect to an Annex V procedure, the Panel erred, and failed to resolve adequately the legal issues presented.

The Appellate Body then proceeded to consider the European Union's request for completion of the analysis and for four specific findings.

4.2.1.3.2 The European Union's specific requests

4.2.1.3.2.1 Request for a finding that initiation of the Annex V procedure is by negative consensus or is automatic

The Appellate Body next turned to the question of how an Article V procedure is initiated. In this regard, the Appellate Body observed that paragraph 2 of Annex V imposes an obligation on the DSB to initiate an Annex V procedure when two conditions are satisfied: (i) there must be a request by a WTO Member for initiation of such a procedure; and (ii) the relevant matter must be "referred to the DSB under paragraph 4 of Article 7", that is, the DSB must establish a panel. The Appellate Body viewed initiation of an Annex V procedure as a straightforward and specific administrative action that is a procedural incident of the DSB's decision to establish a panel when the initiation of an Annex V procedure has been requested. The Appellate Body contrasted this

mandatory, "executory" function with other responsibilities of a more deliberative nature assigned to the DSB, which require the DSB to discuss and to make a choice among multiple courses of action. In addition, the Appellate Body relied on various other provisions in Annex V as affirming the link between establishment of a panel and the initiation of an Annex V procedure. The Appellate Body rejected the United States' argument that because the DSB must appoint an Annex V facilitator by positive consensus, the initiation of an Annex V procedure must be done in the same way. Without expressing any view as to how the DSB is to appoint an Annex V facilitator, the Appellate Body observed that, as the representative of the DSB within the WTO, the Chairman of the DSB is in principle responsible for discharging the function of facilitating an Annex V procedure until such time as that function is delegated through the DSB's designation of another individual as a facilitator.

The Appellate Body further reasoned that, if a positive consensus rule were to apply to the DSB's initiation of an Annex V procedure, this would enable individual Members to prevent the use of the Annex V procedure. Yet Annex V, as well as Article 6.6 and 6.8 of the SCM Agreement, demonstrate the vital role that an information-gathering procedure plays in the context of a dispute involving an allegation of serious prejudice. These provisions, as well as Article 7.4, reflect Members' recognition of the practical realities of serious prejudice disputes, and their intention to create a procedure for the timely collection of information that is needed by the parties involved in a serious prejudice dispute which would flow into, supplement, and largely precede a panel's substantive adjudication of such disputes. The Appellate Body therefore considered that an interpretation of paragraph 2 of Annex V that would enable a responding Member to frustrate that role by preventing the DSB from initiating such a procedure would be at odds with WTO Members' manifest intention to promote the early and targeted collection of pertinent information, and with the obligation to cooperate in the collection of information relating to serious prejudice disputes to which all Members are subject. It would also be at odds with the mandatory terms used in the SCM Agreement for the DSB's initiation of such procedures.

The Appellate Body also highlighted two consequences that could flow if initiation required positive consensus, and for which there may be no remedy in the panel proceedings. First, the parties to the dispute could be denied access to critical information from third-country Members if those Members chose not to become third parties in the dispute. Second, if the objection to the initiation of the Annex V procedure came from a WTO Member other than the responding party or a concerned third country Member, there may be no basis upon which the panel could allow the complainant to rely upon best available evidence and/or draw adverse inferences based on the conduct of the respondent. Finally, the Appellate Body observed that while the negotiating history of the SCM Agreement supplies little concrete insight as to how Members intended the Annex V procedure to be initiated, it confirms the Appellate Body's understanding of the reasons why Members considered such a procedure to be a key part of serious prejudice disputes.

Accordingly, the Appellate Body found that, in accordance with paragraph 2 of Annex V to the SCM Agreement, the DSB's initiation of an information-gathering procedure in a serious prejudice dispute occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel. One Member of the Division qualified this understanding of paragraph 2 of Annex V to the SCM Agreement, accepting that the DSB's initiation of an Annex V procedure in this manner 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.

4.2.1.3.2.2 The European Union's remaining specific requests

In considering the European Union's request for a finding that, as a matter of law, all of the conditions for the initiation of an Annex V procedure were fulfilled in this dispute, the Appellate Body recalled its finding that two conditions must be satisfied in order to trigger initiation of an Annex V procedure: a request for initiation by a Member and a referral of the matter to the DSB under Article 7.4 of the SCM Agreement. The Appellate Body noted, however, that the Panel made an explicit finding that no Annex V procedure had been initiated and that it is uncontested that no Annex V procedure was conducted. The Appellate Body failed to see how, more than five years after the fact, a ruling on whether the conditions for the initiation of an Annex V procedure were fulfilled would contribute to a positive resolution to this dispute. **Accordingly, the Appellate Body declined to rule on whether all of the conditions for the initiation of an Annex V procedure were fulfilled in this dispute.**

Next, the Appellate Body considered the European Union's last two specific requests for findings. The first was the request for a finding that, in refusing to cooperate in the information-gathering process as required by the first sentence of paragraph 1 of Annex V, the United States failed to comply with its obligations under that provision

The second request was to find that, on account of the lack of co-operation by the United States, the European Communities was entitled to present its serious prejudice case based on the available evidence, and the Panel was entitled to complete the record as necessary by relying on best information otherwise available and to draw adverse inferences, as permitted under paragraphs 6 and 9 of Annex V.

The Appellate Body was of the view that any assessment of the European Union's allegations would likely require consideration of a number of "thorny" and *sui generis* issues regarding this dispute's procedural history, including: the relationship between the proceedings in this dispute (DS353) and those in the previous DS317 dispute (a complaint which had been initiated by the European Communities in October 2004 in respect of alleged subsidies to US producers of large civil aircraft for which an Annex V procedure was initiated and completed, but which ended following the resignation of two members of the panel and for which modalities for the transfer of that record could not be agreed); the Annex V procedure in DS317 and the extent of US participation therein; the relevance, if any, of the fact that European Communities' request for initiation of an Annex V procedure appears to have been removed from the DSB agenda through a consensus joined in by the European Communities itself.

The Appellate Body considered that, in the particular circumstances of this proceeding, it was not evident that the relevant facts are sufficiently clear or uncontested, or that the complex legal issues had been sufficiently explored by the participants to make a finding on the European Union's requests. Nor did the Appellate Body consider that it could answer questions relating to the extent of the United States' cooperation in the abstract, or during the dispute.

Based on all of the above, the Appellate Body made no finding as to these requests.

4.2.1.3.3 The European Union's additional requests

Finally, the Appellate Body noted its difficulty in understanding precisely what the European Union's additional requests sought to have it do, or how they squared with its mandate under Article 17.6 of the DSU. The European Union had requested the Appellate Body to "constantly bear in mind the circumstances of this case" – notably the United States' withholding of information and refusal to cooperate in the Annex V procedure – which the European Union had argued imply that: (i) the United States cannot, in its appeal, criticize the Panel for its factual assessments or for drawing factual inferences where the United States itself deprived the Panel of information; and (ii) the Appellate Body should rule in its favour in the event of doubt or evidentiary conflict or equipoise. The Appellate Body deemed the first request to relate to a moot point since, as explained below, the Appellate Body in any event rejected the two claims of error made by the United States under Article 11 of the DSU (relating to the Panel's estimate of the amount of the subsidy under USDOD R&D contracts and agreements and to its analysis of the effects of the aeronautics R&D subsidies on Boeing). With regard to the second additional request, the Appellate Body observed that it would have expected the European Union to provide a more precise indication of the areas in which it considered the factual record to be incomplete, of how the lack of information related to the United States' alleged non-cooperation, and of the specific inferences that it sought to have the Appellate Body draw. The Appellate Body expressed doubt that the provisions of Annex V imply that any non-cooperation in an Annex V procedure requires the drawing of adverse inferences against the party accused of non-cooperation on all factual issues. Since, in the opinion of the Appellate Body, the drawing of adverse inferences should, at least to some extent, involve consideration of the connection between the non-cooperation and the relevant issue, as well as of other evidence available on the record, the Appellate Body considered that this request by the European Union was not sufficiently supported to allow it to make the requested finding.

4.2.2 NASA and USDOD measures

4.2.2.1 Financial contribution

4.2.2.1.1 The Panel's findings

In its analysis of whether the NASA and USDOD measures challenged by the European Communities constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement, the Panel began by focusing on the interpretative issue of whether measures that are properly characterized as "purchases of services" are excluded from the scope of Article 1.1(a)(1)(i) of the SCM Agreement and, therefore, do not qualify as financial contributions by means of a "direct transfer of funds".

After determining that Article 1.1(a)(1)(i) does not include within its scope measures that are properly characterized as purchases of services, the Panel proceeded to consider whether the NASA and USDOD measures at issue in fact qualify as such. For this purpose, the Panel developed and applied a test to determine whether or not the NASA and USDOD measures could be properly characterized as purchases of services. According to the Panel's test this was dependent on the nature of the work that Boeing was required to perform pursuant to these contracts and, more specifically, whether the resulting research was "principally for [Boeing's] own benefit and use, or whether it was principally for the benefit and use of the U.S. Government (or unrelated third parties)".

In applying its test, the Panel considered the following five categories of evidence: (i) the legislation authorizing the R&D programmes at issue; (ii) the types of instruments entered into between NASA/USDOD and Boeing; (iii) whether NASA/USDOD has any demonstrable use for the R&D performed under the programmes; (iv) the allocation of intellectual property rights under the transactions at issue; and (v) whether the transactions have the typical elements of a purchase of services. The Panel concluded that the NASA procurement contracts and USDOD assistance instruments could not be properly characterized as purchases of services. By contrast, it found that the USDOD procurement contracts did qualify as purchases of services. For measures that qualified as purchases of services under its test – that is, the USDOD procurement contracts – the Panel excluded them from further consideration based on its interpretation of Article 1.1(a)(1) that such measures are not financial contributions. By contrast, where the measures did not qualify as purchases of services under the test – the NASA procurement contacts and USDOD assistance instruments – the Panel treated the payments made by NASA and the USDOD to Boeing pursuant to those contracts and instruments as direct transfers of funds within the meaning of Article 1.1(a)(1)(i). Furthermore, it determined that the access to NASA facilities, equipment, and employees provided to Boeing pursuant to the NASA procurement contracts, and the access to USDOD facilities pursuant to the USDOD assistance instruments, constitute the provision of goods and services under Article 1.1(a)(1)(iii). The Panel additionally found that the access to NASA facilities, equipment and employees provided to Boeing through the NASA Space Act Agreements constitutes a provision of goods or services within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel noted that during the Panel proceedings the United States had accepted that the provision of (access to) facilities, equipment and employees provided to Boeing through NASA Space Act Agreements at issue constitutes a provision of goods or services within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement".

4.2.2.1.2 Claims and arguments on appeal

In its appeal, the European Union requested reversal of the Panel's interpretation that measures properly characterized as purchases of services are excluded from the scope of Article 1.1(a)(1) of the SCM Agreement.

The United States requested reversal of the Panel's finding that the NASA procurement contracts and USDOD assistance instruments do not constitute purchases of services and, consequently, its finding that these measures involve payments that are direct transfers of funds within the meaning of Article 1.1(a)(1)(i), as well as the Panel's finding that the other support provided to Boeing constitutes the provision of goods and services within the meaning of Article 1.1(a)(1)(iii). The United States did not appeal the Panel's finding that the access to facilities, equipment and

employees provided to Boeing under the NASA Space Act Agreements constitutes a financial contribution under Article 1.1(a)(1)(iii).

4.2.2.1.3 The Appellate Body's analysis and findings

4.2.2.1.3.1 The Panel's general approach

The Appellate Body began its analysis by expressing some concerns about the Panel's general approach. First, the Appellate Body noted that the Panel had been confronted with contrasting characterizations of the NASA and USDOD measures before it. However, instead of first resolving the dispute over the proper characterization of the measures, the Panel embarked on an interpretative exercise based on the assumption that the measures are purchases of services. Only after it had completed its interpretative exercise on the basis of that assumption did the Panel return to the question of what was the proper characterization of the measures at issue. The Appellate Body explained that it would seem more logical to determine first the issue of the proper characterization of the measures at issue and, once the measures have been properly determined, to examine the question of whether such types of measures fall within the scope of Article 1.1(a)(1) of the SCM Agreement. The Appellate Body observed that the Panel arrived at the conclusion that the payments and other support are financial contributions by exclusion. This conclusion seems to have proceeded automatically from the Panel's conclusion that the NASA procurement contracts and USDOD assistance instruments *are not* purchases of services. The reason why one conclusion – that the relevant measures are direct transfers of funds – follows automatically from the other – that the same measures are not purchases of services – was not explained by the Panel.

It was not clear to the Appellate Body why, in the face of arguments by the European Communities that the payments under the contracts fall *within* the scope of Article 1.1(a)(1)(i) because they are grants – a category of financial contributions expressly mentioned in that provision – the Panel started from the premise that it was required to determine whether purchases of services – a category that is *not* mentioned in that provision – are excluded from its scope.

In the Appellate Body's view, the Panel should first have examined the measures to determine their relevant characteristics, and then considered whether, in the light of a correct interpretation of Article 1.1(a)(1), these measures, properly characterized, fall within the scope of that provision. The Appellate Body next turned to itself examine the measures – that is, the NASA procurement contracts and USDOD instruments – in order to determine their relevant characteristics. This would be followed by an interpretation of the terms and scope of Article 1.1(a)(1) of the SCM Agreement. Finally, the Appellate Body explained that it would determine whether, in the light of the relevant characteristics, the NASA procurement contracts and USDOD assistance instruments fall within the four categories of financial contributions covered by Article 1.1(a)(1) of the SCM Agreement.

4.2.2.1.3.2 The Proper characterization of the measures at issue

After reviewing the NASA procurement contracts and USDOD assistance instruments, the Appellate Body considered the following as the measures' principal characteristics. The NASA procurement contracts and USDOD assistance instruments involve the commitment of resources from both parties. In the case of the NASA procurement contracts, NASA commits to provide financial resources and contributes the use of its facilities, equipment, and employees, while Boeing contributes the work of its scientists and engineers. Under the USDOD assistance instruments, the USDOD commits to provide financial resources and access to its facilities, and Boeing contributes the work of its scientists and engineers, as well as its own financial resources. Thus, both types of instruments involve monetary and non-monetary contributions. Moreover, the subjects to be researched are often determined collaboratively between NASA/USDOD and Boeing. The fruits of the research are shared between Boeing and NASA or Boeing and the USDOD. Boeing obtains title to inventions and rights to the data that allow use for commercial purposes, while the US Government obtains a royalty-free licence to use the technology or data for government purposes only. Accordingly, the Appellate Body found that the transactions under the NASA procurement contracts and under the USDOD assistance instruments are akin to a joint venture.

4.2.2.1.3.3 The types of financial contributions covered by Article 1.1(a)(1) of the SCM Agreement

The Appellate Body focused its interpretation on subparagraphs (i) and (iii) of Article 1.1(a)(1), which provide:

> Definition of a Subsidy
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> ...
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods; ... .

As regards subparagraph (i) of Article 1.1(a)(1), the Appellate Body stated that it is clear from the examples in that provision 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. Thus, the provision of funding under subparagraph (i) may amount to a donation or may involve reciprocal rights and obligations.

The Appellate Body then discussed subparagraph (iii), noting that that provision contemplates two distinct types of transaction: the first is where a government "provides goods or services other than general infrastructure"; and the second relates to situations in which a government "purchases goods" from an enterprise. In the case of the provision of goods or services, subparagraph (iii) does not specify whether the goods or services are provided gratuitously or in exchange for money or other goods or services. Thus, the provision of goods or services may include transactions in which the recipient is not required to make any form of payment, as well as transactions in which the recipient pays for the goods or services. Therefore, what is captured in the first sub-clause of subparagraph (iii), as well as in subparagraph (i) (referred to above), is a government's provision of goods or services, or of funds, irrespective of whether this is done gratuitously or in exchange for consideration. The difference between the two types of government conduct, however, lies in what is being transferred by the government. Under subparagraph (i), the government transfers financial resources, while under subparagraph (iii) (first sub-clause), the government provides a good or service. Two additional differences between the first and second sub-clauses of subparagraph (iii) were noted by the Appellate Body. 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".

The Appellate Body recalled that 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). However, the Appellate Body observed that it did not need to resolve this interpretative issue because it was not relevant for purposes of resolving the dispute. Therefore the Appellate Body declared 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" to be moot and of no legal effect. The Appellate Body also declared moot the Panel's finding that the USDOD procurement contracts are properly

characterized as "purchases of services" and thus are not financial contributions under Article 1.1(a)(1). However, as neither participant had requested it, the Appellate Body did not complete the analysis regarding the USDOD procurement contracts at issue in this dispute.

4.2.2.1.3.4 Do the NASA and USDOD measures constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement?

The Appellate Body recalled its views that the examples listed in subparagraph (i) provide an indication of the types of transactions intended to be covered by the more general reference to "direct transfer of funds". With respect to those examples in Article 1.1(a)(1)(i), it noted several similarities between the collaborative undertakings that are the NASA/USDOD measures at issue and equity infusions. Like equity investors, NASA and the USDOD provide funding. This funding is provided in the expectation of some kind of return. In the case of NASA and USDOD funding to Boeing, the return is not financial, but rather takes the form of scientific and technical information, discoveries, and data expected to result from the research performed. Moreover, like equity investors, NASA and the USDOD have no certainty at the time they commit the funding that the research will be successful. Success will depend on whether any inventions are discovered and the usefulness of the data collected, as well as the scientific and technical information produced. And like some equity investors, NASA and the USDOD contribute to the project by providing access to facilities, equipment, and employees.

The Appellate Body concluded that where, as here, there are measures that have sufficient characteristics in common with one of the examples in subparagraph (i), this commonality indicates that the measures fall within the concept of "direct transfers of funds" in Article 1.1(a)(1)(i). The Appellate Body further explained that it had 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). In addition, Boeing was given access to NASA facilities, equipment, and employees and to USDOD facilities, which constitute the provision of goods or services within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

Based on all of the above, the Appellate Body found that the payments and access to facilities, equipment, and employees provided to Boeing under the NASA procurement contracts at issue constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement. It additionally found that the payments and access to facilities provided to Boeing under the USDOD assistance instruments at issue also constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.

4.2.2.2 Benefit

4.2.2.2.1 The Panel's finding of benefit under Article 1.1(b) of the SCM Agreement

The Panel found that financial contributions provided under the NASA procurement contracts and Space Act Agreements and the USDOD assistance instruments conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement. The Panel's finding was based on its view that 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.

4.2.2.2.2 Claims and arguments on appeal

The United States appealed the Panel's finding of benefit with respect to both the NASA and USDOD measures. As regards the NASA measures, the United States argued that the Panel's finding that research under the NASA R&D contracts was "principally for Boeing's own benefit and use" was the sole justification for the finding that the NASA aeronautics R&D programmes conferred a benefit. In the United States' view, since the former finding is erroneous, the latter finding of existence of a benefit is equally erroneous. With respect to the USDOD measures, the United States asserted that the Panel erred because it failed to consider that Boeing funded part of the costs of the research undertaken pursuant to the assistance instruments.

The European Union responded that the United States had failed to identify any errors in the Panel's evaluation of the existence of financial contributions and had failed to provide information as to how the income generated from those results may translate into payments from Boeing to the USDOD for the contributions made by the USDOD towards that R&D.

4.2.2.2.3 Did the Panel err in determining benefit?

At the outset, the Appellate Body explained that it would limit its review of the Panel's findings of benefit to the NASA procurement contracts and USDOD assistance instruments, and would not review the Panel's finding that the access to facilities, equipment and employees provided to Boeing under the NASA Space Act Agreements conferred a benefit.

The Appellate Body identified several flaws in the Panel's reasoning on the issue of benefit. First, the Appellate Body noted that both the Panel's test for purchases of services and for benefit revolve around the question of which party to the transaction derives the "principal benefit and use" from the research. The Appellate Body cautioned that this approach risked conflating what are two separate elements of the definition of "subsidy" in Article 1.1 of the SCM Agreement. Second, the Appellate Body stated that the identification of the principal user or beneficiary of the research, on the basis of the five factors relied on by the Panel, does not capture the relevant inquiry under Article 1.1(b), which involves a consideration as to whether the measure is consistent with a market benchmark. Third, the Appellate Body noted that 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 that other entity performs R&D activities principally for its own benefit and use, and that, at a minimum, it would be expected that some form of royalties or repayment would be required. The Appellate Body recognized 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, a panel would be expected in such circumstances to at least explain and develop reasoning regarding the economic rationale or theory that supports its intuition, which the Panel in this case did not do. A panel should test its intuitions empirically, especially where the parties have submitted evidence as to how market actors behave. In this case, both the European Communities and the United States had submitted evidence as to how research transactions between two market actors are structured, yet the Panel did not discuss this evidence in its reasoning. Finally, the Appellate Body was not persuaded that, *a priori*, it can be excluded that two market actors would enter into a transaction with each other in circumstances where the returns are unequally distributed between them.

Having found that the Panel's approach and reasoning were not based on a proper market benchmark, the Appellate Body turned to completing the analysis. In this regard, the Appellate Body outlined the evidence of market benchmarks that had been submitted to the Panel by the European Communities and the United States. It then noted that, in response to the evidence submitted by the European Communities, the United States did not contest that this evidence indicates that there were market transactions in which the entity commissioning the R&D obtained ownership of all intellectual property rights. Rather, the United States argued that the market does not dictate a single outcome in the negotiation of intellectual property rights, and introduced evidence of alleged market transactions showing more diversity in the disposition of rights. In the light of this, the Appellate Body explained that, in completing the analysis, it would proceed as if the Panel had treated the evidence submitted by the United States as accurate and probative. Thus, it would seek to determine whether the evidence submitted by the United States shows that the disposition of intellectual property rights under the NASA/USDOD measures at issue is consistent with what occurs in transactions between two market actors.

The Appellate Body concluded that the allocation of intellectual property rights in the examples of market transactions on record submitted by the United States was more favourable to the party commissioning the research and less favourable to the commissioned party than under the NASA procurement contracts and USDOD assistance instruments before it. This evidence thus indicated that transactions in the market result in an equilibrium that is more favourable to the commissioning party than in the measures at issue. In other words, Boeing obtained more and NASA and the USDOD obtained less than they would have obtained in the market. In the Appellate Body's view, this conclusion was 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 were before it conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement.

4.2.2.3 The scope of the Panel's findings of benefit as regards the NASA measures

4.2.2.3.1 The Panel's findings

The Panel estimated that the total amount of payments to Boeing through R&D contracts under the eight NASA R&D programmes over the period 1989-2006 was $1.05 billion. In addition, the Panel estimated the value of the free access to facilities, equipment and employees provided by NASA to Boeing under the eight R&D programmes at issue to be $1.55 billion.

4.2.2.3.2 Claims and arguments on appeal

On appeal, the United States' claimed that the Panel erred by basing its valuation of the total benefit conferred by NASA research contracts on a combination of transactions covering not only LCA-related research challenged by the European Communities, but also other transactions that the European Communities did not challenge. In particular, the United States complained that the Panel did not exclude $280 million in expenditures for research that NASA had determined was unrelated to the European Communities' claims. The United States characterized this omission as an error inconsistent with Article 1.1(b) because it treats transactions that were not part of the financial contribution under Article 1.1(a) as conferring a benefit.

The European Union contended that the United States' claim was not properly within the scope of this appeal because the United States had failed to identify in its Notice of Other Appeal any alleged errors by the Panel under Article 1.1(b) of the SCM Agreement in *valuing* the benefit to Boeing from the NASA aeronautics R&D programmes, or reference any of the relevant paragraphs of the Panel Report, in accordance with Rule 23(2) of the Working Procedures. The European Union additionally argued that Article 1.1(b) contains no obligations pertaining to the quantification of the benefit and thus the Panel could not have committed any errors under Article 1.1(b) in valuing the amount of the subsidy. Moreover, the European Union asserted that, even if Article 1.1(b) contained obligations pertaining to the quantification of the benefit, the United States' claim should be seen as an effort to reargue the facts.

4.2.2.3.3 The Appellate Body's analysis and findings

4.2.2.3.3.1 Was the United States' claim properly within the scope of the appeal?

The Appellate Body rejected the European Union's procedural objection because it considered that the United States' Notice of Other Appeal sufficiently identified the allegation of error. Nevertheless, the Appellate Body cautioned that the relevant item in the United States' Notice of Other Appeal is drafted at a level of vagueness and imprecision that made it difficult for the appellee, the third participants, and the Appellate Body to understand easily the full scope of the United States' claim. The Appellate Body added that 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.

4.2.2.3.3.2 Did the Panel err under Article 1.1(b) of the SCM Agreement?

The Appellate Body recalled that the Panel had decided to rely on the methodology proposed by the United States which proceeded as follows. First, the United States identified all of the contracts that were awarded by NASA to Boeing under the eight R&D programmes at issue during the period 1989-2006. For this purpose, the United States ran a search in a NASA database. Second, from this broad pool of Boeing contracts, the United States eliminated all contracts that it considered were not related to aeronautics research. This was done by identifying the awards issued by the NASA research centres that perform aeronautics research. The United States explained that NASA conducts all of its research activities at nine research centres, but that only four of those centres – Langley Research Center, Glenn Research Center, Ames Research Center, and Dryden Research Center – are responsible for all the aeronautics research conducted by NASA. These four research centres administer the eight R&D programmes and perform all the aeronautics research required in

support of NASA's other programmes. This second step yielded a figure of $1.05 billion. In the third step, the United States eliminated contracts that, in its view, although awarded by one of the four NASA research centres that perform aeronautics research, nevertheless pertained to non-aeronautics research – for example, contracts whose subject matter pertained to space, atmospheric science, airspace hypersonics, vertical take-off and landing/short take-off and landing, and aircraft support related to the maintenance and upkeep of NASA's aircraft. Under this third step, the United States excluded $280 million in expenditures, resulting in a total value of $775 million between 1989 and 2006. Some of these figures have been rounded off, thus the discrepancy when the figures are added up.

The Appellate Body understood the Panel to have accepted the results of the second step of United States' methodology pursuant to which the contracts awarded to Boeing by the four NASA research centres that conduct aeronautics research were segregated from those awarded by NASA's other five research centres that do not conduct aeronautics research. However, the Panel did not address the third step of the methodology that had been proposed by the United States, which involved eliminating the contracts that, despite being awarded by one of these four NASA research centres that perform aeronautics research, NASA had identified as not pertaining to aeronautics research. The Appellate Body expressed the view that, once the Panel had decided to engage with the methodological approach and the data provided by the United States, it should not simply have stopped at the second step without explaining the reasons for not engaging with the third step. Rather, the Panel should have explained why it disagreed with the third step or why it did not find it probative: for instance, because the results of the manual review, by NASA personnel, of the descriptions of the research conducted under each Boeing contract awarded by the four research centres could not be verified.

Nonetheless, the Appellate Body rejected the United States' claim of error for the following reasons. First, the Panel's consideration of the amount of the subsidy was eminently a factual exercise that fell within the Panel's authority as the initial trier of facts and the United States had not raised a claim under Article 11 of the DSU in this respect. Second, there is no obligation in the SCM Agreement to quantify the precise amount of the subsidy for purposes of an adverse effects claim and, in the absence of such an obligation, it was not clear on what basis the Panel's reluctance to go further in its calculations could constitute legal error. The Panel did not attempt to estimate the value of the benefit conferred to Boeing under the NASA measures at issue and thus the United States' appeal was misdirected. Third, the Panel never purported that its calculations would be precise, since it indicated that the amount is an estimate. Lastly, because the Appellate Body had declined to disturb the Panel's finding as to the estimated amount of the subsidy provided through the payments made by NASA to Boeing, there was no basis to interfere with the Panel's estimate of the value of Boeing's access to NASA facilities, equipment, and employees.

4.2.2.4 Article 11 of the DSU – Amount of USDOD R&D funding potentially relevant to LCA

4.2.2.4.1 The Panel's findings

Before the Panel, the European Communities estimated that the USDOD had provided Boeing with $4.3 billion in funding and support for "dual-use" R&D over the period 1991-2006, and argued that $2.4 billion of that total should be treated as a subsidy to Boeing's LCA division. The United States responded that the total amount of any subsidy to Boeing's LCA division under USDOD R&D contracts and agreements is significantly less than $308 million over the period 1991-2006. The Panel rejected both estimates, but ultimately was unable to arrive at its own estimate of the amount of subsidy provided to Boeing's LCA division under the USDOD assistance instruments.

4.2.2.4.2 Claims and arguments on appeal

In rejecting the United States' estimate of the subsidy amount, the Panel stated that it did not consider it credible that less than 1% of the $45 billion in aeronautics R&D funding that [US]DOD provided to Boeing over the period 1991-2005 had any potential relevance to LCA. The United States challenged this statement on appeal arguing that the Panel acted inconsistently with Article 11 of the DSU because the Panel's statement lacks an evidentiary basis. The European Union asserted that, even assuming the statement were reviewable on appeal, it is really

in the nature of a conclusion as to the Panel's evidence-based rejection of the United States' claim that dual-use R&D funding to Boeing was no greater than $308 million.

4.2.2.4.3 The Appellate Body's analysis and findings

The Appellate Body was not persuaded that the Panel had acted inconsistently with its obligation to make an objective assessment of the matter under Article 11 of the DSU. The Appellate Body acknowledged that, in making the statement challenged by the United States, the Panel did not cite specific evidence in support of its position. Nonetheless, the Appellate Body considered that other parts of the Panel's analysis lent support to the Panel's statement. In addition, the Appellate Body noted that the statement challenged by the United States was the final remark made by the Panel in explaining why it was not persuaded by the estimate provided by the United States. When it made the challenged statement, the Panel had already provided three reasons why it could not accept the United States' estimate. Therefore, had the Panel refrained from making the challenged statement, it would have made little difference to the outcome of the Panel's analysis; moreover, it would not have made much difference in terms of the underlying support for the Panel's decision to reject the United States' estimate. Moreover, the Panel ultimately declined to provide a figure for its estimate of the total subsidy amount because the evidence on record did not allow it to segregate the payments and access to USDOD facilities provided under the assistance instruments (which it had found to be financial contribution) from payments and access to USDOD facilities provided under the procurement contracts (which were not found to constitute financial contributions). Finally, the Appellate Body explained that to succeed in its challenge under Article 11, an appellant must show that the statement was material to the panel's legal conclusion. In this case, the United States had not demonstrated that the challenged statement was material to the Panel's conclusion as to the total amount of the subsidy provided to Boeing through the USDOD measures. This is because, as explained above, other elements of the Panel's analysis do support that conclusion.

4.2.2.5 Allocation of patent rights

At the outset of its analysis, the Appellate Body clarified three aspects of the scope of the appeal before it. First, it noted that the European Union's appeal was directed only at the Panel's finding concerning the *patent rights* and did not include the Panel's finding on the data rights. Second, it observed that the Panel proceeded on the assumption that the allocation of patent rights was in some respects a self-standing subsidy that was separate from the payments and other support provided under the NASA/USDOD contracts and agreements. The Appellate Body proceeded on the same assumption. Third, the Appellate Body noted that any of its findings in connection with the specificity of the allocation of patent rights did not traverse the Panel's findings of specificity relating to the payments and other support provided under the NASA/USDOD contracts and agreements.

The Panel found that, assuming *arguendo* that the allocation of patent rights under NASA and USDOD R&D contracts and agreements with Boeing involved a subsidy within the meaning of Article 1.1 of the SCM Agreement – that is, a financial contribution that confers a benefit – the European Communities had failed to demonstrate that any such subsidy was specific within the meaning of Article 2 of the SCM Agreement.

On appeal, the European Union alleged that the Panel erred in the interpretation and application of Article 2.1(a) of the SCM Agreement by considering that the US Government "as a whole" can be a "granting authority" for purposes of that provision. The European Union asserted that, in this case, the granting authorities are NASA and the USDOD. It further argued that the Panel erred by failing to adjudicate the European Communities' arguments of *de facto* specificity under Article 2.1(c) of the SCM Agreement. The United States responded that the European Union misinterpreted Article 2.1 in calling for an analysis based on a subset of the US legislation. According to the United States, the granting authority with respect to the allocation of patent rights under both the NASA and USDOD measures is the President of the United States.

Although neither participant challenged the Panel's *arguendo* approach on appeal, the Appellate Body expressed some reservations about it. The Appellate Body first noted that the Panel's failure to make an assessment under Article 1.1 of the SCM Agreement was problematic in this case because there might have been some overlap in the claims put forward by the

European Communities. It also found it difficult to reach a finding on specificity because an assessment under Article 2.1 follows an assessment of whether a financial contribution conferring a benefit within the meaning of Article 1 of the SCM Agreement exists. The Appellate Body also observed that, were it to disagree with the Panel's finding, the Panel's arguendo approach could lead to the claim remaining unresolved.

The Appellate Body then proceeded to assess whether the Panel erred in the interpretation of Article 2.1(a) of the SCM Agreement. It noted that subparagraph (a) of Article 2.1 calls for a determination of whether access to a subsidy is limited to "certain enterprises". In its view, while the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is not the purpose of a specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*. **The Appellate Body therefore did not believe that that the Panel erred in the interpretation of Article 2.1 of the SCM Agreement by assessing the alleged subsidies provided by NASA and the USDOD against the legal framework that exists in the United States for the allocation of patent rights under government R&D contracts and agreements and pursuant to which these granting authorities operate. Accordingly, it rejected this aspect of the European Union's appeal.**

With respect to the Panel's application of Article 2.1(a) of the SCM Agreement, the Appellate Body noted that both under the general regulations, which apply to the USDOD and other departments, and under a NASA waiver, title over the invention will belong solely to the contractor, even though the mechanism for the initial allocation of patent rights is formally somewhat different. It also noted that the retention of title by contractors, under the USDOD regulations, and the waiver of patent rights, under the NASA regulations, are based on a broader US legislative and regulatory framework pursuant to which enterprises that perform R&D work for the US Government get to enjoy the patent rights over inventions discovered. **The Appellate Body thus did not see a basis to find that such subsidy was explicitly limited to certain enterprises, and therefore specific within the meaning of Article 2.1(a) of the SCM Agreement.**

Lastly, the Appellate Body examined whether the Panel erred by failing to address the European Communities' allegation of *de facto* specificity under Article 2.1(c) of the SCM Agreement. It noted in this regard that the language of Article 2.1(c) – particularly the initial clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" – indicates that the application of this provision will normally follow the application of the other two subparagraphs of Article 2.1. It further noted that a conclusion that there is "an appearance of non-specificity" under Article 2.1(a)-(b) does not provide a panel license to refrain from examining claims under Article 2.1(c). **The Appellate Body therefore found that the Panel erred by failing to examine the European Communities' arguments under Article 2.1(c) and therefore concluded that the Panel's overall finding under Article 2.1 could not be sustained. However, it was not persuaded that, on the assumption that the allocation of patent rights is a self-standing subsidy, it was "in fact" specific within the meaning of Article 2.1(c) of the SCM Agreement, and thus declined to make such a finding.**

4.2.2.6 Washington State B&O tax rate reduction

4.2.2.6.1 Financial contribution

The Panel evaluated whether the Washington State B&O tax rate reduction in House Bill 2294 for commercial aircraft and component manufacturers constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. On the basis of its review of the Appellate Body's reasoning in *US – FSC* and *US – FSC (Article 21.5 – EC)*, the Panel concluded that, where it is possible to identify a general rule of taxation applied by the Member in question, a "but for" test can be applied to determine whether the challenged measure is an "exception" to that "general" rule. The Panel considered that there was a general rate of taxation of 0.484% for manufacturing and wholesaling activities and 0.471% for retailing activities, and that the reduced taxation rate of 0.2904% applicable under House Bill 2294 to the activities of commercial aircraft and component manufacturers constituted an exception to this rule. The Panel further concluded that, were it not for the exceptional tax rate set out in House Bill 2294, commercial aircraft and component manufacturers would be subject to the higher rates of taxation. Accordingly, the Panel

found that the Washington State B&O tax rate reduction results in the foregoing of revenue otherwise due, and therefore constitutes a financial contribution under Article 1.1(a)(1)(ii) of the SCM Agreement.

The United States argued that the Panel applied an improper standard under Article 1.1(a)(1)(ii) of the SCM Agreement by elevating the "but for" test to the status of a general rule. The United States also alleged two "specific errors of law" regarding the Panel's application of Article 1.1(a)(1)(ii). First, the United States contended that the Panel erred in its identification of the proper benchmark by failing to examine the Washington State B&O tax system as a whole, consisting of 36 activity classifications subject to B&O tax. Second, the United States asserted that the Panel erred in failing to account for the fact that, due to the "pyramiding" inherent in the Washington State B&O tax system, the effective tax rate for aerospace manufacturing exceeded the average effective tax rate for businesses in Washington State. The European Union argued that the Panel did not misinterpret the legal standard. The European Union also maintained that the Panel properly rejected using the range of 36 B&O tax rates in Washington State as the normative benchmark for purposes of establishing whether a financial contribution exists, and that the Panel properly excluded from its analysis consideration of pyramiding and the average effective B&O tax rate in Washington State.

The Appellate Body considered when a government can be found to have foregone revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The Appellate Body recalled core aspects of its reasoning in US – FSC and US – FSC (Article 21.5 – EC) and concluded that WTO Members are sovereign in determining the structure and rates of their domestic tax regimes, and that they must have some flexibility to make adjustments to their systems. The Appellate Body explained that the identification of circumstances in which government revenue that is otherwise due is foregone requires a comparison between the tax treatment that applies to the alleged subsidy recipients and the tax treatment of comparable income of comparably situated taxpayers. First, a panel should identify the tax treatment that applies to the income of the alleged recipients, considering the objective reasons behind that treatment and the reasons underlying any change in that treatment. Second, the panel should identify a benchmark for comparison by developing an understanding of the tax structure and principles that best explains that Member's tax regime, and providing a reasoned basis for what constitutes comparable income of comparably situated taxpayers. Third, the panel should compare the reasons for the challenged tax treatment with the benchmark tax treatment it has identified to determine whether, in the light of the treatment of the comparable income of comparably situated taxpayers, the government is foregoing revenue that is otherwise due.

The Appellate Body then turned to consider the United States' appeal. The Appellate Body noted the Panel's view that Article 1.1(a)(1)(ii) requires a comparison of the fiscal treatment under a challenged measure with that in respect of either (i) a general rule of taxation, or (ii) comparable income of comparably situated taxpayers. This approach suggested that, as long as a general rule of taxation is identified, it is sufficient to conduct an analysis limited to the determination that, but for the challenged measure, higher tax liability would have attached by virtue of the general rule. Although this approach could have led to an overly narrow conception of which rules are relevant in identifying a benchmark, the Panel nevertheless indicated its awareness that the identification of a general rule does not lead invariably to the exclusive application of such a test. The Appellate Body therefore did not consider that the Panel's articulation of the legal standard was inconsistent with Article 1.1(a)(1)(ii) of the SCM Agreement.

The Appellate Body examined next the Washington State B&O tax rate reduction provided for in House Bill 2294 and found that it established an exceptional rate of taxation of 0.2904% below the general rates of 0.484% for manufacturing and wholesaling activities and 0.471% for retailing activities. Although the Appellate Body noted the limitations inherent in identifying a benchmark within a domestic tax regime solely by reference to historical tax rates, it considered that the higher taxation rates did not reflect only what *previously* applied to commercial aircraft manufacturing activities, but rather what would *currently* apply to these activities if certain conditions for the lower rates were not met. The Appellate Body also considered that the Panel examined the relative tax treatment of other taxpayers engaged in the same broad category of business activities as commercial aircraft manufacturers so as to ensure that the "exceptions" were not so numerous as to undermine the existence of a "general rule". In these circumstances, the Appellate Body found that the Panel properly concluded that the application of the tax rate

of 0.2904% under House Bill 2294 indicated the foregoing of government revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

The Appellate Body rejected the United States' arguments that the Panel erred in the application of the legal standard under Article 1.1(a)(1)(ii). First, the Appellate Body was not persuaded that the Washington State B&O tax system as a whole could serve as a benchmark, whether on the basis of all of the tax rates within that system, or on the basis of an average representing all such rates. Such an exercise either fails to engage the inquiry as to an appropriate benchmark, or leads to potentially indiscriminate outcomes whereby rates at or above an average rate would appear permissible, whereas rates below that benchmark would be deemed a financial contribution. Second, the Appellate Body saw no indication in the Panel record that adjusting tax rates to approximate the average effective tax rate, adjusted to account for "pyramiding" within the Washington State tax system, reflected a principle under the Washington State B&O tax regime. **The Appellate Body therefore upheld the Panel's finding that the reduction in the Washington State B&O tax rate applicable to commercial aircraft and component manufacturers constitutes the foregoing of revenue otherwise due, and therefore a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.**

4.2.2.7 Specificity

The Panel also evaluated whether the Washington State B&O tax rate reduction granted under House Bill 2294 is a subsidy that is specific within the meaning of Article 2.1(a) of the SCM Agreement. The Panel considered that the taxation subsidies under House Bill 2294 are expressly and unambiguously limited to enterprises manufacturing commercial airplanes or components for such airplanes, and that this constitutes a limitation either to an "industry" or to a "group of enterprises" within the meaning of Article 2 of the SCM Agreement. The Panel also examined the broader Washington State B&O taxation system and concluded that, although the aerospace industry was not alone in receiving an exception to the general rates of taxation for manufacturing, wholesaling, and retailing activities, the Panel was not persuaded that this led to a finding of non-specificity under Article 2.1(a). The Panel considered that if the differential B&O tax rates were truly implemented as part of a common subsidy programme, it would be reasonable to expect some links between the individual tax reductions, for example, in the timing of their introduction, in their purpose, or in their levels. The Panel found, however, that the United States had not provided evidence to suggest that the reductions to separate industries are part of a wider, generally available and explicit programme of tax reductions, and that, in fact, some of the evidence submitted by the United States ran counter to this argument. The Panel thus found that the Washington State B&O tax rate reduction granted under House Bill 2294 was a subsidy that is specific within the meaning of Article 2.1(a) of the SCM Agreement.

On appeal, the United States claimed that the Panel failed, in the application of Article 2.1(a), to consider the entirety of the subsidy that the Panel had found to exist. In the United States' view, the Panel failed to analyze whether, taking all of the differential tax rates in the Washington State tax system together, access to the subsidy was limited to certain enterprises under Article 2 of the SCM Agreement. First, the United States argued that, because the Panel had found that the application of a tax rate lower than the standard rate constitutes a subsidy under Article 1 of the SCM Agreement, the Panel was required to make an assessment of whether access to *that* subsidy was explicitly limited to certain enterprises. Second, the United States challenged the basis for the Panel's conclusion that it was not appropriate to consider the various B&O differential tax rates as part of the same subsidy programme. The European Union contended that the Panel needed to examine only House Bill 2294 to arrive at a finding of *de jure* specificity, but that the Panel nevertheless proceeded to evaluate the B&O taxation system as a whole. In doing so, the European Union maintained, the Panel found that there was no evidence to justify considering all of the B&O tax rate exceptions together as a single measure for purposes of its analysis. According to the European Union, the Panel rightly called for evidence of a connection among the multiple tax breaks in order to determine that they were part of a common subsidy programme, and noted the lack of any such evidence on the Panel record.

The Appellate Body explained that, 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 one must examine the legislation pursuant to which the granting authority operates, or express acts of the granting authority. That inquiry requires careful scrutiny of the relevant legislation to determine whether the subsidies are provided pursuant to the same subsidy scheme. Once a

subsidy scheme is identified, then the question is whether that subsidy is explicitly limited to "certain enterprises". The Appellate Body considered that for purposes of the assessment under Article 2.1, the subsidy as defined in Article 1.1 was the Washington State B&O tax rate reduction contained in House Bill 2294. The Panel, however, did not limit the scope of its analysis to the B&O tax rate reduction enacted under House Bill 2294, but rather proceeded to examine the Washington State B&O taxation system as a whole. The Appellate Body considered that the Panel correctly broadened the scope of its analysis to the Washington State B&O tax regime and sought to verify whether under this broader legal framework the same subsidy was being made available to other enterprises or industries. The Appellate Body understood the Panel to have concluded that the same subsidy was not made available to other enterprises under the Washington State B&O tax regime, and that the other differential B&O tax rates contained in the Washington State tax code were not part of the same subsidy scheme as the challenged B&O tax rate reduction. The Appellate Body therefore concluded that the Panel's approach was consistent with the scope of the inquiry under Article 2.1(a).

The Appellate Body further agreed with the Panel that, where multiple subsidies are part of the same subsidy scheme, one would expect to find links or commonalities between those subsidies. The Appellate Body recognized that the Washington State B&O tax rate reduction, together with the other differential tax rates, were expressed as exceptional rates to the general rates set out in the same tax code. The Appellate Body considered that the fact that a series of differential tax rates are located in the same section of the tax code, while relevant, cannot be dispositive as to whether they constitute part of the same subsidy scheme for purposes of a specificity analysis under Article 2.1(a). The Appellate Body further noted that House Bill 2294 did not indicate that it was enacted as part of a broader subsidy scheme, and that the Panel record supported the Panel's statement that the differential tax rates were introduced at a range of different times and for a variety of different purposes. Furthermore, although the United States had identified that "pyramiding" was a problem associated with the B&O tax, the Appellate Body noted the Panel's finding that exhibits on the Panel record did not support the conclusion that any tax rate reductions were introduced in order to combat this problem. The Appellate Body further noted that, apart from observing that all of the differential tax rates are contained within the *Revised Code of Washington*, the United States had not referred to any evidence on the Panel record to support the proposition that the B&O tax rate reduction applicable to commercial aircraft and component manufacturers and the other differential tax rates form part of the same subsidy scheme. Accordingly, the Appellate Body found that the Panel had a proper basis to conclude that the differential B&O tax rates set out in the *Revised Code of Washington* do not form part of a common subsidy programme. **The Appellate Body therefore upheld the Panel's finding that the Washington State B&O tax rate reduction granted under House Bill 2294 is a subsidy that is specific within the meaning of Article 2.1(a) of the SCM Agreement.**

4.2.2.8 City of Wichita IRBs – Specificity

The Panel considered whether tax abatements provided to Boeing pursuant to IRBs issued by the City of Wichita are a specific subsidy under Article 2.1(a) of the SCM Agreement. The Panel considered that the relevant Kansas State statutory provisions authorizing the issuance of IRBs by Kansas cities and counties did not expressly limit the availability of the subsidy within the meaning of Article 2.1(a). The Panel therefore turned to consider the European Communities' claim of *de facto* specificity under Article 2.1(c) of the SCM Agreement, and in particular whether Boeing and Spirit were granted "disproportionately large" amounts of IRB subsidies within the meaning of that provision. The Panel considered that, in assessing whether a subsidy granted to certain enterprises is "disproportionately large", it is necessary to convert the amount of the subsidy into a ratio and then to assess whether that ratio is lacking proportion. The Panel noted that there is no explicit guidance in the text of Article 2.1(c) regarding against what the relative amount of subsidy received by Boeing and Spirit should be compared. Although the Panel considered that neither of the approaches suggested by the parties was completely satisfactory, it ultimately endorsed the European Communities' approach of assessing Boeing's and Spirit's receipt of IRB subsidies against a benchmark that measured the companies' share of manufacturing employment in the City of Wichita. The Panel concluded that there was a significant disparity between the proportion of IRBs received by Boeing and Spirit and their place within the goods sector of the economy, as indicated by the proportion of the sector they employ. Accordingly, the Panel found that the IRB tax abatements granted to Boeing and Spirit were disproportionately large, and therefore specific to "certain enterprises" within the meaning of Article 2.1(c) of the SCM Agreement.

The United States challenged the Panel's decision to use company-specific employment levels of Boeing and Spirit, relative to total manufacturing employment in the City of Wichita, as the benchmark for its disproportionality analysis. The United States considered that the Panel's approach, by focusing on a single numerical ratio, and using the total level of manufacturing employment within the jurisdiction of the granting authority as its baseline, did not provide a valid benchmark against which to measure the proportionality of a subsidy like the IRBs. The European Union argued that the United States failed to present any evidence to demonstrate that the share of IRB benefits received by Boeing and Spirit indeed reflected its participation in the Wichita economy, or that reliance on employment levels as a measure of economic participation was misleading.

The Appellate Body noted that the Panel's conclusion that the IRB subsidies are not specific within the meaning of Article 2.1(a) was not appealed. The Appellate Body further observed that the Kansas State authorizing statute expresses eligibility for IRB benefits in very broad terms, noting no limitations on access to a particular enterprise or industry or group of enterprises or industries. The statute also indicates that its purpose is to encourage new business to locate in Kansas State, to assist in the retention of existing business, and to promote economic stability through the diversification of industry. In the Appellate Body's view, these and other indicators pointed to broad access to IRB benefits without any apparent limitation to a particular enterprise or industry, or group thereof. Moreover, the Appellate Body considered that, although the European Communities had not presented a claim under Article 2.1(a), it was correct for the Panel to have assessed whether the legislation pursuant to which the IRB benefits were granted explicitly limited access to certain enterprises within the meaning of that provision.

The Appellate Body turned next to review the Panel's consideration of the IRB subsidies under Article 2.1(c). The Appellate Body considered that the inquiry under Article 2.1(c) focuses on whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure. Concerning the factor under Article 2.1(c) relating to disproportionately large amounts of subsidy, this inquiry requires a panel to examine the reasons as to why the actual allocation of "amounts of subsidy" differs from an allocation that would be expected to result 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 the Appellate Body's view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the 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.

On that basis, the Appellate Body turned to consider the reasons as to why the allocation of IRB subsidies granted to Boeing and Spirit by the City of Wichita may or may not be disproportionately large. The Appellate Body noted that, because IRBs are available to enterprises that seek to purchase, construct, or improve various types of commercial or industrial property, enterprises that would seek to have the City of Wichita issue IRBs on their behalf are those that intend to invest in property development. Although the Appellate Body recognized that enterprises that are actually in a position to avail themselves of IRB benefits at any given time represent only a subset of all enterprises in Wichita, it nevertheless considered that, on the basis of the conditions established for IRB eligibility, a wide distribution of those benefits across various sectors of the Wichita economy was expected. In the Appellate Body's view, the fact that Boeing and its successor received over two thirds of all IRB property tax abatements from the City of Wichita over a 25-year period provided a reason to believe that the IRB subsidies were granted in disproportionately large amounts to these enterprises.

The Appellate Body did 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 was particularly meaningful for the inquiry of whether the IRB subsidies granted to Boeing and Spirit were disproportionately large. Although it acknowledged that examining qualifying investments would have been a reasonable basis on which to show why the 69% figure did not indicate that IRB subsidies were granted in disproportionately large amounts, the Appellate Body did not see that the United States provided evidence in support of such an explanation. The Appellate Body moreover did not see that the United States demonstrated 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. The United States thus failed to provide 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 the expected distribution of the subsidy in accordance with the conditions for eligibility set out in the relevant legislation. **The Appellate Body therefore upheld, albeit for different reasons, the Panel's finding that the IRB subsidies provided by the City of Wichita to Boeing and Spirit are specific within the meaning of Article 2.1(c) of the SCM Agreement.**

4.2.3 Adverse effects

4.2.3.1 Technology effects of the aeronautics R&D subsidies

4.2.3.1.1 The Panel's analysis

In this part, the Panel considered whether, as alleged by the European Communities, the aeronautics R&D subsidies caused adverse effects to Airbus through their "technology effects". The aeronautics R&D subsidies, which the Panel found to amount to at least $2.6 billion, consist of: (i) payments made to Boeing and access to NASA facilities, equipment, and employees provided to Boeing by NASA pursuant to procurement contracts and Space Act Agreements entered into under the eight aeronautics R&D programmes at issue; and (ii) payments made to Boeing and access to USDOD facilities provided to Boeing by USDOD pursuant to assistance instruments entered into under the 23 USDOD RDT&E programmes at issue. By "technology effects", the European Communities meant that the aeronautics subsidies "have helped Boeing develop, launch and produce a technologically-advanced 200-300 seat LCA much more quickly than it could have on its own".

The Panel structured its analysis of the alleged technology effects of the aeronautics R&D subsidies in two stages, beginning with an analysis of the effect of the subsidies on Boeing's offering of the 787, and followed by an analysis of the effect of the subsidies on Airbus' prices and sales. The Panel explained that it would take into account relevant non-attribution factors, and that its analysis would be counterfactual in nature.

At the close of its analysis of the effects of the subsidies on Boeing, at the first stage, the Panel stated that the "aeronautics R&D subsidies contributed in a genuine and substantial way to Boeing's development of technologies for the 787". The Panel also concluded that, without the subsidies, Boeing would not have been able to launch an aircraft incorporating all of the technologies that are incorporated on the 787 in 2004, with promised deliveries commencing in 2008. At the second stage of its analysis in which the Panel considered the effect of the aeronautics R&D subsidies on Airbus' prices and sales, the Panel concluded that, but for the subsidies, Airbus would not have suffered significant lost sales, a threat of displacement or impedance of exports from Australia, Iceland, Kenya, and Ethiopia, or significant price suppression. On the basis of these two intermediate conclusions, the Panel found overall that the effect of the aeronautics R&D subsidies was a threat of displacement and impedance of European Communities' exports from third-country markets within the meaning of Article 6.3(b) of the SCM Agreement, with respect to the 200 300 seat LCA market, and significant lost sales and significant price suppression, within the meaning of Article 6.3(c) of the SCM Agreement with respect to that product market, each of which constitute serious prejudice to the interests of the European Communities within the meaning of Article 5(c) of the SCM Agreement.

4.2.3.1.2 Claims and arguments on appeal

On appeal, the United States sought reversal of a number of intermediate findings made by the Panel at both stages of its causation analysis, which it alleged undermined the overall conclusion that the aeronautics R&D subsidies caused adverse effects to Airbus, through its technology effects. With respect to the first stage, the United States identified five main findings and/or reasoning of the Panel (referred to below) that it alleged, when considered in their totality, attenuate the genuine and substantial causal link between the aeronautics R&D subsidies and the adverse effects. Separately, the United States argued that the Panel's counterfactual analysis relating to the first and second stages was inconsistent with the legal requirements of Articles 5 and 6 of the SCM Agreement. Finally, the United States challenged discrete elements of the Panel's reasoning that the aeronautics R&D subsidies caused serious prejudice to Airbus in the form of significant lost sales, threat of displacement and impedance, and significant price suppression. For

its part, the European Union disagreed that any part of the Panel's analysis was flawed, and objected to many of the United States' arguments on the ground that they implicated the Panel's weighing of facts and evidence and should have been brought as claims challenging the Panel's objectivity under Article 11 of the DSU.

4.2.3.1.3 The Appellate Body's findings

4.2.3.1.3.1 The Panel's analysis of the effects of the aeronautics R&D subsidies on Boeing

As a preliminary matter, the Appellate Body identified and addressed one of the key issues of contention between the parties, namely, the proper characterization of the United States' claims and, in particular, whether they implicate the Panel's application of the legal standard to the facts of this dispute, or, rather, exclusively the Panel's appreciation of the facts. The United States argued that, despite having appropriately identified the legal requirements under Articles 5(c) and 6.3, in applying them, the Panel had taken "impermissible short-cuts". The European Union countered that many of the United States' arguments reflected no more than mere disagreement with the Panel's factual findings.

The Appellate Body recalled that the causation requirement under Articles 5(c) and 6.3 involves the establishment of "a genuine and substantial" causal link between the subsidies in question and the alleged adverse effect. It further recognized the difficulty of distinguishing clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact. The Appellate Body highlighted that a party is free to frame its claim on appeal as it sees fit, but that important consequences flow from that choice, including the standard of review that will apply in adjudicating that claim. While noting that the Panel in this dispute used language reminiscent of the "genuine and substantial" legal standard articulated by the Appellate Body – for instance, in stating that the aeronautics R&D subsidies contributed in a "genuine and substantial" way to the development of the 787 – the Appellate Body did not consider this alone to be determinative. The Appellate Body was cognisant that in reviewing a panel's findings, it is often difficult to disentangle legal conclusions or legal reasoning from factual findings, and that where findings were ambiguous, it would inevitably fall on the Appellate Body to determine whether a finding – and a related challenge to it on appeal – is properly characterized as legal or factual, in the circumstances of a specific case. It explained that it would proceed to evaluate the United States' claims as framed, namely under the relevant legal standard, save where it had itself determined that the Panel's finding, and the United States' challenge to it, relate exclusively to the Panel's factual assessment, which it could not review absent a claim under Article 11 of the DSU.

The Appellate Body then proceeded to consider each of the grounds of the United States' appeal.

First, the United States alleged that the Panel erred when it "extrapolated" findings with respect to three NASA composites programmes – the ACT, AST, and R&T Base programmes – to the remaining R&D programmes that were less relevant and bore little relation to the technologies used on the 787. The Appellate Body dismissed this argument on the ground that the causal link found by the Panel was based on its consideration that all of the NASA and USDOD programmes, to differing degrees, contributed to the process of technological development that eventually led to the commercialization of the 787 technologies, and did not rest on "extrapolation". This included even those programmes that ended in failure or did not result in the creation of technologies directly applied on the 787. Far from attenuating or diluting any link, the Panel's assessment of the role of the remaining R&D programmes buttressed its overall finding that all of the aeronautics R&D subsidies contributed to the development of the technologies used on the 787.

Second, the United States argued that, by misreading a table in a Study relating to NASA's system of categorizing research according to its level of maturity – the Peisen Study – the Panel miscalculated and understated the time and resources that Boeing, on its own, was required to invest to bring the technologies used on the 787 to commercial viability. Even though the Appellate Body agreed that the Panel had in fact misread the table, and therefore underestimated the amount of time taken by Boeing to develop technologies, it dismissed the United States' claim because it involved an error in the appreciation of the facts, and consequently could only be reviewed under Article 11 of the DSU. In any event, the Appellate Body did not consider that the

numerical error by the Panel vitiated the overall finding of the Panel that the aeronautics R&D subsidies facilitated an earlier launch of the 787 than would have otherwise been possible.

The third claim of the United States related to the Panel' assessment of the role of Boeing and its suppliers in the development of the technologies used on the 787. While appreciating their important contributions, and in particular Boeing's investment at early stages of research, the Appellate Body did not consider that the Panel had erred in concluding that the aeronautics R&D subsidies contributed in a genuine and substantial way to the 787. Recalling case law that in order to establish the existence of a genuine and substantial cause, a panel need not determine the subsidy in question to be the *sole*, or even the *only substantial* cause of the alleged adverse effect, the Appellate Body referred to findings of the Panel that the subsidies operated complementarily with Boeing's own internal R&D efforts, and that in the earlier stages of research, the subsidies alleviated the initial burden for the private sector when technology was at its lowest stage of maturity and where risk was highest. The United States had failed to explain how the contribution of Boeing and its suppliers attenuates that important role. Separately, the Appellate Body dismissed the sole claim brought by the United States under Article 11 of the DSU in relation to technology effects, in respect of a finding by the Panel that "Boeing's ability to use other companies' commercially available technologies on the 787 was due to 'the knowledge and experience that Boeing obtained pursuant to the aeronautics R&D subsidies as an integrator of the various technologies'". The Appellate Body did so because the United States had failed to demonstrate that this statement lacked an evidentiary basis, or was material to the Panel's overall conclusion that the aeronautics R&D subsidies contributed to the 787 technologies.

Fourth, the United States claimed that a finding of the Panel that there are restrictions on the dissemination of certain aspects of NASA-funded research results, and that public dissemination does not occur immediately, implied that Boeing restricted dissemination only for a limited time. The eventual dissemination meant that the Panel should have discounted the value of the NASA subsidies which it had estimated to be worth $2.6 billion. The Appellate Body was not swayed by this argument because the most commercially valuable information was subject to data protection clauses in NASA contracts; the United States had not explained how the competitive position of Airbus was improved – or how Airbus suffered lesser adverse effects – because "certain aspects" of the results of the NASA research programmes were disseminated nor what the impact of any reduction in the $2.6 billion amount of the NASA subsidies would be on the Panel's finding; and finally, the claim brought by the United States would require the Appellate Body to recalculate the value of the subsidies, which was outside the scope of appellate review.

The final argument of the United States concerned the magnitude of the subsidies, which the Panel had estimated to be worth at least $2.6 billion. The Appellate Body agreed with the Panel that, although when compared to Boeing's own R&D expenditure and revenues, this amount was not large, consideration of relative cash value of the subsidies alone did not diminish the Panel's view that the subsidies allowed Boeing to overcome the disincentives in investing in risky aeronautics R&D.

In sum, the Appellate Body rejected the claim under Article 11 of the DSU, and dismissed all five of the United States' arguments raised on appeal, either because they related solely to factual matters not subject to an Article 11 challenge, or because, on the merits, the United States had not succeeded in demonstrating that the Panel failed properly to find the existence of a genuine and substantial causal link. The Appellate Body concluded that the Panel did not err in stating, in paragraph 7.1773 of the Panel Report, that "the aeronautics R&D subsidies contributed in a genuine and substantial way to Boeing's development of technologies for the 787" in 2004.

4.2.3.1.3.2 The Panel's counterfactual analysis

The second set of arguments raised by the United States relate to the counterfactual analysis conducted by the Panel which led it to conclude that "absent the aeronautics R&D subsidies, Boeing would not have been able to launch an aircraft incorporating all of the technologies that are incorporated on the 787 in 2004, with promised deliveries commencing in 2008". The Panel had arrived at this conclusion having stated that the two "most likely" scenarios befalling Boeing if it had not received the subsidies were: first, that Boeing would have developed a 767-replacement that incorporated all of the technologies that are incorporated on the 787, with a "significantly later" launch and promise of first deliveries; and second that Boeing would have launched a 767

replacement in 2004 that was technologically superior to the 767, but not as technologically innovative as the 787 (the "767-plus" scenario). As neither of these two scenarios involved the launch of a 787 in 2004, the Panel considered that it did not have reach "any definitive view" as to which of these outcomes would have occurred.

On appeal, the United States challenged the Panel's counterfactual assessments at both the first and second stages of its analysis. Before addressing them, the Appellate Body made some general observations about how panels should assess counterfactual analyses pursuant to Articles 5(c) and 6.3. It noted that such an analysis may be useful but that the precise way in which it is deployed will vary depending on how the causal problem presents itself in a particular dispute. A counterfactual analysis may be highly quantitative, or predominantly qualitative in nature, or it might involve both quantitative and qualitative elements. The Appellate Body also observed that a complaining party may elect to employ a counterfactual analysis, and might find it difficult to establish causation of certain Article 6.3 phenomena (for example, impedance and price suppression) without such counterfactual argumentation. A panel evaluating the respective claims and defences of the parties will have to give due consideration to the use of a counterfactual analysis, especially when such an analysis forms part of the arguments submitted by the parties. The panel might decide to accept the counterfactual scenario(s) proposed by one party as to the market situation that would have prevailed absent the subsidies, but it is not bound to do so. A panel may even find it appropriate to construct its own counterfactual scenario(s). A panel is not required to identify and explore every possible hypothetical market scenario, especially where the parties themselves have not elaborated upon, or substantiated the likelihood of, such possible scenarios. However, having selected a reasonable scenario, a panel should pursue its counterfactual analysis in a coherent and consistent fashion.

In this dispute, the Appellate Body understood the Panel's counterfactual analysis to be underpinned by the two counterfactual scenarios presented by the parties: the first, as argued by the European Communities was that, without the subsidies, Boeing would not have launched the 787 in 2004, but rather would have done so later; and the second, proposed by the United States was that, without the subsidies, Boeing would have launched the same 787 aircraft in 2004 because it had the experience and financial capacity to do so. The Panel had engaged with these two scenarios in its analysis, and at the close of the first stage of its analysis concluded, in favour of the European Communities, that the aeronautics R&D subsidies allowed Boeing to deliver the 787 earlier than would have otherwise been possible. At the second stage, the Panel had also agreed with the European Communities when it concluded that a 787 aircraft would not have been present in the market until "years later" (that is, not available to customers until well after 2004). Under that scenario, the market, during the reference period would most likely have consisted of the A330 and the 767, which were the two models available before 2004. As the A330 was the "undisputed market leader" in the 200-300 seat LCA market, with an 82% share of the market in 2003, in the absence of subsidies, most sales would likely had gone to that aircraft, and with increased demand, the A330 would have maintained or even raised its prices. As the Appellate Body saw it, therefore, none of the arguments or evidence before the Panel supported a pursuit of a 767-plus scenario, referred to by the Panel.

Turning to the specific arguments, the Appellate Body rejected the United States' claims to set aside the Panel's counterfactual analysis as related to the first stage since most of the arguments largely coincide with ones that the Appellate Body had dealt with, and dismissed, in the previous part of the Report. These included arguments relating to Boeing's own involvement in research alongside NASA, its access to research facilities, as well as its substantial financial capabilities. With respect to the United States' criticisms of the counterfactual analysis at the second stage, the Appellate Body noted that these arguments were premised on the scenario involving a 767-plus which it had already determined was not based on any counterfactual arguments of the parties, and for which there was no support in the Panel's reasoning or factual findings.

For the above reasons, the Appellate Body found that the Panel did not err in its use of a counterfactual analysis and therefore rejected the United States' request for consequential reversal of the Panel's finding that the aeronautics R&D subsidies caused adverse effects to the interests of the European Communities.

4.2.3.1.3.3 The Panel's analysis of the effects of the aeronautics R&D subsidies on Airbus

The Appellate Body addressed three sets of arguments by the United States challenging the Panel findings of significant lost sales; threat of displacement and impedance; and significant price suppression.

Significant lost sales

The Panel found that four of the 10 sales campaigns referred to by the European Communities in support of its claim that the aeronautics R&D subsidies caused lost sales – that is, those involving Qantas, Ethiopian Airlines, Kenya Airways, and Icelandair – were lost by Airbus A330 and Original A350 because of the subsidy-induced performance characteristics, and 2008 delivery date, of the 787. The United States made two arguments concerning these findings. First, it alleged that the Panel's finding wrongly implies that sales of both the A330 and the Original A350 were lost for each sale gained by Boeing; and second that, as regards the Ethiopian Airlines, Icelandair, and Kenya Airways sales campaigns, the Panel failed to take into account "customer-specific situations" showing that Boeing's victory in these campaigns was not the effect of the aeronautics R&D subsidies.

With respect to the first argument, the Appellate Body disagreed that the Panel "double-counted" lost sales. While the United States' argument appeared to focus on an isolated Panel statement that, but for the subsidies, Airbus "would have made additional sales of the A330 *and* Original A350", in its analysis, the Panel neither stated nor implied that it considered that two sales had been lost by Airbus for each 787 ordered. The Appellate Body referred to findings of the Panel that customers chose the 787 because it is more technologically advanced than either the A330 or the Original A350, and because of its low price. The evidence demonstrated that, in at least one sales campaign, Airbus did not offer either of these two aircraft and, in another, both the A330 and Original A350 were offered. Second, the Appellate Body observed that, in its findings of threat of displacement and impedance, the Panel stated that Airbus would have obtained additional orders for its "A330 *or* Original A350", which also discounted the United States' double-counting argument. Finally, the Appellate Body highlighted the ultimate conclusion of the Panel which referred to the 200-300 seat LCA market generally, and did not mention either or both specific Airbus LCA models.

The Appellate Body also rejected the second argument of the United States regarding "customer-specific situations". While expressing some concerns with the scarcity of the Panel's analysis as to why the presence of an all-Boeing fleet was decisive for Continental Airlines, All Nippon Airways, and Japan Airlines, but not for Ethiopian Airlines, Icelandair, and Kenya Airways (which shared that characteristic), the Appellate Body considered that this argument could only be reviewed under Article 11 of the DSU because the United States sought to have the Appellate Body attribute different weight to a specific factor than did the Panel and the United States had not raised a claim under that provision. The Appellate Body made identical findings with respect to the argument that the Icelandair sales campaign shared features with the Royal Air Maroc sales campaign for which the Panel rejected the European Communities' claim of lost sales because of Airbus' "failure to submit a formal offer within the time limit specified".

In the light of the above, the Appellate Body dismissed the United States' request for reversal of the Panel's lost sales findings.

Threat of displacement and impedance

The United States alleged that the Panel failed to establish that Ethiopia, Kenya, and Iceland constitute third-country "markets" within the meaning of Article 6.3(b) and moreover, that the low volume of orders generated in the sales campaigns involving Ethiopia, Iceland, and Kenya demonstrates that there was no "trend" of Airbus exports being threatened with displacement and impedance.

The Appellate Body noted that the Panel's finding of a threat of displacement and impedance was based on delivery data for the four countries where the sales campaigns on which its lost sales finding was based took place. It also noted that the Panel relied on order data that was capable of

showing that future imports or exports would be displaced or impeded and, therefore, of establishing the existence of a threat of serious prejudice.

With respect to the proper meaning of the term "market" as used in Article 6.3(b) of the SCM Agreement, the Appellate Body recalled its findings in *EC and certain member States – Large Civil Aircraft* that a market is a place where products compete, and that it can have both geographic and product components. 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. The Appellate Body endorsed the Panel's finding in this dispute that the LCA market is a global market geographically and that competition in each of the three national LCA product markets that it had identified takes place on a worldwide basis. It also did not find fault with the Panel's finding that, in this case, it was "not required to consider whether the European Communities ha[d] established the existence of such country markets". Rather, as the Panel had found, the issue before it was whether, "based on evidence of sales occurring in those countries, [it was] satisfied that there ha[d] been displacement and impedance … in the particular country market." As this approach was consistent with the approach it had taken in *EC and certain member States – Large Civil Aircraft*, the Appellate Body rejected the United States' argument that the Panel erred by assuming the existence of third-country markets.

By contrast, the Appellate Body agreed with the United States that the data and evidence before the Panel relating to Ethiopia, Kenya, and Iceland disclosed insufficient "trends" to warrant a finding of a threat of displacement and impedance for these markets. Recalling guidance in *EC and certain member States – Large Civil Aircraft* that a panel assessing a claim of displacement would have to ascertain that at least a portion of the market share of the exports of the like product of the complaining Member must have been taken over or substituted by the subsidized product, and that it must be possible to discern trends in volume and market share, the Appellate Body was not convinced that there was evidence of the "substitution" or taking over of the market by the 787 in Ethiopia, Kenya and Iceland. With respect to the Panel's findings of impedance, the Appellate Body also noted that impedance refers to a situation where the exports or imports of the like product of the complaining Member would have expanded more had they not been "obstructed", "hindered", or "held back" by the subsidized product. A finding of impedance should be supported by evidence of changes in the relative market share in favour of the subsidized product to demonstrate "clear trends" in the development of the market concerned. However, unlike with displacement, impedance may not be a visible phenomenon, which meant that evidence of trends may not be dispositive. The Appellate Body noted that there was no clear evidence of trends in these third-country markets in terms of impedance either. Moreover, as with its findings of displacement, the Panel did not provide a specific explanation or reasoning as to how it reached its finding of a threat of impedance.

In the light of the above, the Appellate Body rejected the United States' appeal that the Panel failed to establish third-country "markets" for Iceland, Kenya, and Ethiopia, but reversed the Panel's finding that there was a threat of displacement and impedance in those same third-country markets because of the absence of clear trends.

Significant price suppression

The United States sought reversal of "three findings" of the Panel, namely: (i) that an effect of the aeronautics R&D subsidies was significant price suppression with regard to the A330 in the world market; (ii) that an effect of the aeronautics R&D subsidies was significant price suppression with regard to the Original A350 in the world market; and (iii) that an effect of the aeronautics R&D subsidies was significant price suppression with regard to Airbus 200-300 seat LCA.

As regards the first argument that the Panel improperly relied on a perceived coincidence between the 2004 launch of the 787 and a decline of prices for the A330, the Appellate Body referred to (indexed) pricing data for the A330, as well as market share trends in the 200-300 seat LCA market (based on orders from 2000-2006) which the Panel had relied on to conclude that the effects of the aeronautics R&D subsidies was price suppression. The Appellate Body noted that the Panel had found that the evidence – showing declining prices of the A330 in the reference period and an upswing in the 787 market share in the light of strong demand – was consistent with what one would expect to occur from the introduction of a technologically-superior aircraft, offering operating cost advantages over older-technology aircraft, for around the same price. The

Appellate Body was satisfied that the Panel considered the relevance of the price and market share trends and did not find error in the inferences and conclusions that it drew from the evidence.

The second set of arguments relate to the evidence relied on by the Panel for the Original A350. In the United States' view, the Panel's finding was in error because the Panel did not rely on pricing data, but rather on "anecdotal evidence" relating to sales campaigns representing 30% of sales of the Original A350 in the 200-300 seat LCA market. In rejecting these arguments, the Appellate Body noted first that evidence from sales campaigns which accounted for one third of Original A350 sales during the reference period constituted direct and sufficiently representative evidence of what was happening to the prices of the Original A350 and therefore provided a sufficient basis to conclude that there was price suppression with respect to the Original A350. Second, the Appellate Body rejected the argument that price trend data was indispensable for a finding of price suppression for the Original A350. The Appellate Body noted that, while price trend data was relevant to a price suppression analysis, it was not conclusive of the existence of price suppression. Finally, the Appellate Body agreed with the European Union that pricing trends for the Original A350 would not have been particularly probative in this dispute since prices for the Original A350 were never unaffected by the existence of the 787 given that the Original A350 was launched in a market where the effects of the subsidies were already being felt.

Finally, the United States argued that the Panel was required, but failed, to determine the existence of significant price suppression for the product "as a whole", comprising the A330, Original A350, and A350XWB-800. The Appellate Body did not consider the Panel's approach to be in error. With respect to the A350XWB-800, the United States had not pointed to evidence that consideration of prices for this model would change the Panel's conclusion. With respect to the A330 and Original A350, the Appellate Body found the evidence relied on by the Panel to be sufficient since the Panel had reviewed pricing data for the A330 (accounting for 65.7% of total sales of Airbus aircraft), and, as noted above, had relied on evidence relating to the sales of the Original A350 (accounting for 30.4% of total Original A350 sales, or 10.4% of overall Airbus orders for 200-300 seat LCA during the reference period). For these reasons, the Appellate Body disagreed that the Panel erred in its treatment of the evidence concerning the prices of Airbus LCA in the 200-300 seat LCA market, and in concluding that the effect of the aeronautics R&D subsidies was significant price suppression with respect to the 200-300 seat LCA market.

4.2.3.1.4 Conclusion

In sum, having addressed the grounds of the United States' appeal concerning the Panel's analysis of the technology effects of the aeronautics R&D subsidies, the Appellate Body upheld, albeit for different reasons, the Panel's overall conclusion, in paragraphs 7.1797, 7.1854(a), and 8.3(a)(i) of the Panel Report, that the aeronautics R&D subsidies, through their technology effects, caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) and Article 6.3(b) and (c) of the SCM Agreement with respect to the 200-300 seat LCA market.

4.2.3.2 Article 11 of the DSU

In explaining, how it would conduct its assessment of serious prejudice as regards the effects of the USDOD measures, the Panel recalled that it had found that only funds provided pursuant to assistance instruments (and not funds provided pursuant to procurement contracts) could be characterized as specific subsidies. The Panel also referred to its finding that two of the 23 USDOD RDT&E programmes, namely, the ManTech and DUS&T programmes, "were predominantly funded through cooperative agreements or other assistance instruments". The word "predominantly", used in the Final Report, had not appeared in the corresponding sentence of its Interim Report. The Panel felt that it could safely assume that the effects of the ManTech and DUS&T programmes pertained to the effects of assistance instruments. The Panel, however, found itself unable to take the same approach for the other 21 USDOD RDT&E programmes because there was insufficient evidence on the record as to whether those other RDT&E programmes funded "predominantly" assistance instruments. Accordingly, the Panel did not analyze the effects of those 21 programmes.

On appeal, the European Union contended that the Panel failed to ensure due process on two grounds: (i) the Panel's "predominance" approach, set out for the first time in the Final Report, could not have been anticipated and, consequently, the European Communities did not have a "meaningful opportunity to respond to" it; and (ii) the Panel failed to seek from the United States the information necessary to apply its "predominance" test, that is, to determine the extent to which the 21 USDOD RDT&E programmes were funded pursuant to assistance instruments rather than procurement contracts. In response, the United States argued that the Panel's approach was not "unexpected" or "surprising", and that the Panel was not obliged, under Article 13 of the DSU, to "develop information on behalf of the complaining party".

The Appellate Body first observed that the Panel's approach appeared to have emerged from repeated exchanges between the parties and the Panel over the course of the Panel proceedings. Moreover, even if the word "predominantly" was not used in the Interim Report, the Appellate Body was of the view that the essence of this test could be discerned from other parts of the Interim Report. Accordingly, the Appellate Body found that the mere inclusion of new language in the Final Report did not mean that the Panel had acted inconsistently with Article 11 of the DSU. The Appellate Body further pointed out that, in any event, a panel is not required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving a dispute. Thus, the Appellate Body rejected the first argument raised by the European Union that the Panel failed to accord it a meaningful opportunity to comment on the Panel's "novel" approach.

The Appellate Body then turned to the European Union's argument that the Panel had failed to seek information from the United States necessary to satisfy its "predominance" approach. The Appellate Body observed that the Panel had decided not to include the effects of the other 21 USDOD programmes in its analysis of adverse effects because there was insufficient evidence of the effects of assistance instruments funded under those programmes on the record. However, given that the Panel had decided to conduct its analysis of the effects of the USDOD measures based on the type of contracts that were used, information as to the extent to which assistance instruments were used under each of the USDOD programmes was critical to enable it to do so. Since this information was within the exclusive possession of the United States, the Appellate Body considered that the Panel was required to assume an active role under Article 13 of the DSU in pursuing a train of inquiry that would enable it to apply its "predominance" approach. The Appellate Body, therefore, found that, by failing to exercise its authority to seek out relevant information to satisfy its predominance approach, the Panel acted inconsistently with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it. In its appeal, the European Union further requested the Appellate Body to reverse the Panel's finding that the USDOD programmes "(other than ManTech and DUS&T) do not cause the same effects as the other aeronautics R&D subsidies". The Appellate Body, however, did not view the Panel as having made any such finding. To the contrary, the Appellate Body read the Panel as having recognized that the other 21 USDOD RDT&E programmes may well also have had adverse effects to the extent that they were funded through assistance instruments. The Appellate Body, hence, concluded that there was no finding to reverse as a consequence of the Panel's failure to comply with its duties under Article 11 of the DSU.

4.2.3.3 Price effects

The Panel also evaluated whether the subsidies to Boeing caused, through their effects on the pricing of Boeing LCA ("price effects"), adverse effects in the form of serious prejudice, within the meaning of Articles 5(c) and 6.3 of the SCM Agreement. The Panel noted that, although the European Communities had challenged all of the subsidies by reason of their price effects, it would analyze the price effects of the "tied tax subsidies" – namely, the FSC/ETI subsidies and the Washington State and the City of Everett B&O tax rate reductions – separately from the price effects of the other subsidies, namely, (i) the aeronautics R&D subsidies; (ii) the property and sales tax abatements provided to Boeing pursuant to IRBs issued by the City of Wichita, Kansas; (iii) the Washington State B&O tax credits for preproduction development, computer software and hardware, and property taxes; (iv) the Washington State sales and use tax exemptions for computer hardware, peripherals, and software; (v) the Washington State workforce development programme and Employment Resource Center; (vi) the reimbursement of a portion of Boeing's relocation expenses by the State of Illinois; (vii) the 15-year EDGE tax credits provided by the State of Illinois; (viii) the abatement or refund of a portion of Boeing's property taxes provided by the State of Illinois; and (ix) the payment to retire the lease of the previous tenant of Boeing's new headquarters building in Chicago.

The Panel considered that the tied tax subsidies were subsidies directly tied to sales of individual LCA, and that they operated to lower taxes that Boeing paid and thereby increased Boeing's after-tax profits. The Panel thus concluded that the tied tax subsidies have a far more direct and immediate relationship to aircraft prices and sales than other subsidies at issue in this dispute, such as the aeronautics R&D subsidies. In respect of the FSC/ETI subsidies in particular, the Panel considered that, by virtue of their very nature as export subsidies, they are more likely to cause adverse trade effects. The Panel thus concluded that, because the FSC/ETI subsidies are contingent on Boeing making export sales, it was entitled to determine, absent reliable evidence to the contrary, that by their very nature, they will have trade distortive effects.

The Panel calculated that the FSC/ETI subsidies amounted to approximately $2.2 billion over the period from 1989 to 2006, and approximately $153 million, $142 million, and $140 million, respectively, in the years 2004, 2005, and 2006. The Panel also calculated that, through 2006, Boeing received $13.8 million and $2.2 million in B&O tax rate reductions from the State of Washington and the City of Everett, respectively. The Panel also considered evidence introduced by the parties concerning the magnitude of subsidization in relation to Boeing's revenues. The Panel noted the United States' contention that the FSC/ETI subsidies received by Boeing were too small relative to Boeing's order revenues to have affected Boeing's pricing in a manner causing adverse effects. The Panel also noted the European Communities' argument that, when based on the more relevant measure of Boeing's delivery revenues, the *ad valorem* rates of subsidization are significant. The Panel did not consider that either measure was particularly informative or illustrative of the capacity for the FSC/ETI subsidies to have affected Boeing's prices, and by extension, Airbus' prices and sales. The Panel, however, pointed to evidence that, in its view, clearly pointed to the significance of the FSC/ETI subsidies to Boeing's ability to compete on price against Airbus.

On that basis, the Panel concluded that it had no doubt that the availability of the FSC/ETI subsidies, in combination with the B&O tax subsidies, enabled Boeing to lower its prices beyond the level that would otherwise have been economically justifiable, and that in some cases, this led to it securing sales that it would not otherwise have made, while in other cases, it led to Airbus being able to secure the sale only at a reduced price. The Panel added that, because the FSC/ETI programme had already been in operation prior to 2000, it was not possible for the Panel to ascertain the effects of the subsidies from direct observation of market share and pricing trend data over the 2000-2006 period. The Panel further considered that factors other than the FSC/ETI subsidies that, in the United States' view, explained the prices and performance of Airbus LCA in the 2004-2006 period did not reverse or attenuate the pervasive and consistent pricing advantage that Boeing had in LCA campaigns due to the availability of the FSC/ETI subsidies. The Panel noted that it could decline to make a serious prejudice finding due to the difficulty of precisely calculating the degree to which Boeing's pricing of the 737NG and the 777 was affected by the tied tax subsidies. The Panel was, however, of the view that such an approach would be inconsistent with its obligations to make an objective assessment of the matter as required by Article 11 of the DSU. Instead, the Panel considered it necessary and appropriate to deduce the effects of the FSC/ETI subsidies and the B&O tax subsidies on Airbus' sales and prices over the 2004-2006 period based on commonsense reasoning and the drawing of inferences from its conclusions regarding the nature of the subsidies, the duration of the FSC/ETI subsidies, and the nature of the competition between Boeing and Airbus.

The Panel therefore considered it reasonable to infer, based on the fact that the effects of the subsidies on Airbus' prices would be most acutely felt in particular sales campaigns of strategic importance to Boeing and/or Airbus, that the effects of the subsidies were therefore significant in the sense that Boeing's success in such sales campaigns necessarily constitutes a significant lost sale to Airbus, and that such sales secured by Airbus in the face of Boeing's reduced prices necessarily constitute sales secured at significantly suppressed prices. The Panel also found it inescapable to arrive at the conclusion that the effects of the subsidies on Airbus' prices and sales constitute significant lost sales and significant price suppression, within the meaning of Article 6.3(c) of the SCM Agreement, as well as displacement and impedance of exports from third-country markets, within the meaning of Article 6.3(b). The Panel thus concluded that the effects of the FSC/ETI subsidies and the Washington State B&O tax rate reduction in the 100-200 seat LCA market, and the effects of the FSC/ETI subsidies and the Washington State and City of Everett B&O tax rate reductions in the 300-400 seat LCA market, were: (i) to significantly suppress Airbus' prices in sales in which it competed against Boeing; (ii) to cause Airbus to lose significant sales; and (iii) to displace and impede EC exports in third-country markets. The Panel

determined that the City of Everett B&O tax rate reduction applies to the 777 and 787 families, but not to the 737NG family. The European Communities did not claim that the FSC/ETI subsidies had adverse effects in the 200 300 seat LCA market, and the Panel conducted its analysis on the basis that these subsidies had no effects in that product market. For the 200-300 seat LCA market, the Panel therefore considered the price effects of only the Washington State and the City of Everett B&O tax rate reductions, and found that there was insufficient evidence to conclude that these subsidies were of a magnitude that would enable them, on their own, to have such an effect on Boeing's prices of the 787 so as to cause Airbus to suffer serious prejudice. The European Union's appeal of this finding is addressed in the next section on cumulation.

The United States requested that the Appellate Body reverse the Panel's findings of adverse effects on the grounds that, in reaching them, the Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) and (c) of the SCM Agreement. According to the United States, the Panel failed to undertake a proper analysis of these subsidies, and therefore did not establish a genuine and substantial relationship of cause and effect between the subsidies and the adverse effects alleged by the European Communities. The United States also argued that the Panel committed specific errors in reaching its findings of significant price suppression, significant lost sales, and displacement and impedance. The European Union responded that each of these allegations by the United States is baseless, and that the United States was improperly using its appeal to repeat arguments that it had advanced unsuccessfully before the Panel. The European Union also maintained that the United States' appeal presented an incomplete account of the Panel's analysis and findings, and that, contrary to what the United States claimed, the Panel reached findings that complied with the relevant requirements of Articles 5(c) and 6.3(b) and (c) of the SCM Agreement.

The Appellate Body addressed the United States' appeal by first considering general aspects of the Panel's causation analysis relating to the United States' allegation that the Panel relied on an impermissible presumption that subsidies prohibited under Part II of the SCM Agreement cause serious prejudice for purposes of Part III, as well as on the United States' arguments relating to the Panel's treatment of the magnitude of the tied tax subsidies, its counterfactual analysis, and its consideration of the other factors advanced by the United States to explain the alleged market effects. The Appellate Body then addressed the United States' contention that the Panel committed specific errors in reaching its findings of significant price suppression, significant lost sales, and displacement and impedance. Because various elements of the United States' claim related to different aspects of the Panel's causation analysis, the Appellate Body explained that it would analyze each of these elements independently before providing an overall assessment of the Panel's causation analysis.

The Appellate Body first examined the United States' contention that the Panel erred in relying on a presumption that subsidies found to be prohibited under Part II of the SCM Agreement cause adverse effects within the meaning of Part III. The Appellate Body did not consider that the Panel's reasoning, considered in its totality, showed that the Panel had applied a presumption of the sort claimed by the United States. The Appellate Body did not understand the Panel to have expressed the view that the legal status of subsidies under Article 3.1(a) of the SCM Agreement is determinative of the characterization of the effects of such subsidies for purposes of Article 6.3 of that Agreement, but rather that the FSC/ETI subsidies were, by virtue of their very nature as export subsidies, *more likely* to cause adverse trade effects. The Appellate Body found this general proposition to be in itself unobjectionable. The Appellate Body also did not understand the Panel's reference to "trade distortive effects" to equate the existence of such effects to establishing "serious prejudice" or "adverse effects" within the meaning of Articles 5(c) and 6.3 of the SCM Agreement. Rather, the Appellate Body said, the Panel seemed to have been elaborating upon its view that the nature of the FSC/ETI subsidies increased the likelihood that they will produce adverse effects, and that it would, for that reason, accord this factor considerable weight in its analysis of such effects and of whether they demonstrated serious prejudice. Finally, the Appellate Body noted that the Panel had found, and both parties had accepted, that the nature of a challenged subsidy is a relevant factor to take into consideration in determining whether it has caused adverse effects. The Appellate Body agreed that an analysis of the export-contingent nature of a subsidy may reveal elements that are highly pertinent to an assessment of its trade effects, even if a finding of export-contingency would not, by itself, establish the existence of adverse effects phenomena such as those at issue in this appeal.

The Appellate Body then considered the United States' argument that the Panel failed to take proper account of the magnitude of the subsidies, and, in particular, the fact that the FSC/ETI

benefits amounted to less than 1% of the value of Boeing's sales. The Appellate Body stated that 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, and that both considerations may shed light on the impact that those subsidies have on price. By scrutinizing the magnitude in the light of the particular subsidies, products, and characteristics of the market within which those products compete, the Appellate Body added, 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. The Appellate Body observed that the reasoning of the Panel in this dispute with respect to the magnitude of the subsidies could have been more clearly elaborated. It may well be, the Appellate Body ventured, that 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. The Appellate Body did 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. Yet, 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, the Appellate Body considered that the Panel should have offered more of an explanation as to why it rejected the relevance of such data for its analysis. The Appellate Body noted, however, that the Panel did provide other reasons, arguably relating to the magnitude of these subsidies, and had identified elements other than magnitude, in support of its finding regarding the significance of the FSC/ETI subsidies to Boeing's ability to compete on price against Airbus.

The Appellate Body then turned to consider the United States' argument that the Panel did not apply a proper counterfactual analysis, because it failed to establish that, absent the tied tax subsidies, Boeing's LCA prices would have been higher. The Appellate Body recalled that a core element of the European Communities' causation theory was that, although the tied tax subsidies gave Boeing the potential to use those benefits to lower LCA prices by up to the amount of the subsidy, Boeing was more likely to do so in what the European Communities referred to as competitive sales campaigns. Thus, although the tied tax subsidies have the potential to produce trade-distortive effects, this did not establish under what circumstances, or to what extent, they would do so in particular sales campaigns. On that basis the Appellate Body understood that, when the Panel concluded that the tied tax subsidies "enabled Boeing to lower its prices beyond the level that would otherwise have been economically justifiable", the Panel considered that these subsidies only established the possibility or likelihood that Boeing would do so in particular sales campaigns. The Appellate Body observed that the Panel did not discuss LCA prices for Boeing or Airbus, or explain what would have constituted "economically justifiable" behaviour for Boeing in the absence of subsidies, and compare that with Boeing's actual pricing behaviour. The Appellate Body therefore considered that, because the Panel did not provide reasoning or discuss under what circumstances the tied tax subsidies led Boeing to lower its prices beyond the level that would otherwise have been economically justifiable in LCA sales campaigns, it did not provide a reasoned basis for its generalized finding that the tied tax subsidies led Boeing to lower its prices in a manner causing Airbus to lose sales or to secure sales only at reduced prices.

The Appellate Body also evaluated the United States' argument that the Panel failed to engage in a meaningful analysis of the effects of other factors on prices and sales of Boeing and Airbus LCA. The Appellate Body noted the Panel's reasoning that, because the FSC/ETI programme was in effect before the reference period, this made it impossible for it to determine the effects of the subsidies through direct observation of market share and price trend data. The Appellate Body did not agree with the suggestion of the Panel that considerations of market share and price trends during a period of sustained subsidization, and of "other factors" potentially contributing to such shares or trends, were of no assistance or relevance in analyzing the effects of the subsidies. Even if the FSC/ETI subsidies were provided over a long period, the Appellate Body explained, the question as to whether there was a discernible correlation between subsidy levels and price trends was still a relevant one. Moreover, the lack of such a correlation would have called for some explanation as to why this did not detract from or preclude the Panel from reaching a finding of a genuine and substantial causal relationship in this dispute. The Panel, however, did not discuss these considerations in its analysis. The Appellate Body further noted that the Panel did not, in its reasoning, mention any specific other factors raised by the United States, or engage in any discussion of whether or to what extent such factors may have had an effect on Boeing's pricing of its LCA or on Airbus' prices and sales. In the Appellate Body's view, the Panel should have

addressed these specific other factors raised by the United States and assessed whether they were capable of contributing to effects on Airbus' sales and prices and, if so, what their relative causal significance was in relation to that of the tied tax subsidies. The Appellate Body further noted that the Panel's failure to address the relative significance of the other causal factors to Boeing's prices contrasted with the Panel's consideration of such factors in respect of the effects of the aeronautics R&D subsidies in the 200-300 seat LCA market.

The Appellate Body then evaluated the United States' appeal as it related to the Panel's specific findings of significant price suppression, significant lost sales, and displacement and impedance within the meaning of Article 6.3(b) and (c) of the SCM Agreement. With respect to the Panel's finding of significant price suppression, the United States argued that the Panel undertook no analysis of prices in the 100-200 seat and 300-400 seat LCA markets. Although the Appellate Body acknowledged that Boeing's receipt of FSC/ETI benefits over a long period might have made the Panel's task more difficult because there was no prior, subsidy-free period against which to compare, this did not mean that there was nothing to be gained from examining such data on the record in a price suppression analysis. As the Appellate Body explained, the fact that prices of a subsidized product were lower during a period of lower subsidization might have required further consideration or explanation in order to demonstrate a genuine and substantial relationship between the subsidies and any alleged price effects. In this dispute, the Panel made no reference to, and its reasoning contained no analysis of, any pricing information or market share data in the 100-200 seat and 300 400 seat LCA markets on the record. The Appellate Body further noted the contrast between the Panel's approach in its analysis of price effects, and the fact that the Panel took pricing information into account in its analysis of the technology effects of the aeronautics R&D subsidies in the 200 300 seat LCA market.

With respect to the Panel's finding of significant lost sales, the United States argued that the Panel failed to meet the requirements of Article 6.3(c) because it did not identify the sales in the 100 200 seat and 300-400 seat LCA markets that it found to constitute significant lost sales. The Appellate Body considered that the scope of the Panel's lost sales finding was unclear, in particular because the Panel did not clearly indicate whether its finding related to the individual sales campaign evidence identified by the European Communities, or to some other conception of "competitive" or "strategic" sales campaigns. The Appellate Body rejected the European Communities' contention that the Panel made a global finding of significant lost sales, but added that, irrespective of whether that finding was made on a generalized basis, or on the basis of individual sales campaigns, the Panel reached its findings without referring to, or discussing in its reasoning, any of the evidence relating to lost sales advanced by the European Communities in support of its lost sales claim. The Appellate Body explained that, even if a claim of serious prejudice relies on specific evidence to support a generalized finding of lost sales, this does not mean that a panel is free to conduct its reasoning without any reference to, or analysis of, that evidence. Indeed, where certain evidence forms the foundation for a claim, it is all the more necessary for a panel to contend with that evidence and to explain why such evidence of a subset of sales supports a broader finding of lost sales. Given the structure of the European Communities' claim, the Appellate Body considered that the manner in which the sales campaign evidence advanced by the European Communities "illustrated" under what circumstances, and to what extent, lost sales occurred was a matter that should have been addressed by the Panel. The Appellate Body further noted the contrast between the Panel's approach in its analysis of the price effects, with its explicit discussion of the reasons why particular sales campaigns amounted to significant lost sales arising from the technology effects of the aeronautics R&D subsidies in the 200-300 seat LCA market.

Regarding the Panel's finding of displacement and impedance, the United States contended that the Panel failed to meet the requirements of Article 6.3(b) because the Panel did not determine whether any of the countries in which the European Communities alleged displacement or impedance occurred constituted a "market", and did not identify the third countries in which displacement or impedance occurred. The Appellate Body noted that the entirety of the Panel's displacement and impedance analysis was located in one paragraph of the Panel Report, and disagreed with the Panel's failure to distinguish in its analysis between the phenomena of displacement and impedance, and the implication of the Panel's reasoning that the phenomena of displacement and impedance necessarily follow from a finding of significant lost sales. In addition, the Appellate Body recalled that the European Communities had identified specific sales campaigns that it alleged resulted in displacement and impedance in the 100-200 seat and 300-400 seat LCA markets. The Appellate Body considered that, given the well-defined geographic focus of

Article 6.3(b), a panel's analysis of displacement and impedance must engage with the evidence of the particular third country market or markets in which such market phenomena are alleged. Accordingly, the Appellate Body did not consider that it was appropriate for the Panel to conduct an analysis of displacement and impedance without any reference to or discussion of the specific countries or sales campaign evidence advanced by the European Communities in support of its claim. The Appellate Body again highlighted the contrast between the Panel's approach in its analysis of price effects, and its examination of specific countries and sales campaign evidence in its analysis of the technology effects of the aeronautics R&D subsidies in the 200-300 seat LCA market.

The Appellate Body concluded that, taken together, the deficiencies it identified in the Panel's reasoning amounted to legal error in the Panel's analysis of serious prejudice. **The Appellate Body therefore reversed the Panel's findings that significant price suppression, significant lost sales, and displacement and impedance, under Article 6.3(b) and (c) of the SCM Agreement, were the effects of: (i) the FSC/ETI subsidies and the Washington State B&O tax rate reduction in the 100-200 seat LCA market; and (ii) the FSC/ETI subsidies and the Washington State and the City of Everett B&O tax rate reductions in the 300-400 seat LCA market.**

The Appellate Body proceeded to consider whether it could complete the analysis and rule on the European Union's claim that the tied tax subsidies caused serious prejudice within the meaning of Articles 5(c) and 6.3 of the SCM Agreement. The Appellate Body recalled findings and uncontested facts on the Panel record as they related to the nature of the tied tax subsidies, their magnitude, the conditions of competition in the LCA industry, and the particular sales campaign evidence supplied by the European Communities. On the basis of these elements, the Appellate Body considered that, where it can be established that Boeing was under particular pressure to reduce its prices in order to secure LCA sales in particular sales campaigns, and there were no other non-price factors that explained Boeing's success in obtaining the sale or suppressing Airbus' pricing, it could conclude that the subsidies contributed in a genuine and substantial way to the lowering of Boeing's prices, and that the effect of such price reductions was that Boeing won the sale from Airbus, or that Airbus was forced to suppress its own price in order to secure the sale. The Appellate Body therefore considered that, although the factual findings and uncontested facts drawn from the Panel record relating to the nature and magnitude of the subsidies, and the conditions of competition in the relevant markets, did not themselves suffice to establish on a generalized basis the requisite causal connection between the tied tax subsidies and the effects on Airbus' LCA sales and prices, serious prejudice could be established where the pricing dynamic set out above was found to have occurred in particular LCA sales campaigns.

The Appellate Body examined the sales campaign evidence of the European Communities, and the subsequent BCI and HSBI submissions of the United States and the European Communities relating to these various sales campaigns. The Appellate Body considered that, where the United States advanced other factors in respect of particular sales campaigns that were capable of explaining the effects on Airbus' LCA sales and prices, it must treat as disputed whether or not the other factor or factors sufficed to attenuate a genuine and substantial relationship between the tied tax subsidies and those effects. The Appellate Body considered that the United States identified potentially valid other factors for all but two of the sales campaigns. With respect to the sales campaigns involving the purchase of 737NG LCA by Japan Airlines ("JAL") and Singapore Aircraft Leasing Enterprise ("SALE"), the Appellate Body noted BCI and HSBI statements on the Panel record, uncontested by the parties, demonstrating the particularly price-sensitive nature of these campaigns, and the fact that both Boeing and Airbus had similar strategic incentives leading them to engage in intense competition in terms of price in order to win the sales. Moreover, the Appellate Body noted, the United States did not specifically identify other factors that could have demonstrated that Boeing had an advantage in these campaigns that would have led it to win the sales for reasons other than price. In these circumstances, the Appellate Body concluded that Boeing was under particular pressure to reduce its prices in order to secure the sales in these two campaigns, and that there was therefore a sufficient basis to complete the analysis and conclude that there was a genuine and substantial causal relationship between the FSC/ETI subsidies and the Washington State B&O tax rate reduction, through their effects on Boeing's prices, and the significant lost sales experienced by Airbus in these two sales campaigns. **Accordingly, the Appellate Body found that the FSC/ETI subsidies and the Washington State B&O tax rate reduction caused serious prejudice in the 100 200 seat LCA market within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement.**

4.2.3.4 Collective assessment of the subsidies and their effects

At the outset, the Appellate Body considered it useful to outline the key elements of the approaches taken in *US – Upland Cotton* and *EC and certain member States – Large Civil Aircraft*. Based on its review of these cases, it noted that, in the past, two distinct means of undertaking a collective assessment of the effects of multiple subsidies have been used, namely: (i) an *ex ante* decision taken by a panel to undertake a single analysis of the effects of multiple subsidies whose structure, design, and operation are similar and thereby to assess in an integrated causation analysis the collective effects of such subsidy measures; and (ii) an examination undertaken by a panel, after it has found that at least one subsidy is a genuine and substantial cause of adverse effects, as to whether the effects of other subsidies complement and supplement – are a genuine cause of – those same adverse effects. The former type of approach was employed by the panel in *US – Upland Cotton*, and the latter approach was employed by the panel and endorsed by the Appellate Body in *EC and certain member States – Large Civil Aircraft*. For the sake of convenience, the Appellate Body referred to the first type of approach as a decision to "aggregate" the subsidies, or "aggregation", and to the second type of approach as a decision to "cumulate" the effects of the subsidies, or "cumulation".

The Panel in this case, in considering how to conduct its analysis of the effects of the various subsidy measures, explained that it would use the approach set out by the panel in US – Upland Cotton. This approach led the Panel to undertake an aggregated analysis within each of the following three groups of subsidies: (i) the tied tax subsidies; (ii) the aeronautics R&D subsidies; and (iii) the remaining subsidies. It also led the Panel not to undertake an aggregated analysis of the tied tax subsidies together with the aeronautics R&D subsidies, or of the tied tax subsidies together with the remaining subsidies. The Panel gave the following reason for deciding not to conduct a collective assessment of the price effects of the B&O tax rate reductions and the technology effects of the aeronautics R&D subsidies within the 200-300 seat LCA market: "the two groups of subsidies operate through entirely distinct causal mechanisms". The Panel did not address explicitly the question of whether it would have been appropriate to undertake a collective assessment of the effects of the remaining subsidies together with the effects of the tied tax subsidies. Nonetheless, the Panel examined the effects of the B&O tax rate reductions within the 200-300 seat LCA market, alone, and the effects of the remaining subsidies, alone.

The European Union first contended that the Panel erred in declining to assess collectively the effects of the aeronautics R&D subsidies and the effects of the B&O tax rate reductions. It challenged, in particular, the "distinct causal mechanism" test relied upon by the Panel in deciding that it was not appropriate to undertake a collective assessment of the effects of these two groups of subsidies within the 200-300 seat LCA market. The European Union sought to demonstrate, through its interpretation of the text of Articles 5(c) and 6.3 of the SCM Agreement, read in the light of their context and the object and purpose of that Agreement, that the Panel's test has no basis in the SCM Agreement, is overly restrictive, and would enable Members to escape subsidy disciplines by providing a series of small subsidies that each affects the recipient slightly differently. The European Union further contended that, having found that the aeronautics R&D subsidies allowed Boeing to suppress Airbus' pricing in the 200-300 seat LCA market, and having also found that the B&O tax rate reductions had the capacity to suppress Airbus' pricing (in the 100-200 seat and 300-400 seat LCA markets), the Panel failed to take the next step and combine the effects of the B&O tax rate reductions with those of the aeronautics R&D subsidies within the 200-300 seat LCA market.

The United States, in turn, submitted that the Panel's decision was permissible under Articles 5 and 6.3 of the SCM Agreement, based on the European Communities' own arguments about the differing nature of these two groups of subsidies and their different effects on Boeing's commercial behaviour, and consistent with the Appellate Body's affirmation that panels enjoy "a certain degree of discretion in selecting an appropriate methodology" for determining adverse effects. The United States added that the Panel's approach accorded with the views of the Appellate Body in *EC and certain member States – Large Civil Aircraft*, i.e. that even when using a cumulation methodology, panels should focus on discerning whether the various subsidies operate through the same causal mechanism to cause adverse effects.

The Appellate Body noted that, according to the Panel, the aeronautics R&D subsidies were a genuine and substantial cause of a threat of displacement and impedance, significant lost sales, and significant price suppression in the 200-300 seat LCA market, and recalled that it had upheld

much of that finding on appeal. The Appellate Body also understood the Panel to have found that the B&O tax rate reductions had a genuine causal connection with Boeing's prices and, therefore, with Airbus' prices. The Appellate Body thus considered that the next step for the Panel would have been to consider whether the effects of the B&O tax rate reductions complemented or supplemented the effects of the aeronautics R&D subsidies within the 200-300 seat LCA market. The Appellate Body did not see any *a priori* reason why cumulation would be precluded. Nor did it consider that the mere fact that the two groups of subsidies operated through distinct causal mechanisms could, alone, have resolved the questions of whether each group had effects relevant to the serious prejudice alleged and whether those effects were capable of being combined in the Panel's analysis of serious prejudice. For purposes of cumulating, the Appellate Body recalled that the requisite genuine causal connection can be established even when the other subsidies do not operate along the same causal pathway as the subsidy found to be a genuine and substantial cause of Article 6.3 market phenomena, provided that those subsidies meaningfully contribute to the same market phenomena caused by the first subsidy. **The Appellate Body therefore 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.** The European Union did not request the Appellate Body to complete the analysis on this issue.

The European Union contended, in addition, that the Panel erred in declining to assess collectively the effects of the tied tax subsidies and the effects of the remaining subsidies. In its view, since, like the tied tax subsidies, the remaining subsidies had a nexus with the subsidized LCA and with Boeing's pricing, either the Panel should have conducted an *aggregated* assessment of their effects, or, after determining that the tied tax subsidies caused serious prejudice, it should have *cumulated* the effects of these two groups of subsidies. The European Union stressed, in this regard, that the Appellate Body recognized, in *US – Upland Cotton*, that untied (non-price-contingent) subsidies can have price effects. The United States, on the contrary, considered that the Panel did not err in declining to undertake a collective assessment of the remaining subsidies and the tied subsidies in its analysis of adverse effects. In its view, this ground of the European Union's appeal relied on an incorrect understanding of the panel reports in *US – Upland Cotton* and *EC and certain member States – Large Civil Aircraft*, and a flawed interpretation of Articles 5 and 6.3 of the SCM Agreement as requiring the collective assessment of "any and all subsidies benefiting the subsidized product in the market at issue". The United States emphasized that no sufficient nexus between the remaining subsidies and the subsidized products was established.

The Appellate Body noted that the Panel did not explicitly address the question of whether it should have collectively assessed these two groups of subsidies and their effects. Although it viewed the absence of any reasoning by the Panel as problematic, the Appellate Body considered that there was sufficient support on the record for the view that the Panel did not act outside the scope of its discretion by not conducting an *aggregated* analysis of these two groups of subsidies. The Appellate Body found more persuasive the European Union's alternative argument – that the Panel erred in failing to make a *cumulative* assessment of whether the remaining subsidies affected Boeing's prices in a way similar to the tied tax subsidies, such that they complemented and supplemented the effects of the tied tax subsidies. According to the Appellate Body, the Panel should not have limited its analysis to the question of whether the remaining subsidies constitute a genuine and substantial cause of serious prejudice on their own. Instead, the Panel should have inquired as to whether these subsidies had a genuine causal relationship with the effects that it had found the tied tax subsidies to have on Boeing's LCA pricing, such that the remaining subsidies could be said to complement and supplement those effects and, thereby, the serious prejudice caused to the interests of the European Communities. For these reasons, **the Appellate Body found that the Panel erred in concluding that the remaining subsidies had not been shown to have affected Boeing's prices in a manner giving rise to serious prejudice, without having considered whether those subsidies had a genuine relationship to, and effects on, such prices and accordingly, it reversed that finding.**

The European Union further requested the Appellate Body to complete the analysis and find that, together with the tied tax subsidies, the remaining subsidies caused adverse effects. In this respect, the European Union requested the Appellate Body to conduct an *aggregated* assessment of these two groups of subsidies and find that they both provided Boeing with pricing advantages and caused the same market effects. Alternatively, it requested the Appellate Body to cumulate

the effects of these two groups of subsidies or, in other words, to find that the effects of the remaining subsidies complemented and supplemented the price effects that the Panel found to have been caused by the tied tax subsidies. In response, the United States emphasized the differences between the facts of this dispute and those in *EC and certain member States – Large Civil Aircraft*. It argued that the European Union did not identify relevant factual findings or undisputed facts that would enable the Appellate Body to complete the analysis, and asserted that there were no such findings or undisputed facts on the record.

The Appellate Body recalled that it had found that the Panel did not err in refusing to undertake an aggregated analysis of these two groups of subsidies and determined that it would be inappropriate to itself consider the same question again. It thus focused on the question of whether the effects of the remaining subsidies complemented and supplemented the effects of the tied tax subsidies. It recalled its previous determination that Boeing was under particular pressure to reduce its prices in order to secure 737NG sales in the 2005 JAL and SALE campaigns, and that Boeing used the FSC/ETI subsidies and the State of Washington B&O tax rate reduction to do so. The Appellate Body examined whether a genuine link could be established between the remaining subsidies and the price effects of those subsidies.

The Appellate Body recalled that the remaining subsidies comprised eight measures provided in several different jurisdictions, at both the local and state level, and pursuant to several different subsidy programmes. With respect to the Washington State workforce development programme, the Employment Resource Center, and the Washington State B&O tax credit for property taxes, the Appellate Body noted that the evidence on the record showed that these measures benefited only the 787 in the 200 300 seat LCA market, and not the 737NG in the 100-200 seat LCA market. Moreover, the Appellate Body was not persuaded that the four subsidies granted in connection with Boeing's relocation of its corporate headquarters to the State of Illinois had been shown to meaningfully contribute to any lowering of Boeing's prices for its 737NG, thus the Appellate Body could not cumulate the effects of these subsidies with those of the tied tax subsidies. The Appellate Body further determined that neither the Panel's findings nor the uncontested facts on the record demonstrated a genuine link between Boeing's 737NG and the B&O tax credits for certain preproduction development expenditures and for computer software and hardware, or between the 737NG and the sales and use tax exemptions for computer hardware, software, and peripherals.

However, with respect to the City of Wichita IRBs, which the Panel had estimated to amount to $475.8 million, the Appellate Body noted that these were specifically aimed at, and were used for the purpose of, enhancing Boeing's manufacturing facilities in Wichita, which produced parts for the 737NG. The Appellate Body accepted the general proposition that subsidies that are not directly contingent upon production or sale can nevertheless affect pricing decisions in some circumstances. Within the product market at issue and in the circumstances of the JAL and SALE campaigns, the Appellate Body was further satisfied that Boeing would have used all available means to reduce its prices to the extent necessary to secure those sales, including subsidy benefits directly linked to production of the 737NG. In the Appellate Body's view, moreover, the IRBs could not be considered trivial in terms of their overall magnitude or duration, and they had a genuine link to Boeing's production of the 737NG. For these reasons, it considered that Boeing's IRB benefits enhanced the pricing flexibility that Boeing enjoyed by reason of the tied tax subsidies in the circumstances of the JAL and SALE campaigns. **Accordingly, the Appellate Body found that the effects of the City of Wichita IRBs complemented and supplemented the price effects of the FSC/ETI subsidies and the 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.**

4.3 Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R

This dispute concerned a tobacco control measure adopted by the United States that prohibits cigarettes with characterizing flavours, other than tobacco or menthol. The measure at issue – Section 907(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act ("FFDCA") – became law in the United States on 22 June 2009 and entered into force three months thereafter. Non-binding guidance from the Food and Drug Administration ("FDA") noted that "flavoured products make it easier for new smokers to start smoking by masking the unpleasant flavour of tobacco", and thus

"[r]emoving these flavoured products from the market is important because it removes an avenue that young people can use to begin regular tobacco use."

4.3.1 Article 2.1 of the TBT Agreement and Article 11 of the DSU

4.3.1.1 "Like products" under Article 2.1 of the TBT Agreement

The Appellate Body addressed the Panel's interpretation of the term "like products" in Article 2.1 of the TBT Agreement. Moreover, the Appellate Body addressed the United States' claims that the Panel erred in its interpretation and application of the "likeness" criteria of end-use and consumer tastes and habits, and that the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits. The United States did not appeal the Panel's findings concerning the other "likeness" criteria, namely, the products' physical characteristics and tariff classification.

With regard to the Panel's interpretative approach to the concept of "like products" under Article 2.1 of the TBT Agreement, the Appellate Body disagreed with the Panel that the declared legitimate public health objective of Section 907(a)(1)(A), that is, the reduction of youth smoking, must "permeate and inform" a "likeness" analysis under Article 2.1 of the TBT Agreement. The Appellate Body considered, instead, that the context provided by Article 2.1 itself, by other provisions of the TBT Agreement, by the TBT Agreement as a whole, and by Article III:4 of the GATT 1994, as well as the object and purpose of the TBT Agreement, support an interpretation of the concept of "likeness" in Article 2.1 that is based on the competitive relationship between and among the products. In this connection, the Appellate Body explained that the concept of "like products" in Article 2.1 of the TBT Agreement serves to define the scope of products that must 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 purpose(s), such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. In the Appellate Body's view, 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. Although the Appellate Body rejected the Panel's approach to the regulatory purpose of the measure in its "likeness" analysis, the Appellate Body clarified that the regulatory concerns that underlie a measure are relevant to the determination of "likeness" to the extent that they have an impact on the competitive relationship between and among products.

With regard to the United States' claim that the Panel erred in its interpretation and application of the "likeness" criterion of end-use, the Appellate Body disagreed with the Panel's conclusion that the end-use of clove and menthol cigarettes is simply "to be smoked". In the Appellate Body's view, the Panel was not correct in characterizing the more specific end-uses put forward by the United States, that is, "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" as consumer tastes and habits and not end-uses. To the extent that they describe possible functions of the products, rather than the consumers' appreciation of these functions, they represent, in fact, more specific end-uses of the products at issue, rather than consumers' tastes and habits. Nevertheless, the Appellate Body considered that, based on the Panel's findings, both clove and menthol cigarettes are capable of performing the more specific end-uses put forward by the United States. Thus, the Appellate Body concluded that the more specific end-uses of clove and menthol cigarettes also support the Panel's overall finding that clove cigarettes and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement.

With regard to the United States' claim that the Panel erred in its interpretation and application of the "likeness" criterion of consumers' tastes and habits, the Appellate Body considered that, because an interpretation of the concept of "likeness" under Article 2.1 of the TBT Agreement must focus on the competitive relationship between and among the products, rather than on the regulatory purpose(s) of a measure, the Panel was wrong in confining its analysis of consumer tastes and habits to those consumers (young and potential young smokers) that are the concern of the objective of the measure at issue (to reduce youth smoking). Nevertheless, the Appellate Body considered that the degree of competition and substitutability that the Panel found for young and potential young smokers is sufficiently high to support a finding of likeness under Article 2.1 of the TBT Agreement. Thus, while the Panel should not have limited its analysis of consumers' tastes and habits to young and potential young smokers to the exclusion of current adult smokers, this

did not undermine the Panel's finding regarding consumers' tastes and habits in respect of the products at issue, or its ultimate finding that clove cigarettes and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement.

Turning to the claim by the United States that the Panel acted inconsistently with Article 11 of the DSU by disregarding survey evidence on how consumers actually use and perceive the products at issue in the relevant market, the Appellate Body was not persuaded that the reasons advanced by the Panel for not relying on the surveys justified the cursory treatment given by the Panel to these surveys. Even if these surveys were not directly comparable or based on different methodological approaches, the Panel was required to consider them and extract any relevant information that they contained. Nevertheless, the Appellate Body considered that the survey evidence that the Panel did not engage with did not have material consequences for the Panel's finding that clove and menthol cigarettes are substitutable in certain segments of the market, and did not, therefore, undermine the Panel's finding that clove and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement. Accordingly, the Appellate Body found that the Panel's treatment of the survey evidence did not amount to a violation of Article 11 of the DSU.

Thus, the Appellate Body upheld, albeit for different reasons, the Panel's finding that clove and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement.

4.3.1.2 "Less favourable treatment" under Article 2.1 of the TBT Agreement

The Appellate Body addressed the interpretation of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. Moreover, the Appellate Body considered the United States' specific claims that: (i) the Panel improperly narrowed the product scope of its analysis by focusing exclusively on the treatment accorded to imported clove cigarettes and to domestic menthol cigarettes; (ii) the Panel improperly narrowed the temporal scope of its analysis by focusing exclusively on the effects of Section 907(a)(1)(A) on domestic like products at the time that the measure came into effect; (iii) the Panel erred in finding that the less favourable treatment accorded to imported clove cigarettes was related to the origin of the products; and (iv) the Panel acted inconsistently with Article 11 of the DSU in reaching these findings.

The Appellate Body considered that Article III:4 of the GATT 1994 constitutes relevant context for the interpretation of the "treatment no less favourable" requirement under Article 2.1 of the TBT Agreement. Referring to Appellate Body case law under Article III:4 of the GATT 1994, the Appellate Body stated that 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. The Appellate Body explained, however, that the context of the TBT Agreement, in particular, the sixth recital of its preamble and Article 2.2, as well as the 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, the "treatment no less favourable" requirement of Article 2.1 prohibits only de jure and de facto discrimination against imported products. Thus, 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 products 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.

With regard to the United States' appeal regarding the product scope of the Panel's less favourable treatment analysis, the Appellate Body considered that, in determining the scope of like imported and domestic products, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess and identify, based on the nature and extent of their competitive relationship, 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. With regard to the group of imported products, the Appellate Body rejected the United States' argument that the Panel erred in failing to include in its analysis the treatment accorded to menthol cigarettes imported into the United States from all Members. The national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to the group of like products imported from the Member alleging a violation of Article 2.1, and treatment accorded to the group of like domestic products. It follows, in the Appellate Body's view, that the Panel did not err in finding that a determination of Indonesia's claims under Article 2.1 required an examination of whether Section 907(a)(1)(A) accords to the group of products imported from Indonesia less favourable treatment than that accorded to the group of like products of US origin. With regard to the group of domestic products, the United States' appeal focused on the Panel's exclusion of domestically produced flavoured cigarettes from its less favourable treatment analysis. The Appellate Body noted, however, that the United States did not challenge on appeal the Panel's exclusion of domestically produced flavoured cigarettes from the likeness stage of its analysis. Because Article 2.1 expressly limits the scope of the less favourable treatment comparison to imported and domestic like products, in the absence of specific findings by the Panel that domestically produced flavoured cigarettes other than menthol are like clove cigarettes, the Appellate Body was unable to determine whether the Panel erred in failing to include domestically produced flavoured cigarettes in its less favourable treatment analysis.

In respect of its appeal of the temporal scope of the Panel's less favourable treatment analysis, the United States argued that the Panel should have taken into account evidence demonstrating that there were domestically produced flavoured cigarettes on the market in the years closely preceding the entry into force of the ban. In this connection, the United States' allegation of error was directed at the Panel's statement that "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes" on the US market. The Appellate Body agreed with the participants that Article 2.1 does not establish a rigid temporal limitation on the evidence that a panel could review in assessing a claim under Article 2.1. According to the Appellate Body, nothing in Article 2.1 enjoins panels from taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at the time of the establishment of the panel. Nevertheless, the Appellate Body considered that it was not clear that the Panel viewed Article 2.1 as prohibiting review of evidence pre-dating the entry into force of Section 907(a)(1)(A). In the Appellate Body's view, the Panel's statement that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol" on the US market was not the basis for the Panel's exclusion of domestic flavoured cigarettes from its less favourable treatment analysis. Rather, it was the basis for its finding that Section 907(a)(1)(A) imposes "costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity".

The Appellate Body also rejected the United States' claim on appeal that the Panel acted inconsistently with Article 11 of the DSU in disregarding evidence demonstrating that, at the time of the ban, domestic flavoured cigarettes other than menthol cigarettes were marketed in the United States. In the Appellate Body's view, the Panel did not disregard the evidence that, according to the United States, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban. Rather, the Panel reviewed that evidence but was ultimately not persuaded by it. In particular, the Panel did not exceed its authority under Article 11 of DSU by attributing to the evidence a weight and significance different from that attributed to it by the United States.

With regard to the United States' claim on appeal that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products, the Appellate Body recalled that the existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of like domestic products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the TBT Agreement. The Appellate Body agreed with the United States that the Panel did not clearly articulate its reasons for concluding that "the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity." Nevertheless, the Appellate Body was not persuaded that the Panel erred in ultimately finding Section 907(a)(1)(A)

to be inconsistent with Article 2.1. In this connection, the Appellate Body noted that the products prohibited under Section 907(a)(1)(A) consist primarily of clove cigarettes imported from Indonesia, while the like products permitted under this measure consist primarily of domestically produced menthol cigarettes. Moreover, the Appellate Body was not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes stems from a legitimate regulatory distinction. The Appellate Body noted that the stated objective of Section 907(a)(1)(A) is to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes. To the extent that this particular characteristic is present in both clove and menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justifies the prohibition of clove cigarettes. Thus, 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 reflects discrimination against the group of like products imported from Indonesia.

The Appellate Body also rejected the United States' claim on appeal that the Panel acted inconsistently with Article 11 of the DSU because there was no basis in the record for its finding that Section 907(a)(1)(A) avoids imposing costs on any US entity. In the Appellate Body's view, the United States' claim was concerned with the Panel's less favourable treatment comparison, rather than with the alleged absence of evidence in the Panel record to justify the Panel's finding that Section 907(a)(1)(A) avoids imposing costs on any US entity. In this connection, the Appellate Body noted that the United States' argument that the Panel erred in not considering the impact of Section 907(a)(1)(A) on US producers before the entry into force of the ban, also implies that the Panel was wrong in stating that the measure imposed no costs on any US producers. The Appellate Body considered, therefore, that the claim by the United States that the Panel violated Article 11 of the DSU because it found that Section 907(a)(1)(A) imposed "no costs on any US entity" was subsidiary to its claim that the Panel erred in concluding that Section 907(a)(1)(A) accords less favourable treatment to imported clove cigarettes than to like domestic menthol cigarettes. The Appellate Body recalled its statement in EC – Fasteners (China) that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements." Accordingly, the Appellate Body found that the Panel did not act inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accords imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, for the purpose of Article 2.1 of the TBT Agreement.

In the light of the above, the Appellate Body upheld, albeit for different reasons, the Panel's finding that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, for the purpose of Article 2.1 of the TBT Agreement.

4.3.2 Article 2.12 of the TBT Agreement

On appeal, the Appellate Body considered the United States' claims that: (i) the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision; and (ii) the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the TBT Agreement, that the United States failed to rebut. Article 2.12 requires Members to allow a "reasonable interval" between the publication of technical regulations and their entry into force. Paragraph 5.2 of the Doha Ministerial Decision establishes that "[s]ubject to the conditions specified in [Article 2.12 of the TBT Agreement], 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." The period of time allowed by the United States between the publication and the entry into force of the technical regulation at issue was an interval of three months. The Appellate Body first considered whether paragraph 5.2 has the legal status of a multilateral interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the WTO Agreement.

Article IX:2 establishes, inter alia, that interpretations of the Multilateral Trade Agreements contained in Annex 1 to the WTO Agreement – such as the TBT Agreement – shall be taken on the basis of a recommendation by the Council overseeing the functioning of the relevant Multilateral

Trade Agreement. The Appellate Body noted 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 and, for that reason, found that paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2. In the light of this finding, the Appellate Body considered whether, as the Panel found, paragraph 5.2 could be characterized as a subsequent agreement of 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.

Article 31(3)(a) of the Vienna Convention requires a treaty interpreter to "[take] into account, together with the context" any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions". Based on the text of Article 31(3)(a), the Appellate Body considered 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 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. After examining paragraph 5.2 of the Doha Ministerial Decision, the Appellate Body considered that paragraph 5.2 met both requirements. Accordingly, the Appellate Body upheld the Panel's finding that paragraph 5.2 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.

The Appellate Body considered the meaning of Article 2.12 of the TBT Agreement in the light of the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision. The Appellate Body observed that Article 2.12 of the TBT Agreement explains that the reason for allowing an 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. In the Appellate Body's view, the term "normally" in paragraph 5.2 of the Doha Ministerial Decision relates to the rationale of the obligation to provide a "reasonable interval" between the publication and the entry into force of a technical regulation, as expressed in Article 2.12 of the TBT Agreement. Thus, the Appellate Body considered that, 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 6 months" to adapt their products or production methods to the requirements of an importing Member's technical regulation.

The Appellate Body turned to the United States' claim on appeal that the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the TBT Agreement and that the United States had failed to rebut this *prima facie* case. The Appellate Body considered that the elements of a *prima facie* case of inconsistency with Article 2.12 are to be drawn from a proper interpretation of that provision, taking into account – pursuant to Article 31(3)(a) of the Vienna Convention – the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision. Based on this interpretative approach to Article 2.12 of the TBT Agreement, the Appellate Body considered 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. If the complaining Member establishes this *prima facie* case of inconsistency, it is for the responding Member to rebut this *prima facie* case. According to the Appellate Body, the text of Article 2.12, 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. In this connection, the Appellate Body considered that there are three ways for a responding Member – that has failed to allow a period of at least six months between the publication and the entry into force of its technical regulation – to rebut a *prima facie* case of inconsistency with Article 2.12. Such a Member may establish: (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 period of "not less than" six months would be ineffective to fulfil the legitimate objectives of its technical regulation. Accordingly, the Appellate Body disagreed with the view expressed by the Panel that the burden was on Indonesia to establish, as part of its

prima facie case, that allowing at least six months between the publication and the entry into force of Section 907(a)(1)(A) would not have rendered the objective pursued by that measure ineffective. In this connection, the Appellate Body recalled that the rule in Article 2.12, as clarified by paragraph 5.2, is expressly designed to allow producers in the complaining Member sufficient time to adapt their products or production methods to the requirements of the responding Member's technical regulation. Thus, where a responding Member seeks to deviate from this rule, which, by its own terms, singles out producers in the complaining Member as the beneficiaries of a "reasonable interval" between the publication and the entry into force of a technical regulation, the responding Member must shoulder the burden of establishing a *prima facie* case that the conditions under which derogations from the rule are permitted are present.

Turning to the question of whether Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the TBT Agreement, the Appellate Body recalled that the Panel found that the actual interval allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) was a three-month period. Thus, Indonesia had successfully established a *prima facie* case of inconsistency with Article 2.12. The Appellate Body then turned to the question of whether the United States had rebutted the *prima facie* case of inconsistency established by Indonesia. The Appellate Body observed that, before the Panel, the United States did not contend that the urgent circumstances referred to in Article 2.10 of the TBT Agreement surrounded the adoption of Section 907(a)(1)(A). Moreover, in the Appellate Body's view, the United States had not submitted sufficient evidence and argument before the Panel to establish either: (i) that producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within the three-month interval between the publication and the entry into force of that measure; or (ii) that allowing a period of at least six months would have rendered the objective pursued by Section 907(a)(1)(A) ineffective. Thus, the Appellate Body agreed with the Panel that the United States had not rebutted the *prima facie* case of inconsistency with Article 2.12 that Indonesia had established.

The Appellate Body thus upheld, albeit for different reasons, the Panel's finding that, by failing to allow an interval of not less than six 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.

4.4 Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R

This appeal originated from a complaint brought by Mexico against certain legal instruments of the United States establishing the conditions for the use of a "dolphin-safe" label on tuna products. The legal instruments identified by Mexico in its panel request comprised the "Dolphin Protection Consumer Information Act" or the "DPCIA", implementing regulations, and a ruling by a US federal appeals court in *Earth Island Institute v. Hogarth* relating to the application of the DPCIA (collectively, the "measure at issue"). The measure at issue did not make the use of a "dolphin-safe" label obligatory for the importation or sale of tuna products in the United States. Instead, it set out the conditions under which such a label indicating "dolphin-safety" could be used. These conditions varied as a function of the area where the tuna contained in the tuna product was caught and the type of vessel and fishing method by which it was harvested. In particular, tuna products made from tuna caught by "setting on" dolphins (that is, chasing and encircling dolphins with a net in order to catch the tuna associating with them) was not eligible for a "dolphin-safe" label in the United States. Before the Panel, Mexico alleged that the measure at issue was inconsistent with Articles I:1 and III:4 of the GATT 1994, and Articles 2.1, 2.2, and 2.4 of the TBT Agreement.

4.4.1 Legal characterization of the measure at issue

The Appellate Body began by examining the United States' appeal of the Panel's finding that the measure at issue constituted a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. On appeal, the United States had alleged, inter alia, that the Panel had failed properly to distinguish a "technical regulation" from a "standard" as a result of an incorrect interpretation of the phrase "with which compliance is mandatory" in Annex 1.1 to the TBT Agreement.

4.4.1.1 Interpretation of Annex 1.1 to the TBT Agreement

On the basis of the text of Annex 1.1, the Appellate Body observed that the term "technical regulation" is defined by reference to a "document", which in turn could "cover a broad range of instruments or apply to a variety of measures". Noting that the second sentence of Annex 1.2, which sets out the definition of "standard", contains language identical to that found in the definition of a "technical regulation", the Appellate Body explained that the subject matter of a particular measure is not dispositive of whether that measure constitutes a technical regulation or a standard. The Appellate Body concluded that the fact that "labelling requirements" may consist of criteria or conditions that must be complied with in order to use a particular label does not imply therefore that the measure is, for that reason alone, a "technical regulation" within the meaning of Annex 1.1.

The Appellate Body further explained 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". The Appellate Body added that such an assessment "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."

4.4.1.2 Whether the measure at issue constituted a "technical regulation"

Regarding the measure at issue, the Appellate Body noted that the measure challenged by Mexico was composed of legislative, regulatory, and judicial acts of the US federal authorities. The Appellate Body added that the measure established "a single and legally mandated set of requirements" for making any statement with respect to the subject of 'dolphin-safety' of a tuna product in the United States and 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. The Appellate Body also attached significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller" of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim in connection with the tuna product.

On this basis, 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.

4.4.2 Article 2.1 of the TBT Agreement

The Appellate Body then turned to address Mexico's claim that the measure at issue was inconsistent with Article 2.1 of the TBT Agreement because it provides "less favourable treatment" to Mexican tuna products than to like products originating in the United States and other countries.

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

The Appellate Body referred, first, to its finding in *US – Clove Cigarettes* that, when assessing a claim under Article 2.1 of the TBT Agreement, a panel should 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 as compared to the group of like domestic products or like products originating in any other country. The Appellate Body explained that, in an analysis of "less favourable treatment" under Article 2.1, any adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may be relevant. Having found that the Panel applied an incorrect approach to assessing whether the measure at issue was inconsistent with Article 2.1 of the TBT Agreement, the Appellate Body turned to conduct its own analysis in the light of the factual findings made by the Panel and uncontested facts on the Panel record.

4.4.2.2 Conformity of the US measure with Article 2.1 of the TBT Agreement

The Appellate Body first assessed whether the measure at issue modified the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other WTO Member. The Appellate Body then examined whether any detrimental impact reflected discrimination against Mexican tuna products, or whether the measure at issue was even handed in the manner in which it addressed the risks to dolphins arising from different fishing methods in different areas of the ocean.

4.4.2.2.1 Whether the measure modified the conditions of competition in the US market to the detriment of Mexican tuna products

With respect to the question of whether the measure at issue modified the conditions of competition in the US market to the detriment of Mexican tuna products, the Appellate Body referred to the Panel's finding that access to the United States' "dolphin-safe" label constitutes an "advantage" on the US market. It further recalled the Panel's findings that: (i) the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the Eastern Tropical Pacific Ocean (the "ETP"); (ii) at least two thirds of Mexico's purse seine tuna fleet fishes in the ETP by setting on dolphins and is therefore fishing for tuna that would not be eligible to be contained in a "dolphin safe" tuna product under the US dolphin-safe labelling provisions; (iii) the US fleet currently does not practice setting on dolphins in the ETP; and (iv) as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin safe product under the US dolphin safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label. In the light of these findings, the Appellate Body found that the conditions of competition in the US market had been modified to the detriment of Mexican tuna products.

The Appellate Body further examined whether it was the measure at issue, rather than private actors, that caused the detrimental impact to Mexican tuna products. The Appellate Body observed that the fact that the detrimental impact on Mexican tuna products may involve some element of private choice did not relieve the United States of responsibility under the TBT Agreement, where the measure it adopted denied access to the "dolphin-safe" label to most Mexican tuna products. The Appellate Body therefore concluded that it was the measure itself, rather than private action, that modified the competitive conditions in the US market to the detriment of Mexican tuna products.

4.4.2.2.2 Whether the detrimental impact reflected discrimination

With respect to the question of whether this detrimental impact reflected discrimination, the Appellate Body recalled that the Panel had found the United States' objectives of informing consumers and protecting dolphins to be legitimate objectives within the meaning of Article 2.2 of the TBT Agreement. The Appellate Body noted: (i) that both Mexico and the United States had recognized that setting on dolphins may adversely affect dolphins"; (ii) the Panel's statement that the "number of dolphins killed in the ETP before the adoption of the controls established by the [Agreement on the International Dolphin Conservation Program], and the ensuing degradation of dolphin stocks in this area, are well-documented", adding that "Mexico does not deny that dolphins may be killed or seriously injured during purse-seine net fishing manoeuvres"; and (iii) the United States did not contest that "under the DPCIA provisions that are currently applicable *all* tuna products containing tuna caught in a non-ETP fishery using a method other than setting on dolphins are eligible to be labelled dolphin safe without certifying that no dolphin was killed or seriously injured in the set". The Appellate Body also reviewed a number of factual findings made by the Panel that were challenged by the United States as inconsistent with Article 11 of the DSU, and found no fault with the Panel's assessment of the evidence.

The Appellate Body then proceeded to examine the United States' contention that, to the extent that there were any differences in criteria that must be satisfied in order to substantiate "dolphin-safe" claims, they were "calibrated" to the risk that dolphins may be killed or seriously injured when tuna is caught.

The Appellate Body noted that the aspect of the measure at issue that caused the detrimental impact on Mexican tuna products was the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The Appellate Body therefore found that the question before it was whether the United States had demonstrated that this difference in labelling conditions was a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stemmed exclusively from such a distinction rather than reflecting discrimination.

The Appellate Body noted that the Panel had accepted the United States' argument that the fishing technique of setting on dolphins is particularly harmful to dolphins. However, the Panel did not agree with the United States, based on the evidence that Mexico had placed before it, that the risks to dolphins from other fishing techniques were insignificant and did not under some circumstances rise to the same level as the risks from setting on dolphins.

The Appellate Body further noted that the measure at issue addressed the observed and unobserved adverse effects on dolphins (such as cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress) resulting from the use of the fishing method that Mexico's fleet predominantly employs by disqualifying all tuna products containing tuna harvested with that method from access to the "dolphin-safe" label, while not addressing adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers. The Appellate Body recalled the Panel's finding that the only requirement applicable to purse seine vessels fishing outside the ETP was to provide a certification by the captain that no purse seine net was intentionally deployed on or used to encircle dolphins during the fishing trip. This requirement, however, did not address risks from other fishing methods, such as fish aggregating devices ("FADs"). The Appellate Body further noted the Panel's statement that risks to dolphins resulting from fishing methods other than setting on dolphins "could only be monitored by imposing a different substantive requirement, i.e. that no dolphins were killed or seriously injured in the sets in which the tuna was caught."

On this basis, the Appellate Body concluded that the United States had not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. For the Appellate Body, it followed from this that the United States had not demonstrated that the detrimental impact of the US measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. The Appellate Body explained that "the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP." Therefore, the Appellate Body was not persuaded that the United States had demonstrated that the measure was even-handed in the manner in which it addressed the risks to dolphins arising from different fishing methods in different areas of the ocean, even accepting that the fishing technique of setting on dolphins was particularly harmful to dolphins.

4.4.2.2.3 Conclusion under Article 2.1 of the TBT Agreement

The Appellate Body reversed the Panel's finding that the measure at issue was not inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body found, instead, that the measure challenged by Mexico provided "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and was therefore inconsistent with Article 2.1 of the TBT Agreement.

4.4.3 Article 2.2 of the TBT Agreement

The Appellate Body turned next to the United States' appeal of the Panel's finding that the measure at issue is more trade restrictive than necessary to fulfil its legitimate objectives, and that, therefore, the measure is inconsistent with Article 2.2 of the TBT Agreement.

4.4.3.1 Interpretation of Article 2.2 of the TBT Agreement

The Appellate Body noted that the first sentence of Article 2.2 requires WTO Members to ensure that their technical regulations are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade, while the second sentence provides that "[f]or this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". The Appellate Body then addressed the different elements set out in the text of Article 2.2.

The Appellate Body found that, in adjudicating a claim under Article 2.2 of the TBT Agreement, a panel must assess what objective a Member seeks to achieve by means of a technical regulation and whether this particular objective is legitimate. The Appellate Body further considered 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 objective. The Appellate Body found support for this reading of the phrase "fulfil a legitimate objective" in the sixth recital of the preamble of the TBT Agreement, which recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives "at the levels it considers appropriate", subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the TBT Agreement. For the Appellate Body, a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective. The Appellate Body emphasized, however, that a panel adjudicating a claim under Article 2.2 of the TBT Agreement must seek to ascertain to what degree the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member.

Turning then to the requirement of "necessity" in Article 2.2, the Appellate Body found that this concept 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. The Appellate Body considered that these factors together provide the basis for the determination of what is to be considered "necessary" in the sense of Article 2.2 in a particular case. The Appellate Body found that 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 a legitimate objective. The Appellate Body explained that a "necessity" analysis in the context of Article 2.2 of the TBT Agreement would in most cases involve a comparison of the trade-restrictiveness and the degree of achievement of the objective of 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. The Appellate Body added that a 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.

In sum, the Appellate Body found that an assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors, including: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. The Appellate Body noted that, in most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. The Appellate Body said that it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

With this in mind, the Appellate Body reviewed the Panel's application of Article 2.2 of the TBT Agreement to the facts of this dispute. The Appellate Body recalled that Mexico had presented "coexistence" of the US "dolphin-safe" label and the Agreement on the International Dolphin Conservation Program ("AIDCP") label as a reasonably available and less trade-restrictive alternative measure.

4.4.3.2 Application of Article 2.2 of the TBT Agreement

The Appellate Body found that the Panel's analysis of whether Mexico had demonstrated that the measure at issue was "more trade-restrictive than necessary" within the meaning of Article 2.2 was based, in part, on an improper comparison. With respect to the dolphin protection objective, the Panel had contrasted the AIDCP labelling requirements with the US "dolphin safe" labelling provisions, stating that "allowing compliance" with the former to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do. Similarly, with respect to the consumer information objective, the Panel had noted, *inter alia*, that, under the US measures, it was possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled "dolphin-safe". The Panel had compared that to the scenario under the AIDCP, where a label would only be granted if no dolphins were killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins. The Appellate Body observed that this comparison failed to take into account that the alternative measure identified by Mexico was *not* the AIDCP regime as such, but rather the coexistence of the AIDCP rules with the US measure.

The Appellate Body found that, in respect of the conditions for labelling as "dolphin-safe" tuna products containing tuna harvested *outside* the ETP, there was no difference between the measure at issue and the alternative measure identified by Mexico. Thus, with respect to fishing activities *outside* the ETP, the degree to which the United States' objectives are achieved under the alternative measure proposed by Mexico would be identical to that achieved by the measure at issue. *Inside* the ETP, however, the measure at issue and the alternative measure set out different requirements. Under the alternative measure, tuna caught by setting on dolphins would be eligible for a "dolphin-safe" label if the prerequisites of the AIDCP label have been complied with. By contrast, the measure at issue prohibited setting on dolphins, and thus tuna harvested in the ETP would only be eligible for a "dolphin-safe" label if it was caught by methods other than setting on dolphins. Accordingly, the Appellate Body concluded that the particular alternative measure identified by Mexico would at least inside the ETP contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, since, overall, the alternative measure would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe".

For these reasons, the Appellate Body found that the Panel's comparison and analysis was flawed and could not stand. Accordingly, the Appellate Body reversed the Panel's finding that the measure at issue was inconsistent with Article 2.2 of the TBT Agreement.

4.4.3.3 Other appeal by Mexico

Mexico filed two conditional other appeals in the event that the Appellate Body were to reverse the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the TBT Agreement. As the condition on which Mexico premised its appeals was met, the Appellate Body first examined Mexico's request that it reverse the Panel's intermediate finding that the United States' objective of contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins is a legitimate objective within the meaning of Article 2.2. Mexico did not claim that "contributing to the protection of dolphins" is an illegitimate objective; instead, Mexico argued that it is illegitimate to pursue this objective "by ensuring that the US market is not used to encourage" certain fishing practices. As the Appellate Body understood it, Mexico thus did not take issue with the United States' dolphin protection objective *per se*, but with the means used in pursuance of this objective. The Appellate Body noted that the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot per se provide a sufficient basis to conclude that the objective is not "legitimate" within the meaning of Article 2.2.

Mexico also requested that the Appellate Body find the measure at issue to be inconsistent with Article 2.2 based on the Panel's earlier finding that the measure did not entirely fulfil the United States' objectives. The Appellate Body noted that the Panel did not find that the measure at issue did not fulfil their objectives or was not "capable" of fulfilling the United States' objectives, but that the measure did fulfil the United States' objectives to a certain extent. The Appellate Body recalled 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. The Appellate Body added that an assessment of the necessity of a measure's trade restrictiveness under Article 2.2 therefore focuses on the extent to which a measure contributes to the objective pursued.

On this basis, the Appellate Body rejected both Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective and Mexico's request to find the measure at issue inconsistent with Article 2.2 of the TBT Agreement based on the Panel's finding that the measure did not entirely fulfil its objectives.

4.4.4 Article 2.4 of the TBT Agreement

4.4.4.1 Interpretation of Article 2.4 of the TBT Agreement

The Appellate Body observed that the United States' appeal required it to decide what constitutes an "international standard" for purposes of the TBT Agreement. The Appellate Body emphasized that this question was important because, under Article 2.4, if a standard is found to constitute a "relevant international standard", WTO Members are required to use it, or its relevant parts, as a basis for their technical regulations, except when such standard would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the Member in question.

The Appellate Body found that a required element of the definition of an "international" standard for purposes of the TBT Agreement is the approval of the standard by an "international standardizing body", that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all WTO Members. With respect to the requirement that the body have "recognized activities in standardization", the Appellate Body found that a "standardizing body" does not need to have standardization as its principal function, or even as one of its principal functions, in order to have "recognized activities in standardization".

With respect to the requirement that membership in an international standardizing body be "open to the relevant bodies of at least all Members", the Appellate Body noted that the TBT Agreement distinguishes international bodies, "whose membership is open to the relevant bodies of at least all Members", from regional bodies, "whose membership is open to the relevant bodies of only some of the Members". The Appellate Body further noted that both the United States and Mexico had referred in their arguments to 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 TBT Agreement. The Appellate Body examined whether the Decision could 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 and therefore provided context that had to be considered in interpreting Article 2.4. The Appellate Body observed in this regard 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, and was thus adopted subsequent to the conclusion of the TBT Agreement. The Appellate Body further noted that the membership of the TBT Committee comprises all WTO Members and that the Decision was adopted by consensus. While the Appellate Body accepted that the terms and content of the Decision express an agreement between Members on the interpretation or application of a provision of WTO law, it noted that the extent to which the Decision informs the interpretation and application of a term or provision of the TBT Agreement in a specific case depends on the degree to which it "bears specifically" on the interpretation and application of the respective term or provision. Regarding this question, the Appellate Body found that the TBT Committee Decision clarifies the temporal scope of the requirement that an international standardizing body be open to the relevant bodies of at least all WTO Members, and specifies that the body should be open on a non-discriminatory basis.

The Appellate Body then turned to evaluate whether the Panel erred in finding that the AIDCP "dolphin-safe" definition and certification is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.

4.4.4.2 Application of Article 2.4 of the TBT Agreement

The Appellate Body considered whether the Panel erred in concluding that the AIDCP is "international", that is, that membership in the AIDCP is open to the relevant bodies of at least all WTO Members. On appeal, Mexico had suggested that being invited to accede to the AIDCP is a "formality". Appellate Body was not persuaded and observed that it was uncontested that the parties to the AIDCP had to take the decision to issue an invitation by consensus. Based on its analysis, the Appellate Body found that the Panel erred in finding that the AIDCP "dolphin-safe" definition and certification is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. Having reached this conclusion, the Appellate Body was not required to address the issue of whether the Panel erred in finding that Mexico had failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfil the United States' objectives. In the light of the Appellate Body's findings, the Panel's ultimate conclusion that the measure at issue was not inconsistent with Article 2.4 of the TBT Agreement stood.

4.4.5 Mexico's claims under Articles I:1 and III:4 of the GATT 1994

The Appellate Body turned finally to address Mexico's contention that the Panel erred in exercising judicial economy with respect to Mexico's claims under Articles I and III:4 of the GATT 1994, thereby acting inconsistently with its obligations under Article 11 of the DSU. The Appellate Body noted that the Panel's decision to exercise judicial economy appeared to rest upon the 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. The Appellate Body did not agree with that proposition. The Appellate Body added that the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with the Panel's view that the measure at issue is a "technical regulation" within the meaning of the TBT Agreement. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the TBT Agreement. The Appellate Body found that, by failing to do so, the Panel engaged in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU.

4.5 Appellate Body Reports, *US – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R

This appeal arose from challenges made by Canada and Mexico (the "complainants") to certain country of origin labelling ("COOL") requirements imposed by the United States. These requirements were contained in the Agricultural Marketing Act of 1946, as amended by the Farm Security and Rural Investment Act of 2002 and the Food, Conservation, and Energy Act of 2008 (the "COOL statute"), passed by the US Congress, and its implementing regulations, promulgated by the Secretary of Agriculture through the Agricultural Marketing Service ("AMS") of the US Department of Agriculture (the "2009 Final Rule (AMS)"). The Panel referred to the COOL requirements under the COOL statute and the 2009 Final Rule (AMS) collectively as the "COOL measure". The COOL measure imposed an obligation on retailers selling specific products in the United States to label those products with their country(ies) of origin. Muscle cuts of beef and pork were among the products subject to such labelling requirements. The COOL measure defined "origin", in the case of meat, as a function of the countries in which the production steps involving the animals from which that meat was derived took place. Three production steps were relevant for this purpose: birth, raising, and slaughter. Thus, although the labelling requirement under the COOL measure applied to meat rather than livestock, the products at issue in these disputes were imported Canadian cattle and hogs and imported Mexican cattle, which were used in the United States to produce beef and pork.

The COOL measure established four categories of origin, and hence four types of labels, for muscle cuts of beef and pork. Category A was reserved for meat derived from animals born, raised, and slaughtered in the United States. Such meat had to be labelled as US origin. Category B concerned meat derived from animals born in a foreign country and raised and slaughtered in the United States. Meat in this category had to be labelled as a product of both countries, and the countries of origin could be listed in any order. Category C concerned meat derived from animals raised outside the United States and imported into the United States for immediate slaughter. Such meat had to be labelled as a product of the United States and of the country(ies) in which the animals were born and raised, but the label could not list the United States first. Category D was reserved for meat produced from animals that were slaughtered outside the United States and

imported into the United States in the form of meat. Meat in this category had to be labelled according to the country of origin declared on import documentation. Notwithstanding these rules, the COOL measure provided that meat could bear a different label from the one it should in principle bear when livestock or meat of different "origins" was processed together on a single production day ("commingled"). Specifically, when Category B meat was commingled with either Category A or Category C meat, all of the resulting meat could be labelled as if it were Category B meat. The COOL also provided for several exclusions and exemptions, in particular that beef and pork needed not be labelled when they were: (i) an ingredient in a "processed food item"; (ii) sold in "food service establishments", such as restaurants and cafeterias; or (iii) sold in butcher shops and small supermarkets. Finally, the COOL measure imposed certain recordkeeping, auditing, and verification requirements on upstream livestock and meat producers, whereby such producers needed to possess, at every stage of the supply and distribution chain, information on the origin of each animal and piece of meat, and they needed to transmit such information to the next processing stage.

4.5.1 Article 2.1 of the TBT Agreement

The United States requested the Appellate Body to reverse the Panel's finding that the COOL measure was inconsistent with Article 2.1 of the TBT Agreement. The United States claimed that the Panel erred in finding that: (i) the COOL measure treated imported livestock differently than domestic livestock; and (ii) the COOL measure accorded less favourable treatment to imported livestock by modifying the conditions of competition to the detriment of imported livestock. The United States also identified several findings as having been made in a manner inconsistent with the Panel's duties under Article 11 of the DSU.

4.5.1.1 Interpretation of Article 2.1

The Appellate Body recalled that, with respect to the national treatment obligation under Article 2.1 of the TBT Agreement, an analysis of less favourable treatment involves an assessment of 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. Moreover, Article 2.1 prohibits both *de jure* and *de facto* less favourable treatment. In determining whether the operation of the measure, in the relevant market, has a de facto detrimental impact on the group of like imported products, a panel must take into consideration the totality of facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market.

However, the Appellate Body explained that, as found in *US – Clove Cigarettes*, not every instance of a detrimental impact amounts to the less favourable treatment of imports that is prohibited under Article 2.1. Rather, some technical regulations that have a de facto detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered "legitimate" and thus the detrimental impact will reflect discrimination prohibited under Article 2.1. In assessing even handedness, 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.

With regard to burden of proof, the Appellate Body recalled that, as with all affirmative claims, it is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products. Therefore, where the complaining party has met the burden of making its *prima facie* case, for example, by adducing evidence and arguments showing that the measure is not even handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent rebuts that, by demonstrating that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.

4.5.1.2 Different treatment under the COOL measure

With respect to the United States' claim that the Panel erred in concluding that the COOL measure on its face accorded different treatment to imported livestock, the Appellate Body noted that formal different treatment is not required for a finding of *de facto* less favourable treatment to be made. In any event, the Appellate Body did not consider that the Panel relied on any instance of different treatment explicitly provided for under the COOL measure to support its ultimate finding that the COOL measure accorded less favourable treatment to imported livestock than to like domestic livestock. Rather, the statement challenged by the United States formed part of an introductory section setting out the Panel's understanding of the measure's *de jure* structure and operation, and preceded its in depth analysis of *de facto* less favourable treatment. The Appellate Body therefore found that the Panel did not err in stating that the COOL measure treated imported livestock differently than domestic livestock.

4.5.1.3 Detrimental impact on imported livestock

The Appellate Body next turned to the United States' claim that the Panel erroneously found the COOL measure to accord less favourable treatment to imported livestock. The United States argued that the Panel erred in examining the effect of "external factors", such as the small market share held by imported livestock and the decisions of private market participants, to determine whether imported livestock and like domestic livestock were "equally competitive", rather than examining whether the measure *itself* treated imported livestock differently and less favourably than like domestic livestock.

The Appellate Body considered the circumstances in this case to be similar to those in *Korea – Various Measures on Beef*. In that dispute, the Appellate Body held that the adoption of a measure, which required small retailers to sell either exclusively domestic beef or exclusively imported beef, had the direct practical effect, in the relevant market, of denying competitive opportunities to imports. In that case the Appellate Body did not, as the United States maintained, find a detrimental impact on imported beef due only to the legal necessity of making a choice that the measure itself imposed. Rather, the findings in that dispute support the proposition that, whenever the operation of a measure in the market creates incentives for private actors systematically to make choices in ways that benefit domestic products to the detriment of like imported products, then such a measure may be found to treat imported products less favourably. The Appellate Body recalled that 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.

The Appellate Body rejected the United States' contention that, in the COOL disputes, the Panel wrongly attributed to the COOL measure a detrimental impact on imports caused exclusively by factors "external" to that measure. The Appellate Body considered that the Panel's analysis indicated that the COOL measure itself, as applied in the US livestock and meat market, created an incentive for US producers to segregate livestock according to origin, in particular by processing exclusively US origin livestock. In its analysis, the Panel properly reasoned that the small market share held by Canadian and Mexican livestock imports exacerbated the effects of the COOL measure. Indeed, in the Appellate Body's view, the opportunity for a technical regulation to discriminate may well derive from its operation within a given market that exhibits particular characteristics, including the market share held by imported products. The Appellate Body further considered that, 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. The Appellate Body noted that, in this case, the Panel expressly found that it was "the result of the COOL measure" that, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, private market participants opted predominantly for the former. The Panel also correctly reasoned that, had it not been for the COOL measure, market participants would not have acted this way.

On this basis, the Appellate Body found that the Panel did not err in finding that the COOL measure modified the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. The Appellate Body, however, found that the Panel should have continued its examination under Article 2.1 and determined whether the circumstances of this case indicated that the detrimental impact stemmed exclusively from a legitimate regulatory distinction. Before examining the Panel's relevant findings with a view to reaching a determination in this respect, the Appellate Body first turned to the United States' claims raised under Article 11 of the DSU.

4.5.1.4 Article 11 of the DSU

The United States alleged that the Panel acted inconsistently with its obligations under Article 11 of the DSU in finding that the COOL measure "necessitate[d]" segregation, and in ignoring evidence showing that producers were taking advantage of the commingling flexibilities contained in the measure in order to avoid segregation "on a widespread basis". Upon reviewing the Panel's findings and its treatment of relevant evidence, the Appellate Body did not consider that the Panel's determinations regarding segregation and commingling evinced a failure to assess the facts objectively. The United States pointed to no evidence that it submitted to the Panel demonstrating that the COOL measure's recordkeeping and verification requirements were being complied with by means other than segregation. Rather, the evidence to which the United States referred was expressly considered by the Panel and deemed inconclusive in this regard. The fact that the Panel found this evidence not to be probative simply indicated that the Panel declined to attribute to the evidence the weight and significance that the United States considered it should have.

The United States also claimed that the Panel failed to make an objective assessment of the facts relating to the price differential between domestic and imported livestock in the US market, because the Panel ignored certain evidence, and because its finding that the Sumner Econometric Study submitted by Canada demonstrated negative price effects on imports lacked a factual basis. The Appellate Body found that the evidence that the United States claimed the Panel ignored was of a different nature than, and did not vitiate the Panel's reliance on, the evidence submitted by Canada and Mexico. Moreover, the Appellate Body noted that the Panel assessed econometric studies submitted by both Canada and the United States, determined that only the Sumner Econometric Study was sufficiently robust, and provided reasons for this conclusion. In any event, the Appellate Body considered that, because the Panel was not required to examine the actual trade effects of a measure in order to reach a finding on less favourable treatment under Article 2.1, these Panel findings did not materially affect its ultimate legal conclusion under Article 2.1 of the TBT Agreement.

The Appellate Body thus concluded that the United States had not demonstrated that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings relating to segregation, commingling, and the price differential between domestic and imported livestock.

4.5.1.5 Whether the detrimental impact reflects less favourable treatment

The Appellate Body went on to review the Panel's findings as they related to the design, architecture, revealing structure, operation, and application of the COOL measure, and found that these findings provided a sufficient basis for it to determine whether the detrimental impact experienced by Canadian and Mexican livestock stemmed exclusively from a legitimate regulatory distinction. The Appellate Body noted, as a preliminary matter, that the Panel identified the objective pursued by the United States through the COOL measure as being "to provide consumer information on origin". Furthermore, the Appellate Body found that it was the distinction between the three production steps defining origin (birth, raising, and slaughter), as well as between the four types of labels that had to be affixed to muscle cuts of beef and pork, that constituted the relevant regulatory distinctions under the COOL measure. Therefore, the Appellate Body proceeded to examine, based on the particular circumstances of this case, whether these distinctions were designed and applied in an even-handed manner, or whether they lacked even-handedness, for example because they were designed or applied in a manner that constituted arbitrary or unjustifiable discrimination.

Taking account of the overall architecture of the COOL measure and the way in which it operated and was applied, the Appellate Body considered that the detail and accuracy of the origin information that upstream producers were required to track and transmit – based on the countries in which the livestock from which meat was derived were born, raised, and slaughtered – was significantly greater than the origin information that retailers of muscle cuts of beef and pork were required to convey to their customers. This was because the labels did not indicate which productions steps took place in which country, and because the commingling flexibility provided for under the measure meant that the origin information contained on the labels could include countries in which no production steps in fact took place, such that a package containing exclusively US origin meat could be labelled as mixed origin. In addition, the origin of *all* livestock had to be tracked and transmitted by upstream producers in accordance with the recordkeeping and verification requirements even though a considerable proportion of the beef and pork derived from that livestock would ultimately be exempt from the labelling requirements and therefore carry no COOL label at all. Lastly, the Panel's findings indicated that a processor's decision to use livestock of different origins rather than exclusively US origin livestock would not only be more costly, it would also lead to confusing information being conveyed to consumers.

For all of these reasons, the Appellate Body found that the informational requirements imposed on upstream producers under the COOL measure were disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels, and that nothing in the Panel's findings or on the Panel record explained or supplied a rational basis for this disconnect. The Appellate Body emphasized that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, was of central importance, because the Panel had found – and the Appellate Body had confirmed – that it was the recordkeeping and verification requirements that "necessitate[d]" segregation, and that created an incentive for US producers to process exclusively domestic livestock and a disincentive to process imported livestock. Consequently, because of the disconnect between the upstream recordkeeping and verification requirements and the information communicated to consumers on the prescribed retail meat labels, the detrimental impact on imports caused by the same recordkeeping and verification requirements could not be explained by the need to provide origin information to consumers. Therefore, the Appellate Body found that the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1 of the TBT Agreement.

4.5.2 Article 2.2 of the TBT Agreement

The United States requested the Appellate Body to reverse the Panel's finding under Article 2.2 of the TBT Agreement on three main grounds: (i) that the Panel erred in finding that the COOL measure was "trade restrictive"; (ii) that the Panel erred in reaching its finding regarding the United States' chosen "level of fulfilment" through the COOL measure; and (iii) that the Panel adopted an erroneous legal framework, and erred in its application of that framework, in determining whether the COOL measure was more trade restrictive than necessary to fulfil a legitimate objective.

The Appellate Body noted that each of the grounds raised by Mexico in its other appeal was conditional upon the Appellate Body's reversal of the Panel's ultimate finding under Article 2.2, but considered its arguments together with Canada's when reviewing the relevant portions of the Panel's analysis. Canada and Mexico both claimed that the Panel erred in its legal approach, and acted inconsistently with its duties under Article 11 of the DSU, in identifying the objective of the COOL measure. Canada further contested the Panel's finding that the objective of providing consumer information on origin was "legitimate" within the meaning of Article 2.2. In the event that the Appellate Body reversed the Panel's finding that the COOL measure was inconsistent with Article 2.2, then Canada and Mexico requested the Appellate Body to complete the analysis and find that the COOL measure did not comply with Article 2.2 because there were less trade-restrictive alternative measures available.

4.5.2.1 Interpretation of Article 2.2

The Appellate Body began its analysis with an interpretation of the relevant elements in an Article 2.2 analysis, drawing in particular on the guidance provided in the report of the Appellate Body in *US – Tuna II (Mexico)*. With regard to the identification of the objective pursued by a measure, the Appellate Body found that a panel must take account of all 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, and is not bound by the responding Member's characterization of the objective it pursues through the measure. As for the legitimacy of the identified objective, the Appellate Body noted that the use of the words "*inter alia*" in Article 2.2 introducing the list of legitimate objectives signifies that the list of legitimate objectives is not a closed one. The Appellate Body further found that 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. Moreover, objectives recognized in the preamble of the TBT Agreement and in 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.

Turning to the phrase "fulfil a legitimate objective", the Appellate Body found that the word "fulfil", as used in Article 2.2, is concerned with the *degree* of contribution that the technical regulation makes towards the achievement of the legitimate objective. 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, the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member.

Regarding the assessment of "necessity", in the context of Article 2.2, the Appellate Body recalled that this involves a "relational analysis" of the following factors: 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. Such an analysis will, in most cases, 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. This comparison 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.

4.5.2.2 Trade-restrictiveness

The United States' claimed that, because the Panel relied upon a finding that it had made in the course of its analysis under Article 2.1 to conclude that the COOL measure was trade restrictive for purposes of Article 2.2, the latter finding had to be reversed once that Article 2.1 finding had been reversed. Since, however, it had upheld the Panel's finding that the COOL measure was inconsistent with Article 2.1, the Appellate Body found that it did not need to consider further this ground of the United States' appeal, and thus made no finding in this respect.

4.5.2.3 Identification of the COOL measure's objective

At the outset, the Appellate Body expressed concerns with respect to the fact that the Panel's formulation of the objective pursued by the United States varied over the course of its analysis. In the Appellate Body's view, the Panel should have sought to avoid using different language to denote the same concept, given that the relevant objective is the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures. The Appellate Body considered that the reason for the difference in the formulations could have resulted from the fact that the Panel used a more general formulation (that is, the provision of consumer information on origin) to reflect the objective pursued, and a more detailed formulation (that is, the provision of *as much clear and accurate* origin information *as possible* to consumers) to represent the level of fulfilment of that objective that the United States desired to achieve. Nevertheless, the TBT Agreement does not require that, in its examination of the objective pursued, a panel discern or identify, in the abstract, the level at which a responding party wishes to achieve that objective. The Appellate Body therefore proceeded to evaluate the claims of error raised on appeal on the basis that the Panel had

identified the objective pursued through the COOL measure as "to provide consumer information on origin".

Canada and Mexico claimed that the Panel erroneously deferred to the United States' articulation of the objective rather than itself determining the objective pursued through the COOL measure based on the arguments and evidence before it relating to the design, architecture, structure, and legislative history of the COOL measure. The Appellate Body noted that the Panel addressed the question of "what is the objective" in two separate places in its Reports. First, when considering whether the objective pursued by the United States was legitimate, the Panel determined "the United States' objective" in the abstract. Second, in analyzing whether the COOL measure was more trade restrictive than necessary to fulfil its objective, the Panel considered the specific objective pursued by the COOL measure itself. The Appellate Body considered the Panel's segmentation of its analysis of the objective pursued by the COOL measure into two parts to be unnecessary, and expressed concerns that the Panel apparently considered itself bound to accept the objective as identified by the United States when it addressed the question of the objective for the first time. However, the Appellate Body noted that, when it considered the objective for the second time, the Panel did consider the evidence relating to the COOL measure's text, structure, design, operation, and legislative history. Therefore, the Appellate Body did not agree with Canada and Mexico that the Panel erred in its application of Article 2.2 of the TBT Agreement by determining the objective of the COOL measure in the "abstract", and solely on the basis of the United States' declared objective.

Canada and Mexico further claimed that the Panel failed to comply with its duties under Article 11 of the DSU when it assessed the COOL measure's objective, because a proper assessment of the evidence would have yielded a conclusion that the true objective of the COOL measure was the protection of the United States' domestic producers of cattle and hogs. The Appellate Body found that Mexico's arguments were primarily based on its claim that the Panel committed legal error in identifying the COOL measure's objective. The Appellate Body recalled its finding that the Panel did not err in this respect, and its findings in past disputes that a claim under Article 11 of the DSU should not be made merely as a "subsidiary argument" in support of a claim that the panel erred in its application of a WTO provision. The Appellate Body further noted that Mexico did not identify any specific error by the Panel or explain why the Panel's findings lacked a factual basis. The Appellate Body therefore rejected Mexico's claim under Article 11 of the DSU.

With respect to Canada's claim under Article 11 of the DSU, the Appellate Body found that the arguments that Canada put forward consisted mainly of the identification of four groups of evidence that it had put before the Panel, coupled with an assertion that the Panel did not reach the appropriate conclusion based on that evidence. The Appellate Body reviewed the Panel's findings with regard to each group of evidence, and found no reversible error. In the Appellate Body's view, Canada did not explain *how* the Panel failed to comply with its duty to assess objectively the facts. Rather, Canada in effect sought to have the Appellate Body conduct its own assessment of the facts, and to ascribe a different weight to the evidence than did the Panel. However, the Appellate Body emphasized that it was not called upon to disturb the Panel's exercise of its discretion merely because it might have arrived at a different conclusion. The Appellate Body therefore found that Canada had not demonstrated that the Panel failed to satisfy its duty to assess objectively the facts. The Appellate Body also rejected Canada's alternative claim, in the event the Appellate Body rejected its Article 11 claim, that the Panel erred in failing to define the objective of the COOL measure at a "sufficiently detailed level" because it did not identify the purpose for which information was provided to consumers. The Appellate Body found that the Panel specified the type of information to be provided (on "origin" as defined under the COOL measure), and the persons to whom that information was to be provided (consumers).

Finally, the United States claimed that, in concluding that the United States aimed to provide "as much clear and accurate origin information as possible", the Panel: (i) acted inconsistently with Article 11 of the DSU because it wilfully distorted and misrepresented the United States' position as to the level at which the United States considers it appropriate to fulfil that objective; and (ii) failed to consider all relevant information regarding the level at which the United States sought to achieve its objective. The Appellate Body found both allegations to be misplaced, because they assumed that, in identifying the objective, the Panel was also required to identify the desired "level of fulfilment". The Appellate Body also disagreed with the United States' contention that the Panel failed to take into account the fact that part of the objective of the COOL measure was to minimize the costs to market participants. The Appellate Body questioned whether the United States had

made such an argument in its submissions to the Panel and, in any event, expressed doubt that the balancing of cost considerations is properly considered as part of the relevant objective. For the Appellate Body, the issue of costs appeared more relevant in the context of assessing whether the COOL measure fulfilled its objective.

On the basis of the above, the Appellate Body found that the Panel did not err in identifying the objective pursued by the United States through the COOL measure as being to provide consumer information on origin.

4.5.2.4 Legitimacy of the identified objective

Canada contended that, in interpreting Article 2.2 of the TBT Agreement, the Panel erred in not adopting the *ejusdem generis* principle to limit "legitimate" objectives to those objectives that are of the same type or kind as the ones explicitly listed in Article 2.2. The Appellate Body recalled that, in determining whether an unlisted objective qualifies as legitimate, a panel may usefully have regard to those objectives that are expressly listed in Article 2.2, because these may provide an illustration and reference point for other objectives that may be considered "legitimate". With respect to the *ejusdem generis* principle, however, the Appellate Body did not, see, and considered that Canada had not elaborated, the alleged "significant elements of commonality of the explicitly listed objectives" that would illuminate the relevant type or kind of objective that can fall within the class of legitimate objectives covered by Article 2.2. Recalling that objectives listed in the recitals of the preamble of the TBT Agreement and provisions of other covered agreements may guide the determination of legitimacy, the Appellate Body observed that the provision of consumer information on origin bears some relation to the objective of prevention of deceptive practices reflected in both Article 2.2 and Article XX(d) of the GATT 1994. The Appellate Body also observed that Article IX of the GATT 1994 indicates that requiring origin labelling for imported goods is, at least in some circumstances and for some definitions of "origin", considered under WTO law to be a permissible means of regulating trade in goods.

The Appellate Body further recalled that the burden of showing that a specific objective is not "legitimate" under Article 2.2 rests on a complaining party. The Appellate Body found that Canada had not explained why it was not legitimate to define the origin of meat in the way the COOL measure defined it. Rather, as it did before the Panel, Canada linked its approach to legitimacy to its arguments on the need to know the purpose for which information on origin is provided to consumers. However, this was a mere repetition of its arguments that the Panel failed to identify the objective of the COOL measure as trade protectionism. Furthermore, although Canada appeared to consider that the Panel wrongly assumed that a widely held social norm is always legitimate, the Appellate Body did not see that the Panel made any such assumption. While the Appellate Body did express concern over certain aspects of the Panel's analysis of "legitimacy", including the role that "the practice in a considerable proportion of WTO Members" and "social norms" played in that analysis, the Appellate Body was not persuaded that these ambiguities tainted the Panel's conclusion. The Appellate Body therefore found that the Panel did not err in finding that providing consumer information on origin was a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.

4.5.2.5 Whether the COOL measure is more trade restrictive than necessary

The United States maintained that, in examining whether the COOL measure was more trade restrictive than necessary to fulfil a legitimate objective, the Panel erroneously found that the United States acted inconsistently with Article 2.2 simply because the COOL measure did not meet some minimum threshold of contribution to its objective. The United States further argued that, in finding that the COOL measure did not fulfil its objective, the Panel ignored its own findings about the extent of the contribution that the COOL measure made to achieving its objective.

The Appellate Body recalled that a panel's assessment of whether a measure *fulfils* its objective is concerned primarily with *the actual contribution* made by a measure towards achieving its objective. Thus, the Appellate Body found, 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. The Appellate Body also noted that a number of findings and observations made by the Panel in the course of its analysis suggested that the COOL measure did contribute to the objective of providing information to consumers on the countries in which the livestock from which meat was derived were born, raised, and slaughtered. The Panel found, for example, that Label A provided meaningful information and that the labelling rules prevented meat derived from animals of non-US origin from carrying Label A. The Panel also found that, on the whole, the COOL measure provided more information to consumers than was available to them prior to its enactment, and that even Labels B and C provided some origin information, namely, information with regard to the possible origin of the meat. Despite these findings, the Panel nonetheless found that the COOL measure did not fulfil the identified objective within the meaning of Article 2.2 because it failed to convey meaningful origin information to consumers. In so finding, the Panel apparently considered that, in order for the COOL measure to fulfil its objective, either all of the labels had to provide 100 per cent accurate and clear information, or that the COOL measure had to meet or surpass some minimum threshold. The Appellate Body therefore found that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement. Furthermore, because the Panel ignored its own findings, which demonstrated 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.

On this basis, the Appellate Body found that the Panel erred in finding that the COOL measure did not fulfil the identified objective within the meaning of Article 2.2 because it failed to convey meaningful origin information to consumers, and reversed the Panel's ultimate finding that, for this reason, the COOL measure was inconsistent with Article 2.2 of the TBT Agreement.

4.5.2.6 Completion of analysis under Article 2.2

Having reversed the Panel's finding under Article 2.2 of the TBT Agreement, the Appellate Body proceeded to consider whether it could rule on the complainants' claim that the COOL measure was inconsistent with Article 2.2 because it was more trade restrictive than necessary to fulfil a legitimate objective. The Appellate Body explained that, to the extent that the factual findings of the panel and the undisputed facts on the panel record provided a sufficient basis for its analysis, it would evaluate the degree of contribution made by the COOL measure to the legitimate objective at issue, its trade restrictiveness, and the nature of the risks at issue as well as the gravity of consequences that would arise from non-fulfilment of the objective. The Appellate Body also stated that it would seek to compare the COOL measure with the four alternative measures proposed by Canada and Mexico by examining whether the latter were less trade restrictive, would make an equivalent contribution to the relevant legitimate objective, and were reasonably available.

The Appellate Body found that the Panel's factual findings suggested that: the COOL measure made some contribution to the objective of providing consumers with information on origin, in particular, because Label A provided "meaningful information" to consumers regarding origin even though Labels B and C did not; that it had a considerable degree of trade restrictiveness; and that the consequences that could arise from non-fulfilment of its objective were not particularly grave. The Appellate Body stressed, however, that it lacked clear and precise Panel findings with regard to these factors, and, in particular, findings that would enable it to identify the *degree* of contribution made by the COOL measure to the United States' objective.

The Appellate Body proceeded to examine the alternative measures proposed by Canada and Mexico, namely: (i) a voluntary country of origin labelling requirement; (ii) a mandatory country of origin labelling requirement based on the criterion of substantial transformation; (iii) a voluntary country of origin labelling regime combined with mandatory country of origin labelling based on substantial transformation; and (iv) a trace back regime. The Appellate Body found that it was unable to identify Panel findings or sufficient undisputed facts on the record that would enable it to determine: (i) to what extent the first three alternatives would contribute to the objective of the COOL measure, or how such a contribution would compare to the degree of contribution made by the COOL measure itself; and (ii) how the trade-restrictiveness of the fourth alternative would compare to the *status quo*. In addition, with regard to the first and third alternatives, the Appellate Body found that it was faced with limited elaboration by the parties of their arguments. With regard to the second alternative, the Appellate Body also observed that a finding made by the Panel in the course of its analysis of the claims raised under Article 2.4 of the TBT Agreement suggested that a mandatory labelling regime based on substantial transformation would, at best, contribute only partially to fulfilling the objective of the COOL measure.

On this basis, the Appellate Body concluded that, due to the absence of relevant factual determinations by the Panel, and of sufficient undisputed facts on the record, it was unable to complete the legal analysis under Article 2.2 of the TBT Agreement and determine whether the COOL measure was more trade restrictive than necessary to fulfil its legitimate objective.

4.5.3 Articles III:4 and XXIII:1(b) of the GATT 1994

The complainants also raised conditional appeals under Articles III:4 and XXIII:1(b) of the GATT 1994. In the event the Appellate Body reversed the Panel's finding under Article 2.1 of the TBT Agreement, the complainants each requested the Appellate Body to find that the Panel erred in its exercise of judicial economy with respect to their claims under Article III:4, and to complete the analysis under that provision. If the Appellate Body reversed the Panel's finding under Article 2.1, and did not make a finding of inconsistency under Article III:4, the complainants each requested the Appellate Body to find that the Panel erred in exercising judicial economy with respect to their claims under Article XXIII:1(b), and to complete the analysis under that provision. **Because the conditions on which these appeals were made were not satisfied, the Appellate Body did not make findings under Articles III:4 and XXIII:1(b) of the GATT 1994.**

4.6 Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R

This dispute concerned the United States' challenge of China's imposition, through China's Ministry of Commerce ("MOFCOM") Notice No. 21, of anti-dumping and countervailing duties on imports of grain oriented flat-rolled electrical steel ("GOES") from the United States. The anti-dumping and countervailing investigations were initiated on 1 June 2009, following the application by two Chinese steel producers: Wuhan Iron and Steel (Group) Corporation ("WISCO") and Baosteel Group Corporation ("Baosteel"). Two exporters/producers of GOES in the United States – AK Steel Corporation ("AK Steel") and ATI Allegheny Ludlum Corporation ("ATI") – registered as respondents in both investigations. The period of dumping and subsidy investigations was from 1 March 2008 to 28 February 2009, and the period of injury investigation was from 1 January 2006 to 31 March 2009. The subsidy investigation concerned 22 of the 27 federal and state laws that the applicants had alleged provided countervailable subsidies. On 20 July 2009, the applicants filed an additional application challenging alleged subsidies provided under 10 additional federal and state laws, and MOFCOM conducted an investigation covering six of these programmes.

On 10 December 2009, MOFCOM published preliminary dumping margins and subsidy rates in a preliminary determination. MOFCOM subsequently released a final injury disclosure document with the stated purpose of disclosing the "basic facts upon which the final injury determination is made". On 10 April 2010, MOFCOM issued its Final Determination for the anti-dumping and countervailing duty investigations. The dumping margins for AK Steel and ATI were 7.8% and 19.9%, respectively, and the subsidy rates for AK Steel and ATI were 11.7% and 12%, respectively. For the unknown US exporters/producers, MOFCOM determined an "all others" dumping margin of 64.8%, and an "all others" subsidy rate of 44.6%. Furthermore, MOFCOM found that there was a causal link between the dumped and subsidized imports of GOES from the

United States and the material injury suffered by the domestic industry. Because MOFCOM conducted its injury and causation analysis by collectively taking into account GOES imports from Russia – which was implicated in the anti-dumping investigation – and the United States, various sections of the Panel Report refer to injury and causation findings by MOFCOM concerning imports from both countries.

At the outset, the Appellate Body noted that, in examining the United States' challenge to MOFCOM's price effects finding, the Panel applied the legal standard in Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, in conjunction with the requirement set out in Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, that a determination of injury be based on positive evidence and involve an objective examination. Therefore, although China did not appeal the Panel's interpretation and application of Articles 3.1 and 15.1, the Appellate Body considered that its examination of the Panel's analysis under Articles 3.2 and 15.2 could not be conducted in isolation from the Panel's analysis pursuant to Articles 3.1 and 15.1. The Appellate Body also stated that it would examine the Panel's analysis in the light of the interpretation of Articles 3.1 and 15.1 that has been developed in the Appellate Body's relevant jurisprudence.

4.6.1 Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement

4.6.1.1 Interpretation of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement

China claimed on appeal that the Panel erred in its interpretation and application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. With regard to the Panel's interpretation of Articles 3.2 and 15.2, China argued that the Panel erred in interpreting the phrase "the effect of" in these provisions to mean that an investigating authority must demonstrate that adverse price effects were caused by dumped and/or subsidized imports. China maintained that Articles 3.2 and 15.2 impose a "limited obligation", whereby investigating authorities need only "consider" the price effects listed therein, but need not demonstrate a causal link between the subject imports and the adverse price effects on the domestic industry. Thus, the Panel erroneously incorporated the stricter standard of causation provided under Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement into Articles 3.2 and 15.2, respectively. In so finding, China argued, the Panel failed to conduct a proper analysis of the text of Articles 3.2 and 15.2, in particular, the terms "consider" and "effect". The Panel also ignored relevant context in failing to distinguish the terms of Articles 3.2 and 15.2 from the terms "demonstrated" and "causal relationship" found in Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement.

The Appellate Body began by noting that the paragraphs of Article 3 of the Anti-Dumping Agreement and Article 15 of the SCM Agreement stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry allegedly caused by subject imports. These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination. The Appellate Body further noted that, pursuant to Articles 3.5 and 15.5, it must be demonstrated that dumped or subsidized imports are causing injury to the domestic industry "*through* the effects of" dumping or subsidies "[a]s set forth in paragraphs 2 and 4". Thus, the outcome of the inquiries set forth in Articles 3.2 and 15.2, and in Articles 3.4 and 15.4, form the basis for the overall causation determination contemplated in Articles 3.5 and 15.5. In the Appellate Body's view, the interpretation of Articles 3.2 and 15.2 should be consistent with the role these provisions play in the overall framework of an injury determination under Articles 3 and 15.

The Appellate Body found that the obligation to "consider" the effect of subject imports on domestic prices under Articles 3.2 and 15.2 does not require an authority to reach a definitive determination. Nonetheless, this does not alter the subject matter of an authority's consideration, such as significant price depression or suppression, or the fact that the authority's consideration must be based on positive evidence and involve an objective examination pursuant to Articles 3.1 and 15.1, and must be reflected in the relevant documentation produced by the authority in the investigation. With regard to an authority's consideration of significant price depression and suppression under the second sentence of Articles 3.2 and 15.2, the Appellate Body disagreed with China's argument that Articles 3.2 and 15.2 do not use language that suggests the need to establish a link between subject imports and domestic prices. The Appellate Body found that, by

asking the question "whether the effect of" subject imports is to depress or suppress domestic prices to a significant degree, the language of Articles 3.2 and 15.2 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. Thus, it is *not* sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering whether significant price depression or suppression occurs. The Appellate Body further considered that this interpretation is reinforced by the very concepts of price depression and price suppression, which implicate an analysis concerning the question of what brings about such price phenomena.

The Appellate Body found that the outcome of the inquiry under Articles 3.2 and 15.2, as to whether subject imports have explanatory force for the occurrence of significant price depression and suppression, will enable the authority to advance its analysis, and to have a meaningful basis for its determination under Articles 3.5 and 15.5 regarding whether subject imports, through such price effects, are causing injury to the domestic industry. The Appellate Body found that, contrary to China's contention, 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. 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. Thus, 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 significant price depression and suppression under Articles 3.2 and 15.2. Moreover, the Appellate Body highlighted that Articles 3.2 and 15.2 do not require an authority to conduct an exhaustive and fully fledged non-attribution analysis regarding all possible factors that may also 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 relating to other elements that calls into question the explanatory force of the former for significant depression or suppression of the latter. On this basis, the Appellate Body rejected China's interpretation that Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement merely require 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.

Turning to the errors appealed by China regarding the Panel's interpretation of Articles 3.2 and 15.2, the Appellate Body noted that, although the Panel stated that an authority "must also show" or "demonstrate" that significant price depression and suppression were the effect of subject imports, the Panel's use of the words "show" and "demonstrate" was ambiguous. To the extent the Panel used these words to mean that an authority is required to make a definitive determination, the Panel's use of these words was not consistent with a proper understanding of the word "consider" in Articles 3.2 and 15.2. However, to the extent the Panel used the words "show" and "demonstrate" to mean that the authority's consideration of price effects must be reflected in relevant documentation produced by the authority in its investigation, and must be based on positive evidence and involve an objective examination, this was consistent with a proper interpretation of these provisions. In any event, the Appellate Body agreed with the Panel that, because Articles 3.2 and 15.2 require an investigating authority to consider *whether the effect of* subject imports is to depress prices of like domestic products to a significant degree, merely showing the existence of significant price depression does not suffice for the purposes of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. The Appellate Body further noted that the Panel's interpretation was largely a restatement of what is expressly required under Articles 3.2 and 15.2. Although the Appellate Body considered that a mere restatement did not do justice to the interpretative question before the Panel, the Appellate Body was not persuaded by China's argument that the Panel's interpretation of Articles 3.2 and 15.2 "duplicate[d]" the obligations regarding the causation analysis between subject imports and injury to the domestic industry pursuant to Articles 3.5 and 15.5.

Furthermore, the Appellate Body was not persuaded by China's contention that the Panel misconstrued the guidance provided by the panel report in *EC – Countervailing Measures on DRAM Chips*. In the Appellate Body's view, the panel report in that dispute did *not* stand for the proposition that an investigating authority is not required by Article 15.2 of the SCM Agreement to

consider whether significant price depression or suppression is an effect of subject imports. Finally, the Appellate Body rejected China's argument that the Panel interpreted Articles 3.2 and 15.2 as imposing an obligation on MOFCOM to make a determination that "the only reason" for price suppression was subject imports, and that this error was revealed by the Panel's examination of MOFCOM's finding of significant price suppression. Rather, the Appellate Body found that the Panel's examination in this respect was directed at MOFCOM's failure to consider whether the evidence relating to the domestic industry's cost structure may have called into question the explanatory force of subject imports for the significant suppression of domestic prices.

For all these reasons, the Appellate Body found that the Panel did not err in not adopting China's interpretation of Articles 3.2 and 15.2.

4.6.1.2 Application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement and China's claims under Article 11 of the DSU

China appealed the Panel's application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement. China argued that the Panel erred by misunderstanding what "low price" meant in MOFCOM's Final Determination, and in determining that MOFCOM relied on that factor in reaching its finding of significant price depression and suppression. China maintained that, contrary to the view adopted by the Panel, MOFCOM never compared subject import prices with domestic prices, and MOFCOM's price effects discussion did not focus on the existence of price undercutting and did not depend on price comparability. In the alternative, China argued that, even if MOFCOM conducted and relied upon price comparisons showing price undercutting for its price effects finding, the Panel nevertheless erred in finding that MOFCOM should have made certain adjustments to ensure price comparability. China asserted that such adjustments are not required by Articles 3.2 and 15.2, and that, even if they were, they were not necessary in the circumstances of this case. This was particularly so because concerns regarding price comparability were neither raised nor developed by the respondents during the investigation. China further argued that, in evaluating MOFCOM's price effects analysis, the Panel improperly focused on the "low price" factor, and failed to give proper regard to other factors relied upon by MOFCOM, consisting of a pricing policy aimed at price undercutting, parallel price trends between subject import and domestic prices, and increases in the volume of subject imports.

China also claimed that the Panel, in its assessment of MOFCOM's price effects analysis, failed to make an objective assessment as required by Article 11 of the DSU. China argued that the Panel mischaracterized a fact that was fundamental and ultimately determinative to its analysis by equating the reference to "low price" in MOFCOM's Final Determination with the existence of price undercutting by subject imports. Moreover, China argued that the Panel erred by relying on this single factor to invalidate MOFCOM's finding of significant price depression and suppression, and thus failed to take into account "the totality of the circumstances that produced the conclusion of price depression and price suppression".

The Appellate Body observed that China, in challenging the Panel's understanding of MOFCOM's price effects analysis in its Final Determination, asserted claims that the Panel erred both in its application of Articles 3.2 and 15.2, and in its duty to make an objective assessment of the facts under Article 11 of the DSU. The Appellate Body considered that, although there were arguably features of the Panel's analysis on appeal that concerned facts that were before MOFCOM and before the Panel itself, the Appellate Body understood China's appeal to address the manner in which the Panel examined and applied Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, read together with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement, to MOFCOM's Final Determination. The Appellate Body further considered that, when the Panel examined the question of whether MOFCOM relied on the existence of price undercutting in the period 2006 to 2008 to find significant price depression and suppression, it was examining whether MOFCOM's Final Determination complied with the legal standard for a price effects analysis conducted on the basis of "positive evidence" and involving an "objective examination". In order to give proper consideration to the Panel's analysis and to China's appeal, the Appellate Body therefore examined this issue in the light of the Panel's application of the legal standard under Articles 3.2 and 15.2, read together with Articles 3.1 and 15.1, to MOFCOM's Final Determination, and not under Article 11 of the DSU.

With regard to China's contention that the Panel misstated MOFCOM's discussion of "low price", the Appellate Body considered that the Panel was correct to conclude that, although MOFCOM did not

make a finding of significant price undercutting, MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression. In this regard, the Appellate Body highlighted that when the Panel found that China had "conceded" that MOFCOM relied on the existence of price undercutting from 2006 to 2008 to support its finding of significant price depression and suppression, that finding was reached on the basis of representations made by China to the Panel that MOFCOM had had an evidentiary basis in the investigation record for its conclusion. The Appellate Body thus concluded that, in the absence of an explanation from China as to why its statements before the Panel were no longer to be relied upon, it was proper for the Panel to have concluded on the basis of those statements that MOFCOM relied on evidence of price undercutting to support its finding that subject imports were kept at a "low price".

The Appellate Body addressed China's alternative argument that, even if MOFCOM conducted and relied upon price comparisons and the existence of price undercutting from 2006 to 2008, the Panel nevertheless erred by mandating the use of certain adjustments to ensure price comparability that are not required by Articles 3.2 and 15.2. The Appellate Body considered that, although there is no explicit requirement of price comparability in Articles 3.2 and 15.2, it did 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". Thus, the Appellate Body saw no reason to disagree with the Panel's statement that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue." The Appellate Body also rejected China's contention that price comparability was not required because concerns regarding price comparability were neither raised nor developed by the respondents during the investigation. In this regard, the Appellate Body did not consider that the question of whether price adjustments are needed to ensure price comparability is to be determined by whether a respondent objects to the use of unadjusted prices. According to the Appellate Body, 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.

With regard to China's contention that the Panel misconceived the role of a pricing policy aimed at undercutting domestic prices, the Appellate Body recalled the Panel's finding that the existence of a pricing policy was "undermined" by the fact that there was no price undercutting during the first quarter of 2009. The Appellate Body considered, however, that, even in the absence of price undercutting, a policy that aims to undercut a competitor's prices may still be relevant to an examination of its price depressive or suppressive effects in instances where, for example, domestic producers were reacting to subject import competition by lowering domestic prices. The Appellate Body therefore considered that it was not appropriate for the Panel to have dismissed the pricing policy on the grounds that it did because it failed to consider whether, even in the absence of actual price undercutting, MOFCOM could have concluded that the policy had the effect of depressing or suppressing domestic prices.

With regard to China's contention that the Panel ignored the role of parallel price trends in MOFCOM's price effects analysis, the Appellate Body considered that, although MOFCOM's Final Determination referred to the fact that subject import and domestic prices first went up and then down over the period of investigation, no explanation or reasoning was provided by MOFCOM in its Final Determination, or by China before the Panel on the basis of the Final Determination, as to how these trends contributed to the price depressive and suppressive effects of subject import prices. Thus, in the absence of sufficient reasoning in MOFCOM's Final Determination, or an elucidation of the Final Determination by China, as to what explanatory force the price trends had for the depression or suppression of domestic prices, the Appellate Body saw no basis to fault the Panel for failing to recognize or discuss the significance of these trends for MOFCOM's analysis.

Finally, the Appellate Body addressed China's argument that the Panel erred by dismissing and giving no weight to the effect of the volume of subject imports as expressed in MOFCOM's Final Determination. The Appellate Body noted that there was no disagreement between the participants that MOFCOM's finding of significant price depression and suppression rested on an examination of the effect of both the prices and volume of subject imports on domestic prices. The Appellate Body considered that, in circumstances where an investigating authority relies on both prices and volume of subject imports, a panel must allow for the possibility that either prices or volume was sufficient by itself to sustain a finding. Thus, the Appellate Body did not consider that the focus of

the Panel's inquiry should have been on whether the effects of either volume or prices of subject imports was the primary basis for MOFCOM's price effects finding. The Appellate Body explained, however, that, while MOFCOM's Final Determination referred to both the prices and volume of subject imports, it did not indicate how these two factors may have interacted, or whether the effect of either prices or volume alone could have sustained MOFCOM's finding of significant price depression or suppression. Without further explanation or reasoning in MOFCOM's Final Determination regarding the manner in which the effects of the prices and volume of subject imports operated either independently or together to depress domestic prices, the Appellate Body understood the Panel to have concluded that it was itself unable to disentangle the relative contribution of these effects in MOFCOM's Final Determination without substituting its judgement for that of the authority. Thus, the Appellate Body agreed with the Panel that it was "not possible to conclude that MOFCOM's finding that price depression was an effect of subject imports might be upheld purely on the basis of MOFCOM's findings regarding the effect of the increase in the volume of subject imports."

The Appellate Body then conducted an overall assessment of China's appeal of the Panel's application of Articles 3.2 and 15.2. Having reviewed China's arguments regarding the "low price" of subject imports, and the AUV data on which it relied, the Appellate Body considered that it was proper for the Panel to conclude that "MOFCOM's reliance on AUVs, without any consideration of the need for adjustments to ensure price comparability, [was] neither objective, nor based on positive evidence", and that this affirmed the Panel's ultimate finding of inconsistency on these grounds under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. The Appellate Body further noted that, notwithstanding its disagreement with the Panel's treatment of the policy aimed at undercutting domestic prices, that factor was, even under China's argument, only one of several factors on which MOFCOM relied to determine the effect of subject import prices on domestic prices. Accordingly, without a foundation to conclude that MOFCOM's analysis of the effect of subject import prices could have been sustained on the basis of the pricing policy alone, the Appellate Body could not conclude that rejecting the Panel's analysis of this pricing policy would lead to a reversal of the Panel's ultimate finding of inconsistency under Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement. Finally, the Appellate Body noted the Panel's scepticism that, following several years of increases in subject import prices, including an increase by 17.57% in 2008, a 1.25% decrease in those prices in the first quarter of 2009 could have had the effect of depressing domestic prices by 30.25% during that same quarter. The Appellate Body further noted that the thrust of this critique was broader in the sense that, whether the contributing factors were argued to be parallel pricing trends, a policy aimed at undercutting domestic prices, and/or a 1.25% decrease in the price of subject imports in the first quarter of 2009, it was nevertheless anomalous that, in the only period for which domestic prices actually went down, there was substantial divergence between the extent of the price decrease for subject imports versus that for domestic products. The Appellate Body considered that this pricing dynamic called into question whether the prices of subject imports adequately explained the depression or suppression of domestic prices. **For the foregoing reasons, the Appellate Body found that the Panel did not err in its application of Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, read together with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.**

The Appellate Body also conducted an overall assessment of China's claims under Article 11 of the DSU. The Appellate Body recalled its conclusion that, although China claimed that the Panel's treatment of MOFCOM's "low price" discussion constituted both an error in the Panel's application of the legal standard, and in its duty to make an objective assessment of the facts under Article 11 of the DSU, the Appellate Body examined that issue in the light of the Panel's application of the legal standard to MOFCOM's Final Determination. The Appellate Body further noted that China's claim regarding the Panel's application of its standard of review also rested on China's contention that the Panel relied on the "low price" of subject imports in the form of price undercutting, and disregarded the totality of factors that formed the basis for MOFCOM's finding of significant price depression and suppression. The Appellate Body recalled its examination of the Panel's consideration of these factors and its finding that the Panel did not err in its application of Articles 3.2 and 15.2, read together with Articles 3.1 and 15.1. The Appellate Body considered that, given the particular focus of China's claims in this case, the examination and disposition of China's application claim also resolved China's claim that the Panel did not apply a proper standard of review under Article 11 of the DSU. **The Appellate Body therefore found that the Panel did**

not act inconsistently with its duty to make an objective assessment under Article 11 of the DSU.

4.6.2 Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement

China challenged the Panel's finding that MOFCOM failed to disclose the essential facts underlying its finding of "low price" of subject imports in relation to its price effects analysis. China argued that MOFCOM adequately disclosed, pursuant to Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement, the essential facts regarding the existence of significant price depression and suppression. China submitted that, contrary to the Panel's view, the essential facts for price depression and suppression need not include any facts about the comparison of domestic prices to subject import prices, or the causal relationship between these two variables.

The Appellate Body found that the term "essential facts" under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement refers to "those facts that are significant in the process or reaching a decision as to whether or not to apply definitive measures." Such facts, according to the Appellate Body, are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. The Appellate Body considered that 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. Moreover, the Appellate Body considered that what constitutes an "essential fact" must be understood in the light of the content of the authority's 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. Hence, in the context of a price effects analysis under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, the essential facts that investigating authorities need to disclose are those that are required to understand the basis for their price effects consideration, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests.

The Appellate Body recalled its finding, in the context of China's claim under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, that the Panel was correct to conclude that, although MOFCOM did not make a finding of significant price undercutting, MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression. Thus, the Appellate Body found that, in the context of this aspect of MOFCOM's reasoning, the essential facts included those facts underlying the existence of price undercutting that would have allowed for an understanding of this element of MOFCOM's finding of significant price depression and suppression. The Appellate Body noted the Panel's finding that MOFCOM's preliminary determination and its final injury disclosure document only stated that subject imports were at a "low price", without providing facts relating to the price comparisons of subject imports and domestic products. The Appellate Body considered that these facts substantiated the existence of price undercutting, and constituted "essential facts" that should have been disclosed to all interested parties. The Appellate Body rejected China's argument that disclosing further details would have compromised business confidential information, and agreed with the Panel that, when confidential information constitutes "essential facts" within the meaning of Articles 6.9 and 12.8, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts. Furthermore, the Appellate Body saw no error in the Panel's statement that "[i]n order to allow the respondents to defend their interests, a summary of the 'essential facts' supporting the finding of a 'low price strategy' was required, rather than merely stating the conclusion that such a strategy existed." **On this basis, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.**

4.6.3 Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement

China's claim under Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement concerned the requirement that a public notice contain "all relevant information" on "matters of fact" "which have led to the imposition of final measures". China challenged the Panel's finding that MOFCOM failed adequately to disclose "all relevant information on the matters of fact" underlying MOFCOM's conclusion regarding the "low price" of subject imports, as required by Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement. In this

respect, China argued that MOFCOM adequately provided public notice of its finding of significant price depression and suppression, which, contrary to the Panel's view, does not require a causal relationship between subject imports and these adverse price effects. Moreover, China highlighted that the Panel wrongly focused on the existence and magnitude of price undercutting, thereby making a comparison of subject import prices to domestic prices "essential elements" and "an important aspect" of MOFCOM's price effects examination.

In interpreting Articles 12.2.2 and 22.5, the Appellate Body considered that 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. Thus, the inclusion of this information should give a reasoned account of the factual support for an authority's decision to impose final measures. The Appellate Body noted that the imposition of final anti-dumping or countervailing duties requires an authority to find dumping or subsidization, injury, and a causal link between these elements. 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. Moreover, the Appellate Body noted that the facts that an investigating authority may consider material to its determinations within the meaning of Article 12.2 of the Anti-Dumping Agreement and Article 22.3 of the SCM Agreement are circumscribed by the framework of the substantive provisions of these Agreements. Finally, the Appellate Body considered that, in the context of a price effects analysis under Article 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.

The Appellate Body recalled its finding, in the context of China's claim under Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement, that the Panel was correct to conclude that, although MOFCOM did not make a finding of significant price undercutting, MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting between 2006 and 2008, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression. Thus, MOFCOM was required to disclose "all the relevant information on the matters of fact" relating to the "low price" of subject imports on which it relied for its finding of significant price depression and suppression. Therefore, in addition to the finding in its Final Determination that subject imports were at a "low price", MOFCOM was also required to disclose the facts relating to price undercutting that were required to understand that finding. The Appellate Body considered that these facts constituted "relevant information on the matters of fact" within the meaning of Articles 12.2.2 and 22.5, which should have been disclosed in the Final Determination. The Appellate Body rejected China's arguments that the Panel erred in considering a comparison of subject import prices to domestic prices "essential elements" and "an important aspect" of MOFCOM's Final Determination, because China's arguments were premised on its contention that MOFCOM did not rely on the existence of price undercutting for its finding of significant price depression and suppression. **On this basis, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement and Article 22.5 of the SCM Agreement.**

5 PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

Table 5 lists the WTO Members that participated in appeals for which an Appellate Body report was circulated in 2012. It distinguishes between a Member that filed a Notice of Appeal pursuant to Rule 20 of the Working Procedures and a Member that filed a Notice of Other Appeal pursuant to Rule 23(1) (known as the "other appellant"). Rule 23(1) provides that "a party to the dispute other than the original appellant may join in that appeal, or appeal on the basis of other alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel". Under the Working Procedures, parties wishing to appeal a panel report pursuant to Rule 23(1) are required to file a Notice of Other Appeal within 5 days of the filing of the Notice of Appeal.

Table 5 also identifies those Members that participated in appeals as third participants under paragraphs (1), (2), or (4) of Rule 24 of the Working Procedures. Under Rule 24(1), a WTO Member that was a third party to the panel proceedings may file a written submission as a third participant within 21 days of the filing of the Notice of Appeal. Pursuant to Rule 24(2), a Member that was a third party to the panel proceedings that has not filed a written submission

may, within 21 days of the filing of the Notice of Appeal, notify its intention to appear at the oral hearing and whether it intends to make a statement at the hearing. Rule 24(4) provides that a Member that was a third party to the panel proceedings and has neither filed a written submission in accordance with Rule 24(1), nor given notice in accordance with Rule 24(2), may notify its intention to appear at the oral hearing and request to make a statement.

Table 5: Participants and third participants in appeals for which an Appellate Body report was circulated in 2012

Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
China – Raw Materials (United States)	China	United States	United States China	Brazil Canada Colombia Japan Korea Saudi Arabia Turkey	Argentina Chile Ecuador India Norway	Chinese Taipei
China – Raw Materials (European Union)	China	European Union	European Union China	Brazil Canada Colombia Japan Korea Saudi Arabia Turkey	Argentina Chile Ecuador India Norway	Chinese Taipei
China – Raw Materials (Mexico)	China	Mexico	Mexico China	Brazil Canada Colombia Japan Korea Saudi Arabia Turkey	Argentina Chile Ecuador India Norway	Chinese Taipei
US – Large Civil Aircraft (2nd complaint)	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea		
US – Clove Cigarettes	United States		Indonesia	Brazil Colombia European Union Mexico Norway Turkey	Dominican Republic Guatemala	

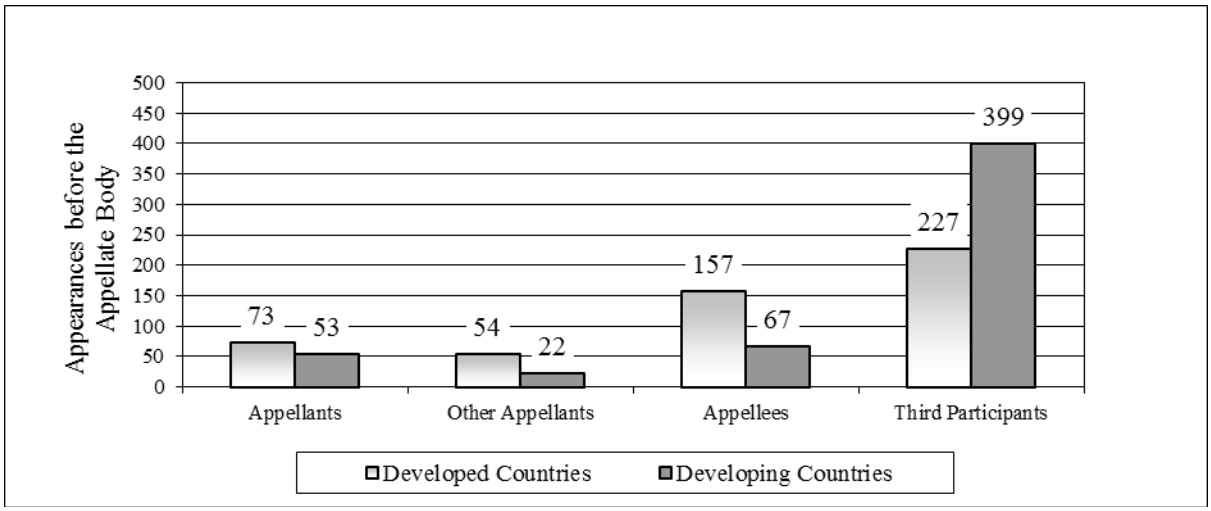
Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
US – Tuna II (Mexico)	United States	Mexico	Mexico United States	Australia Brazil Canada European Union Japan New Zealand	Argentina China Ecuador Guatemala Korea Turkey	Thailand Chinese Taipei
US – COOL (Canada)	United States	Canada	Canada United States	Australia Brazil Colombia European Union Japan	Argentina China Guatemala Korea New Zealand Peru Chinese Taipei	India
US – COOL (Mexico)	United States	Mexico	Mexico United States	Australia Brazil Colombia European Union Japan	Argentina China Guatemala Korea New Zealand Peru Chinese Taipei	India
China – GOES	China		United States	European Union Japan Korea Saudi Arabia		Argentina Honduras India Viet Nam

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

A total of 26 WTO Members appeared at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated in 2012. Of these 26 WTO Members, 7 were developed country Members, and 19 were developing country Members.

Chart 3 shows the ratio of developed country Members to developing country Members in terms of appearances made as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2012.

Chart 3: WTO Member participation in appeals 1996-2012



Annex 6 provides a statistical summary and details on WTO Members' participation as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2012.

6 WORKING PROCEDURES FOR APPELLATE REVIEW

6.1 Procedural issues arising from appeals

6.1.1 Treatment of sensitive information

In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body received a request from the European Union that the Appellate Body adopt additional procedures to protect BCI and HSBI in these appellate proceedings.[35] The European Union explained that the reasons for this request were substantially the same as the reasons given by the participants in *EC and certain member States – Large Civil Aircraft*, namely, that disclosure of confidential information could be "severely prejudicial" to the originators of the information, that is, to the manufacturers of LCA, as well as their customers and suppliers.[36] The European Union requested the adoption of a procedural ruling with substantially the same terms as the one adopted by the Appellate Body in *EC and certain member States – Large Civil Aircraft*. The Appellate Body Division then invited the United States and the third parties to comment in writing on the European Union's request, and informed the participants and third parties of its decision to adopt temporary precautions to protect confidential information. Given that the Panel record was, in accordance with Rule 25 of the Working Procedures, to be transmitted to the Appellate Body immediately upon the filing of a Notice of Appeal, the Division decided to provide additional protection to all BCI and HSBI transmitted to the Appellate Body as part of that record, pending its final decision on the European Union's request.

Written comments were received from the United States, and Australia, Brazil, Canada, China, and Japan. The United States shared the European Union's view that it was necessary for the Division to adopt BCI/HSBI procedures in this appeal. Overall, the United States agreed that the Appellate Body procedural ruling in *EC and certain member States – Large Civil Aircraft* would serve as an appropriate basis for a procedural ruling on the protection of sensitive information in this appeal, with certain modifications made in the light of the previous experience. The third participants expressed their support for, or did not oppose, the request of the European Union, and suggested certain modifications to the proposed procedures in order to ensure that the rights of

[35] Previously, on 23 March 2011, the European Union had sent a letter to the Director of the Appellate Body Secretariat suggesting, in the event of an appeal of the Panel Report in this dispute, the adoption of additional procedures concerning the treatment of BCI and HSBI in the appellate proceedings.

[36] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 17.

third participants to participate meaningfully in these appellate proceedings would be fully protected. Subsequently, the Division issued a Procedural Ruling adopting Additional Procedures to Protect Sensitive Information (the "Additional Procedures"), pursuant to Rule 16(1) of the Working Procedures.[37]

Pursuant to paragraph 19(xiv) of the Additional Procedures, the participants each provided a list of persons designated as "BCI-Approved Persons" and persons designated as "HSBI-Approved Persons". In accordance with paragraph 19(xvi) of the Additional Procedures, the third participants each provided a list of up to eight individuals designated as "Third Participant BCI-Approved Persons". Requests to change the BCI/HSBI Approved Persons and Third Participants BCI-Approved Persons lists were subsequently submitted by the European Union, the United States, Australia, Brazil, Canada, and Korea. The Division provided the participants and third participants with the opportunity to comment on each request. No objections were made and all of the requests were authorized by the Division.

Pursuant to paragraph 19(xiii) of the Procedural Ruling, the Division informed the participants and third participants that it had found it necessary to include in the Appellate Body Report some references to information that was treated by the Panel as BCI or HSBI. Also pursuant to paragraph 19(xiii) of the Procedural Ruling, an advance copy of the Appellate Body Report was provided to the European Union and the United States. Both participants were requested to indicate whether there was a continuing need to treat all of the business sensitive information in the same manner as the Panel or whether such protection could be removed, and if so, for which pieces of information, and whether any BCI or HSBI had been included in the Appellate Body Report without having been identified as such. The European Union indicated that it had not identified any BCI or HSBI that was not designated as such in the Appellate Body Report, and that it was willing to remove BCI protection with respect to two sentences consisting of EU BCI. The United States identified one instance in which it considered that BCI had been inadvertently disclosed, and indicated that the relevant text should be designated as BCI, or revised so as to avoid the need for BCI protection. The United States also identified a number of instances, consisting of US BCI or EU BCI, for which it suggested, or did not object to, the removal of BCI protection. The Division requested the participants to respond to each other's comments. The European Union indicated that it had no objection to the United States' proposal to remove BCI protection for information that related to the United States' interests, but objected to doing so with respect to such information relating to the European Union's interests. The United States stated that it had no objection to the removal of BCI protection for the two sentences identified by the European Union. The Division modified the one inadvertent disclosure of BCI information, as suggested by the United States, so as to avoid the need for BCI protection. The Division decided to remove BCI protection in certain instances in which the participants suggested, or did not object to, such removal.

In the panel proceedings in *US – COOL*, the Panel adopted additional working procedures for the protection of BCI.[38] None of the participants requested the Appellate Body to adopt additional procedures for the protection of sensitive in these appellate proceedings, and the Appellate Body did not do so in this appeal.[39]

6.1.2 Amendments to the official Working Schedule

Upon receipt of the European Union's request for additional procedures for the protection of sensitive information in *US – Large Civil Aircraft (2nd complaint)*, the Division 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. After issuing its Procedural Ruling, the Division provided the participants and third participants the deadlines for filing written submissions, pursuant to Rule 26 of the Working Procedures.

[37] The Procedural Ruling and Additional Procedures are contained in Annex III of the Appellate Body Report in *US – Large Civil Aircraft (2nd complaint)*.
[38] See Panel Report, *US – COOL*, para. 2.4 and Annex E.
[39] Appellate Body Report, *US – COOL*, footnote 57 to para. 12.

In *China – Raw Materials*, the Division received a joint request from the other appellants – the European Union, Mexico, and the United States – for a limited extension of certain time periods for filing submissions in these proceedings. More specifically, the complainants requested the Division to extend the time period for filing the Notices of Other Appeal, other appellants' submissions, and appellees' submissions.

Before making a ruling on this matter, the Division solicited the views of China and the third participants. China requested the Appellate Body not to grant additional time for the filing of the submissions in this case, because it believed that it would itself be prejudiced if the Appellate Body were to extend the deadlines as it would not have sufficient time to prepare its own written responses. The Division also received written comments from Japan and Saudi Arabia. These third participants had no objection to the joint request of the complainants. However, Japan and Saudi Arabia requested that additional time also be granted for filing the third participants' submissions in this case.

After careful consideration, the Appellate Body decided to extend the deadlines for the filing of the complainants' submissions, and also to extend the deadline for the filing of China's appellee's submission, and the third participants' submissions.

In *US – Tuna II (Mexico)*, the Division received a request from the United States to hold the oral hearing in this appeal during the week of 19 February 2012, rather than the scheduled date of 29 February-1 March, on the ground that a senior member of the US legal team would be unable to travel to Geneva after that time period for medical reasons. In the alternative, the United States proposed that the oral hearing be held in the week of 26 March 2012 to provide additional preparation time for the Appellate Body and the participants. Mexico and the third participants were invited by the Division to submit comments. Having carefully considered the United States' request and the comments received from Mexico and the third participants in this dispute, and having also considered the size and complexity of this appeal, the Division ruled that the oral hearing would be held on 15-16 March 2012.

6.1.3 Oral hearings

In *China – Raw Materials*, China requested an extension of the time allocated for its opening statement at the oral hearing in view of the number of other appellants. The Division invited the other participants and the third participants to comment on China's request. Written comments were submitted by the United States, the European Union, and Mexico.[40] The Division informed the participants and third participants that it considered the time allocated for opening statements to reflect an appropriate balance in the light of the number of other appellants and the high number of third participants in the dispute and the time required in order to provide the participants and third participants with a full opportunity to respond to questions that would be posed by the Division at the oral hearing. Consequently, the Division decided not to adjust the amount of time it had allocated to the participants for their opening statements at the oral hearing.

In *US – Large Civil Aircraft (2nd complaint)*, the participants requested that the oral hearing be opened to public observation to the extent that this would be possible given the need for protection of sensitive information. The participants suggested that the Division adopt a further procedural ruling pursuant to Rule 16(1) of the Working Procedures to regulate the conduct of the oral hearing in the light of the request for public observation and the Additional Procedures, and proposed specific modalities for that purpose. On 12 July 2011, the Division invited the third participants to comment on the participants' request and proposed modalities. On 15 July 2011, Canada and China submitted comments on the participants' request to open the oral hearing to public observation. Canada agreed with the joint proposal of the participants that the Division adopt the same additional procedures that were adopted in *EC and certain member States – Large Civil Aircraft*. China expressed its wish that the Division follow the same practice as in *EC and certain member States – Large Civil Aircraft* to allow third participants the opportunity to request confidential treatment of their oral statements. On 26 July 2011, the Division issued a Procedural Ruling authorizing the participants' joint request for opening the hearing to public observation via

[40] The United States, the European Union, and Mexico opposed China's request for additional time. They submitted that the time allocated to China was greater than in other appeals involving multiple complainants, and was also already proportionally greater than that given to other participants in situations comparable to that of China in this dispute.

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.[41]

The oral hearing took place in two sessions: the first on 16-19 August 2011, and the second on 11-14 October 2011. Pursuant to the Procedural Ruling of 26 July 2011, the participants and third participants did not refer to any BCI or HSBI in their opening statements at either session of the oral hearing. The opening statements of the participants and third participants, with the exception of China and Korea, were videotaped at both the first and second sessions of the oral hearing. Upon confirmation that no BCI or HSBI had been inadvertently uttered, the videotapes of the opening statements were subsequently broadcast to those members of the public who had registered for the viewing. No participant or third participant made a closing statement at either session of the oral hearing.

In *US – COOL*, the Appellate Body received a joint communication from Canada and the United States requesting that the Appellate Body allow observation by the public of the oral hearing, with the understanding that any information that was designated as confidential in the documents filed in the Panel proceedings would be adequately protected in the course of the hearing. Mexico did not object to allowing public observation of the oral hearing, but maintained that its position was without prejudice to its systemic views on this matter. The Appellate Body invited the third participants to comment on the request by Canada and the United States and Australia, Brazil, China, Colombia, the European Union, Guatemala, India, and New Zealand all submitted comments. The Division hearing this appeal issued a Procedural Ruling accepting the joint request by Canada and the United States to open the hearing to public observation and adopting additional procedures for the conduct of the hearing.[42]

Public observation of the oral hearing took place via simultaneous closed-circuit television broadcast to a separate room. Transmission was turned off during statements made by those third participants that had indicated their wish to maintain the confidentiality of their submissions.

6.1.4 Timeliness and adequacy of notifications and submissions

In *China – Raw Materials*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants after the deadline for the submission of third participant submissions or notifications. The Division interpreted this action as a notification expressing Chinese Taipei's intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.[43]

In the appeal in *US – Tuna II (Mexico)*, Thailand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, neither of which had filed a written submission or notification, submitted their delegation lists for the oral hearing to the Appellate Body Secretariat, as well as to the participants and other third participants. The Division in this appeal also interpreted these actions as notifications expressing the third participants' intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

In *US – COOL*, certain filings were made outside of the deadlines prescribed by the Working Procedures or by the Division hearing this appeal. The Appellate Body noted, 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. In addition, India's third participant notification in these proceedings was not received before the 17:00 deadline

[41] This procedural ruling was attached as Annex IV to the Appellate Body Report in *US – Large Civil Aircraft (2nd complaint)*.
[42] This procedural ruling was attached as Annex IV to the Appellate Body Report in *US – COOL*.
[43] Appellate Body Report, *China – Raw Materials*, footnote 44 to para. 12.

specified in Rule 18(1) of the Working Procedures. Accordingly, the Division treated India's filing as a notification and request to make an oral statement at the hearing made pursuant to Rule 24(4) of the Working Procedures.[44]

6.1.5 Additional memoranda

In *US – Large Civil Aircraft (2nd complaint)*, following the first session of the oral hearing, the Division invited the participants and third participants to submit additional written memoranda, pursuant to Rule 28 of the Working Procedures, on the topics addressed at the first session, subject to a word limit. The participants and third participants were given an opportunity at the second session of the oral hearing to make comments on the others' additional memoranda.

6.1.6 Unsolicited *amicus curiae* briefs

Two unsolicited *amicus curiae* briefs were received in the *US – Clove Cigarettes* appellate proceedings: a joint brief from the Campaign for Tobacco Free Kids, the American Academy of Pediatrics, the American Cancer Society, the American Cancer Society Cancer Action Network, the American Lung Association, the American Medical Association, and the American Public Health Association; and a brief from the O'Neill Institute for National and Global Health Law at the Georgetown University Law Center. After giving the participants and the third participants an opportunity to express their views, the Division did not find it necessary to rely on these *amicus curiae* briefs in rendering its decision.[45]

In the same proceedings, the Division received a letter from the Director General of the World Health Organization (the "WHO") expressing interest and offering technical assistance in the appeal in areas covered by the WHO's mandate. The Division asked the participants and third participants to comment on the letter from the WHO. The United States and the European Union submitted comments to the Division. 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 the scope of appellate review under Article 17.6 of the DSU, the Division did not deem it necessary to request assistance from the WHO.[46]

In the proceedings in *US – Tuna II (Mexico)*, the Division received three unsolicited *amicus curiae* briefs from the Humane Society of the United States/Humane Society International and Washington College of Law (WCL); ASTM International (formerly the American Society for Testing and Materials); and a law professor. The participants and the third participants were given an opportunity to express their views on these briefs at the oral hearing. The Division hearing the appeal did not find it necessary to rely on these *amicus curiae* briefs in rendering its decision.[47]

6.1.7 Extension of the 60-day appeal period

In a number of cases, the parties jointly requested the DSB to take a decision extending the 60-day deadline in Article 16.4 of the DSU for adoption or appeal of a panel report. These requests were made, *inter alia*, in the light of the "workload of the Appellate Body" and in order to "provide greater flexibility in scheduling any possible appeal". The DSB agreed to an extension of the 60-day period for the adoption or appeal of the panel report until 20 January 2012 in *US – Clove Cigarettes*[48] and *US – Tuna II (Mexico)*[49]; and until 23 March 2012 in *US – COOL (Canada)*[50] and *US – COOL (Mexico)*.[51]

[44] Appellate Body Report, *US – COOL*, footnote 55 to para. 11.
[45] Appellate Body Report, *US – Clove Cigarettes*, para. 10.
[46] Appellate Body Report, *US – Clove Cigarettes*, para. 11.
[47] Appellate Body Report, *US – Tuna II (Mexico)*, para. 8.
[48] WT/DS406/5 and WT/DSB/M/303.
[49] WT/DS381/9 and WT/DSB/M/306.
[50] WT/DS384/11 and WT/DSB/M/310.
[51] WT/DS386/10 and WT/DSB/M/310.

6.1.8 Extension of time period for circulation of reports

The 90-day time period stipulated in Article 17.5 of the DSU was exceeded in 7 out of the 9 appeals for which Appellate Body reports were circulated in 2012: *China – Raw Materials (United States)*; *China – Raw Materials (European Union)*; *China – Raw Materials (Mexico)*; *US – Large Civil Aircraft (2nd complaint)*; *US – Tuna II (Mexico)*; *US – COOL (Canada)*; and *US – COOL (Mexico)*. The Appellate Body reports in *US – Clove Cigarettes* and *China – GOES* were circulated within the 90-day time period.

The Appellate Body communicated to the DSB Chair the reasons for the impossibility to circulate an Appellate Body report within the 90-day time period in each of the appeals for which the 90-day time period was not met in 2012.[52] These reasons included: the numerous issues raised on appeal and their complexity; the considerable size of the panel record; the heavy workload of the Appellate Body; difficulties with scheduling parallel appeals; and the time required for the completion and translation of the report.

6.1.9 Request for separate reports

In the appellate proceedings in *US – COOL*, the United States requested the Appellate Body to issue two reports in one single document with common descriptive and analytical sections, and separate sections containing findings and conclusions for each complainant. Canada and Mexico were afforded an opportunity to respond to the United States' request, and neither raised any objection to that request. Therefore, the Appellate Body issued these reports in the form of a single document constituting two separate Appellate Body Reports: *US – COOL (Canada)*, WT/DS384/AB/R; and *US – COOL (Mexico)*, WT/DS386/AB/R.

7 ARBITRATIONS UNDER ARTICLE 21.3(C) OF THE DSU

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

One Article 21.3(c) arbitration proceeding was carried out in 2012. Further information about the arbitration is provided below.

7.1 *US – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/24, WT/DS386/23

On 23 July 2012, the DSB adopted the Panel and Appellate Body Reports in *United States – Certain Country of Origin Labelling (COOL) Requirements*. These disputes concerned certain US country of origin labelling ("COOL") requirements for beef and pork when sold at the retail level.

The Appellate Body upheld, albeit for different reasons, the Panel's ultimate finding that the "COOL measure", particularly in regard to the muscle cut meat labels, was inconsistent with Article 2.1 of the TBT Agreement because it accorded less favourable treatment to imported livestock than to like domestic livestock. The "COOL measure" comprised the COOL statute (the Agricultural Marketing Act of 1946, as amended by the 2002 and 2008 Farm Bills) passed by the US Congress, and its implementing regulation, the "2009 Final Rule" promulgated by the Secretary of Agriculture through the US Department of Agriculture's (the "USDA") Agricultural Marketing Service.

At the meeting of the DSB held on 31 August 2012, the United States signalled its intention to comply with the recommendations and rulings of the DSB, and stated that it would need a

[52] For *China – Raw Materials*, see WT/DS394/13, WT/DS395/13, WT/DS398/12; for *US – Large Civil Aircraft (2nd complaint)*, see WT/DS353/11; for *US – Tuna II (Mexico)*, see WT/DS381/12; and for *US – COOL*, see WT/DS384/14, WT/DS386/13.

reasonable period of time to do so. As the parties to the disputes were unable to agree on a "reasonable period of time" for implementation, Canada and Mexico referred the matter to arbitration pursuant to Article 21.3(c) of the DSU. Both Canada and Mexico asked that their requests pursuant to Article 21.3(c) of the DSU be dealt with by the same arbitrator in joint proceedings. As the parties failed to agree on an arbitrator, on 4 October 2012, the Director-General appointed Mr. Giorgio Sacerdoti to act as the Arbitrator in these disputes. Mr. Sacerdoti accepted the appointment on 5 October 2012.

The United States proposed that the reasonable period of time for implementation of the DSB's recommendations and rulings should be 18 months from the date of adoption of the Panel and Appellate Body reports. The United States argued that a change to the COOL measure could involve either legislative action followed by regulatory action, or regulatory action only. Although the United States submitted that it had not yet decided which of these two means of implementation it would choose, it requested the Arbitrator to determine the reasonable period of time needed for implementation through regulatory action. The United States contended that it had not ruled out the possibility of making statutory changes, but noted that this would take substantially longer than the 18 months it had requested. This 18-month period encompassed, according to the United States, 12 months to complete the US regulatory process, and six months to comply with the procedural requirement under Article 2.12 of the TBT Agreement to allow a "reasonable interval" between the publication of a modified COOL regulation and its entry into force.

The United States first argued that the shortest timeframe within which it would normally be able to complete the regulatory process to publish a modified COOL regulation would be 12 months. This timeframe would encompass five months for the preparatory phase; 90 days for the Office of Management and Budget's review of the proposed rule and the final rule; 60 days for notice and public comments; and two months for the USDA to review the comments. In addition, the United States explained that, according to the Congressional Review Act, the US Congress should have been provided with at least 60 days to review the final rule after its publication and before its entry into force. The United States recalled, however, that the COOL measure had been found by the Appellate Body and by the Panel to be a technical regulation within the meaning of Annex 1.1 to the TBT Agreement, and that, in *US – Clove Cigarettes*, the Appellate Body had found that Article 2.12 of the TBT Agreement, as clarified by paragraph 5.2 of the Doha Ministerial Decision, requires that Members allow a period *of at least six months* between the publication and the entry into force of technical regulations. The United States thus contended that it would have to allow for an additional period of six months between the publication of the modified COOL regulation and its entry into force (therefore, in total, a period of 18 months).

Canada contended that withdrawal of the COOL measure would entail little complexity, since it would simply require removing muscle cuts of beef and pork from the commodities covered by the COOL measure. In any event, Canada argued that the reasonable period of time for the United States to implement the DSB's recommendations and rulings should not exceed six months from the date of adoption of the Panel and Appellate Body reports, comprising two months for preparatory work and four months to make the implementing measure effective. Mexico argued that the United States should be granted a maximum of eight months for implementation in the present case. Moreover, Mexico contended that, in accordance with Article 21.2 of the DSU, the Arbitrator should pay particular attention to matters affecting the interests of Mexico as a developing country Member.

Both Canada and Mexico argued that the United States omitted relevant flexibilities that are available within its domestic legal system – like, for example, the possibility to issue "interim final rules" – to facilitate expeditious regulatory changes. They also contended that Article 2.12 of the TBT Agreement does not apply to the determination of a reasonable period of time under Article 21.3(c) of the DSU and that, in any case, it did not justify the United States allowing six months to elapse between the publication and the entry into force of the modified COOL regulation so as to continue discriminating against Canadian and Mexican imports of livestock. Canada and Mexico observed that the six-month period in Article 2.12 of the TBT Agreement is provided in

order to allow producers in exporting countries to adapt their products or production methods to the requirements of the importing Member. Since they export livestock to the United States, Canadian and Mexican producers would not require any time to adapt their products (cattle and/or hogs) or their production methods to the requirements of a modified COOL regulation.

Like previous arbitrators, the Arbitrator found that the United States, as the implementing Member, has a measure of discretion in choosing the means of implementation that it deems most appropriate. The Arbitrator considered that the reasonable period of time in this arbitration should allow the United States to comply with the recommendations and rulings of the DSB either by modifying the COOL measure, or by repealing it with regard to muscle cuts of beef and pork. Turning to the order of analysis, the Arbitrator explained that he would address first the reasonable period of time necessary for the United States to implement the COOL rulings within its legal system, and then he would consider the issue of whether an additional six-month period was required for the United States to comply with Article 2.12 of the TBT Agreement.

With respect to implementation within the US legal system, the Arbitrator started by considering the *regulatory process* in the United States. He recalled that the implementing Member is expected to use whatever flexibility is available within its domestic legal system to implement promptly the recommendations and rulings of the DSB, but that it is not required to use extraordinary means. In this regard, he found that for some of the steps of the regulatory process described by the United States there were flexibilities available to make those steps happen more expeditiously. The Arbitrator concluded that the United States could adopt a modified COOL regulation in a period of approximately eight months from the date of adoption of the DSB's recommendations and rulings. In addition, he considered that two months should be allowed for Congressional review between the publication of the modified COOL regulation and its entry into force. That is, in total, a reasonable period of time of 10 months. In the light of Canada's and Mexico's arguments, the Arbitrator also addressed the possibility of the United States modifying the COOL regulation by issuing an *interim final rule*, rather than by following the standard regulatory process. He noted that, since interim final rules enter into force without prior notice and without granting a period for public comments, they speed up the regulatory process. The Arbitrator concluded that, should the United States choose to use an interim final rule, it could bring itself into compliance even faster than through a rule adopted pursuant to the standard regulatory process. Although the United States had indicated at the oral hearing that it would choose regulatory action, the Arbitrator addressed the possibility of a *legislative change*. In this respect, he observed that the flexibilities available in the US legislative process allow the passage of legislation in short timeframes, whenever required. Even if the United States chose legislative action, the Arbitrator noted that, in the event regulatory action was needed in addition to legislative action, this could be done speedily through an interim final rule. The Arbitrator concluded that the United States could comply with the DSB's recommendations and rulings through legislative action followed by regulatory action within the same period of time in which it could complete the standard regulatory process. Finally, the Arbitrator was not persuaded that Mexico's status as a developing country Member required a shorter reasonable period of time for implementation in the circumstances of this case.

Regarding Article 2.12 of the TBT Agreement, the Arbitrator first considered whether compliance with this provision is a factor that must be taken into account in determining the reasonable period of time under Article 21.3(c) of the DSU, when compliance involves the issuance of a technical regulation. He noted that Article 21 of the DSU does not exclude that the requirement to comply with another WTO obligation, which affects the time needed for implementation, may have to be taken into account in the determination of the reasonable period of time. He also recalled that past arbitrators had found that even non-WTO obligations may be relevant to the determination of the reasonable period of time. The Arbitrator then turned to address whether Article 2.12 of the TBT Agreement justified in this case extending the reasonable period of time by six months. He recalled that, in *US – Clove Cigarettes*, the Appellate Body considered that, 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 6 months" to adapt their products or production methods to the requirements of an importing Member's technical regulation. He 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 at issue being prompt compliance. Accordingly, the Arbitrator concluded that Article 2.12

of the TBT Agreement did not justify, in the circumstances of this case, granting the additional period of time requested by the United States.

In the light of the above, the Arbitrator determined that the "reasonable period of time" for implementation of the DSB's recommendations and rulings in these disputes was 10 months, expiring on 23 May 2012.

8 TECHNICAL ASSISTANCE

Appellate Body Secretariat staff participated in the WTO Biennial Technical Assistance and Training Plan: 2012-2013[53], particularly in activities relating to training in dispute settlement procedures. Overall, Appellate Body Secretariat staff participated in 15 technical assistance activities during the course of 2012.

Annex 7 provides further information about the activities carried out by Appellate Body Secretariat staff in 2012 falling under the WTO Technical Assistance and Training Plan.

9 OTHER ACTIVITIES

The Appellate Body Secretariat participates in the WTO internship programme, which allows post-graduate university students to gain practical experience and a deeper knowledge of the global multilateral trading system in general, and WTO dispute settlement procedures in particular. Interns in the Appellate Body Secretariat obtain first-hand experience of the procedural and substantive aspects of WTO dispute settlement and, in particular, appellate proceedings. The internship programme is open to nationals of WTO Members and to nationals of countries and customs territories engaged in accession negotiations. Each internship is generally for a three-month period. During 2012, the Appellate Body Secretariat welcomed interns from Australia, Austria, Belarus, China, Italy, and El Salvador. A total of 107 post-graduate students, of 49 nationalities, have completed internships with the Appellate Body Secretariat since 1998. Further information about the WTO internship programme, including eligibility requirements and application instructions, may be obtained online at:

<https://erecruitment.wto.org/public/hrd-cl-vac-iew.asp?jobinfo_uid_c=3475&vaclng=en>

Appellate Body Secretariat staff participates in briefings organized for groups visiting the WTO, including students. In these briefings, Appellate Body Secretariat staff speaks to visitors about the WTO dispute settlement system in general, and appellate proceedings in particular. Appellate Body Secretariat staff also participates as judges in moot court competitions. A summary of these activities carried out by Appellate Body Secretariat staff during the course of 2012 can be found in Annex 7.

[53] WT/COMTD/W/180/Rev.1.

ANNEX 1A

MEMBERS OF THE APPELLATE BODY
(1 JANUARY TO 31 DECEMBER 2012)

BIOGRAPHICAL NOTES

Ujal Singh Bhatia (India) (2011–2015)

Ujal Singh Bhatia was born in India on 15 April 1950. Prior to becoming an Appellate Body Member, Mr. Bhatia was an independent consultant and academic engaged in developing a policy framework for Indian agricultural investments overseas, while at the same time working with the Commonwealth Secretariat on multilateral trade issues.

Mr. Bhatia was India's Permanent Representative to the WTO from 2004 to 2010. During his tenure as Permanent Representative, he was an active participant in the dispute settlement process, representing India in a number of dispute settlement cases both as a complainant and respondent in disputes relating to anti-dumping, as well as taxation and import duty issues. He also has adjudicatory experience having served as a WTO dispute settlement panelist.

Mr. Bhatia previously served as Joint Secretary in the Indian Ministry of Commerce, where he focused on the legal aspects of international trade. During this period, he was also a Member of the Appellate Committee under the Foreign Trade (Development and Regulation) Act. The Committee heard appeals of exporters and importers against the orders of the Director General Foreign Trade. Mr. Bhatia was also Joint Secretary of the Ministry of Information and Broadcasting and held various positions in the government of the Indian state of Orissa.

Mr. Bhatia's legal and adjudicatory experience spans three decades. He has focused on addressing domestic and international legal/jurisprudence issues, negotiating trade agreements and policy issues at the bilateral, regional and multilateral levels, and formulating and implementing trade and development policies for a range of agriculture, industry and service sector activities.

Mr. Bhatia has lectured on international trade issues**,** and has published numerous papers and articles in Indian and foreign journals on a wide range of trade and economic issues. Mr. Bhatia holds an M.A. in Economics from the University of Manchester and from Delhi University, as well as a B.A. (Hons.) in Economics, also from Delhi University.

Seung Wha Chang (Korea) (2012–2016)

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

He has served on several WTO dispute settlement panels, including *US – FSC*, *Canada – Aircraft Credits and Guarantees*, and *EC – Trademarks and Geographical Indications*. He has also served as Chairman or Member of several arbitral tribunals dealing with commercial matters. In 2009, he was appointed by the International Chamber of Commerce (ICC) as a Member of the International Court of Arbitration.

Professor Chang began his professional academic career at the Seoul National University School of Law in 1995, and was awarded professorial tenure in 2002. He has taught international trade law and, in particular WTO dispute settlement, at more than ten foreign law schools, including Harvard Law School, Yale Law School, Stanford Law School, New York University, Duke Law School, and Georgetown University. In 2007, Harvard Law School granted him an endowed visiting professorial chair title, the Nomura Visiting Professor of International Financial Systems.

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

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

Professor Chang holds a Bachelor of Laws degree (LL.B.) and a Master of Laws degree (LL.M.) from Seoul National University School of Law; and a Master of Laws degree (LL.M.) as well as a Doctorate in International Trade Law (S.J.D.) from Harvard Law School.

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

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

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

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

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

Mr. Graham holds a BA in International Relations and Economics from Indiana University and a J.D. from Harvard Law School.

Shotaro Oshima (Japan) (2008–April 2012)

Born in Japan on 20 September 1943, Shotaro Oshima is a law graduate from the University of Tokyo. Since April 2008, he is Visiting Professor at the Graduate School of Public Policy, the University of Tokyo. He was a diplomat in the Japanese Foreign Service until March 2008, when he retired after 40 years of service, his last overseas posting being Ambassador to the Republic of Korea.

From 2002 to 2005, Mr. Oshima was Japan's Permanent Representative to the WTO, during which time he served as Chair of the General Council and of the Dispute Settlement Body. Prior to his time in Geneva, he served as Deputy Foreign Minister responsible for economic matters and was designated as Prime Minister Koizumi's Personal Representative to the G-8 Summit in Canada in June 2002. In the same year, he served as the Prime Minister's Personal Representative

to the United Nations World Summit on Sustainable Development in South Africa. From 1997 to 2000, he served as Director-General for Economic Affairs in the Ministry of Foreign Affairs, responsible for formulating and implementing major policy initiatives in Japan's external economic relations.

Ricardo Ramírez-Hernández (Mexico) (2009–2013)

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

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

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

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

David Unterhalter (South Africa) (2006–2013)

Born in South Africa on 18 November 1958, David Unterhalter holds degrees from Trinity College, Cambridge, the University of the Witwatersrand, and University College, Oxford. Mr. Unterhalter has been a Professor of Law at the University of the Witwatersrand in South Africa since 1998, and from 2000 to 2006, he was the Director of the Mandela Institute, University of the Witwatersrand, an institute focusing on global law. He was Visiting Professor of Law at Columbia Law School in 2008.

Mr. Unterhalter is a member of the Johannesburg Bar. As a practising advocate, he has appeared in a large number of cases in the fields of trade law, competition law, constitutional law, and commercial law. His experience includes representing different parties in anti-dumping and countervailing duty cases. He has acted as an advisor to the South African Department of Trade and Industry. In addition, he has served on a number of WTO dispute settlement panels. Mr. Unterhalter has published widely in the fields of public law and competition law.

Peter Van den Bossche (European Union; Belgium) (2009–2013)

Born in Belgium on 31 March 1959, Peter Van den Bossche is Professor of International Economic Law at Maastricht University, the Netherlands. He is a visiting professor at the College of Europe in Bruges, Belgium. Mr. Van den Bossche is a Member of the Board of Editors of the *Journal of International Economic Law*.

Mr. Van den Bossche holds a Doctorate in Law from the European University Institute in Florence, an LL.M. from the University of Michigan Law School, and a Licence en Droit *magna cum laude* from the University of Antwerp. From 1990 to 1992, he served as a Référendaire of Advocate General W. van Gerven at the European Court of Justice in Luxembourg. From 1997 to 2001, Mr. Van den Bossche was Counsellor and subsequently Acting Director of the WTO Appellate Body Secretariat. In 2001, he returned to academia and from 2002 to 2009 frequently acted as a consultant to international organisations and developing countries on issues of international economic law. He also served on the faculty of the World Trade Institute in Berne, Switzerland; the China EU School of Law (CESL) in Beijing, China; the IELPO programme of the University of

Barcelona, Spain; the Trade Policy Training Centre in Africa (trapca) in Arusha, Tanzania; and the IEEM Academy of International Trade and Investment Law in Macau, China.

Mr. Van den Bossche has published extensively in the field of international economic law. The second edition of his textbook *The Law and Policy of the World Trade Organization* was published by Cambridge University Press in 2008.

Yuejiao Zhang (China) (2008–2012)

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

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

Ms. Zhang has authored several books and articles on international economic law and international dispute settlement. She has a Bachelor of Arts from China High Education College, a BA from Rennes University, France, and a Master of Laws from Georgetown University.

* * *

DIRECTOR OF THE APPELLATE BODY SECRETARIAT

Werner Zdouc

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

ANNEX 1B

FAREWELL SPEECH OF DEPARTING APPELLATE BODY MEMBER

Farewell remarks of Shotaro Oshima to the Dispute Settlement Body of the WTO
Geneva, 13 June 2012

Members of the DSB, Mr. Director-General, dear colleagues of the Appellate Body and its Secretariat, ladies and gentlemen:

At the outset, I wish to thank all of you for your warm words and for providing me with this opportunity to address you at the conclusion of my term.

Having had the privilege and honour of spending these remarkable four years in the company of the extremely intelligent, wise and collegial members of the Appellate Body, both present and past, and the unbelievably dedicated men and women of the Appellate Body Secretariat, it is with a heavy heart that I have come to say farewell.

When my resignation took effect in April and I was told that the occasion for my farewell would be, in accordance with past practice, in mid-June at the time of the swearing-in of my successor Professor Chang – whom I wish to take this opportunity to personally congratulate and welcome – I was not sure whether I could come because I knew I would have started working for my government by then. Then there was a more serious hesitation, almost reluctance, which was due to a voice from deep inside me that cast a serious doubt as to the advisability of my being here today. This inner voice somehow reminded me of an old movie I saw over fifty years ago, "The Nun's Story". As some of the old timers here might remember, the young woman, played by Audrey Hepburn, takes the vow as a nun, but after the story of her life devoted to god, she decides to leave her convent and return to the life outside. My doubt related to the question whether I would be breaking the oath I took four years ago to serve the truth as embodied in the covered agreements, by resigning from the Appellate Body in order to make myself available to go back to work for my government.

My recollection of the last scene of the movie was nebulous, and I could not remember whether the nun, having walked out into the "real world where people live and work and die"[54], actually looked back over her shoulder at the door that closed behind her. And the metaphor had to do with whether I could come and face you as if to re-enter through the door that I had closed behind me. After some searching for the movie on the internet, I confirmed that, in the very last scene, she walked away, never looking back, and then appeared the two words "The End".

During these past weeks, I have come to realize that I have been asked to work for my government upon its recognition that I had served the Appellate Body in an independent and impartial manner, true to the spirit of professionalism.

Four years ago, I came to the Appellate Body, after a life-long career as a professional diplomat, to serve the interests of the rules-based multilateral trading system. When I resigned, my integrity was, I believe, intact. My commitment and dedication to the rules-based multilateral trading system has not changed and will not change.

Having said the above by way of preamble – Yes, the foregoing was only the chapeau – I will now turn to the operative part of my speech, but I will keep the rest rather short. I will limit myself to raising a concern I have about the way WTO Members react to Appellate Body reports.

When I joined the Appellate Body, I did not naively think I was entering a monastery-like place of sinless purity, but I did look forward to some respite from the intensely political atmosphere of trade negotiations. Sadly, I realized that the politicking did not stop at the door, which said you are entering the sanctity of the dispute settlement process. This became very evident every time Appellate Body reports were made public.

[54] Appellate Body Report, *EC – Hormones*, para. 187.

When a report is issued, almost always, we would see news reports coming from capitals of the parties where spokespersons claim victory or express regret. There were also some rare occasions when two sides declared victory against each other. Nevertheless, whether it was a win-win or win-lose situation, the very fact that the decisions were seen in terms of victory or defeat does not resonate well with the principles of the dispute settlement system.

Members of course have the right to express themselves when the DSB adopts a report. Nevertheless, it is profoundly disconcerting to see those who claim victory applauding the Appellate Body, in effect for "siding" with their arguments, and those who "lost" going at great lengths to criticize the Appellate Body for deciding against them, as if for both sides the principle of independence and impartiality of the Appellate Body did not exist.

Appellate Body Members are guided only by their conscience in clarifying the covered agreements, and will never take sides. Thus, its decisions can never be for or against either of the sides. The truth is, when an Appellate Body report is issued, there is no winner or loser among the parties, because the only winner is the dispute settlement process of the WTO and thus the WTO membership as a whole. It is a victory for the rule of law.

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Before closing, I wish to mention that it is already fifty years since I first entered university in Tokyo, my alma mater. Throughout the five decades since, the notion of the rule of law has been the object of my quest for understanding political systems and statecraft, be it domestic or international. After all, the rule of law is the essence of democracy, which is the best political system in providing stability, which is necessary for the security and predictability in the market, which in turn is critical for economic growth and social stability, which constitute the necessary basis for effective democracy. The logic of this virtuous cycle is true not only for nation-states but also, in this age of globalization, for the international political-economic system.

Being a rare specimen for whom this occasion marks my second time facing the WTO membership to say farewell, I wish to paraphrase my parting words when I addressed the General Council in February of 2005 and say, "An old Appellate Body Member never dies, he just fades away".

So, with these words, and before I completely fade away, I wish to reiterate my heartfelt gratitude to you all, WTO Members and Appellate Body Members past and present, for giving me the honour of serving the principle of the rule of law as Member of the Appellate Body. My final thanks go to those wonderful, best ever, Members of the Appellate Body Secretariat who are absolutely irreplaceable.

Long live the Appellate Body, the WTO and the rules-based multilateral trading system!

ANNEX 2

I. FORMER APPELLATE BODY MEMBERS

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

* Messrs El-Naggar and Matsushita decided not to seek a second term of office. However, the DSB extended their terms until the end of March 2000 in order to allow the Selection Committee and the DSB the time necessary to complete the selection process of replacing the outgoing Appellate Body Members. (See WT/DSB/M70, pp. 32-35)
** Ms. Janow decided not to seek a second term of office. Her term ended on 11 December 2007.

Mr. Christopher Beeby passed away on 19 March 2000.

Mr. Said El-Naggar passed away on 11 April 2004.

Mr. John Lockhart passed away on 13 January 2006.

II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

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

ANNEX 3

APPEALS FILED: 1995–2012

Year	Notices of Appeal filed	Appeals in original proceedings	Appeals in Article 21.5 proceedings
1995	0	0	0
1996	4	4	0
1997	6 [a]	6	0
1998	8	8	0
1999	9 [b]	9	0
2000	13 [c]	11	2
2001	9 [d]	5	4
2002	7 [e]	6	1
2003	6 [f]	5	1
2004	5	5	0
2005	10	8	2
2006	5	3	2
2007	4	2	2
2008	13	10	3
2009	3	1	2
2010	3	3	0
2011	9	9	0
2012	5	5	0
Total	**119**	**100**	**19**

[a] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *EC – Hormones (Canada)* and *EC – Hormones (US)*. A single Appellate Body report was circulated in relation to those appeals.

[b] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – FSC*.

[c] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *US – 1916 Act (EC)* and *US – 1916 Act (Japan)*. A single Appellate Body report was circulated in relation to those appeals.

[d] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – Line Pipe*.

[e] This number includes one Notice of Appeal that was subsequently withdrawn: *India – Autos*; and excludes one Notice of Appeal that was withdrawn by the European Communities, which subsequently filed another Notice of Appeal in relation to the same panel report: *EC – Sardines*.

[f] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – Softwood Lumber IV*.

ANNEX 4

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF ADOPTION: 1995–2012[a]

	All panel reports			Panel reports other than Article 21.5 reports [b]			Article 21.5 panel reports		
Year of adoption	**Panel reports adopted [c]**	**Panel reports appealed [d]**	**Percentage appealed [e]**	**Panel reports adopted**	**Panel reports appealed**	**Percentage appealed**	**Panel reports adopted**	**Panel reports appealed**	**Percentage appealed**
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
2006	7	6	86%	4	3	75%	3	3	100%
2007	10	5	50%	6	3	50%	4	2	50%
2008	11	9	82%	8	6	75%	3	3	100%
2009	8	6	75%	6	4	67%	2	2	100%
2010	5	2	40%	5	2	40%	0	0	–
2011	8	5	63%	8	5	63%	0	0	–
2012	18	11	61%	18	11	61%	0	0	–
Total	**182**	**121**	**70%**	**155**	**102**	**68%**	**27**	**19**	**71%**

[a] No panel reports were adopted in 1995.

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

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

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

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

ANNEX 5

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED THROUGH 2012[a]

Year of circulation	DSU	WTO Agmt	GATT 1994	Agriculture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	Safeguards	GATS	TRIPS
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	0	1	1
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	1	0	0
2000	8	1	7	2	0	0	0	0	2	0	5	2	1	1
2001	7	1	3	1	0	1	1	0	4	0	1	2	0	0
2002	8	2	4	3	0	0	1	0	1	0	3	1	1	1
2003	4	2	3	0	1	0	0	0	4	0	1	1	0	0
2004	2	0	5	0	0	0	0	0	2	0	1	0	0	0
2005	9	0	5	2	0	0	0	0	2	0	4	0	1	0
2006	5	0	3	0	0	0	0	0	3	0	2	0	0	0
2007	5	0	2	1	0	0	0	0	2	0	1	0	0	0
2008	8	1	9	1	2	0	0	0	3	0	3	0	0	0
2009	3	0	4	0	0	0	0	0	3	0	0	0	1	0
2010	1	0	0	0	1	0	0	0	0	0	0	0	0	0
2011	7	1	6	0	0	0	0	0	1	0	2	0	0	0
2012	9	0	7	0	0	0	4	0	1	0	2	0	0	0
Total	**94**	**11**	**75**	**13**	**7**	**3**	**2**	**0**	**29**	**2**	**28**	**7**	**5**	**3**

[a] No appeals were filed in 1995.

ANNEX 6

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1995–2012

As of the end of 2012, there were 157 WTO Members, of which 70 have participated in appeals in which Appellate Body reports were circulated between 1996 and 2012.[55]

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

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua & Barbuda	0	1	1	0	2
Argentina	2	3	5	13	23
Australia	2	2	6	32	42
Bahrain	0	0	0	1	1
Barbados	0	0	0	1	1
Belize	0	0	0	4	4
Benin	0	0	0	1	1
Bolivarian Republic of Venezuela	0	0	1	6	7
Bolivia, Plurinational State of	0	0	0	1	1
Brazil	5	7	12	26	50
Cameroon	0	0	0	3	3
Canada	10	9	18	23	60
Chad	0	0	0	2	2
Chile	3	0	2	12	17
China	10	2	6	35	53
Colombia	0	0	0	16	16
Costa Rica	1	0	0	3	4
Côte d'Ivoire	0	0	0	4	4
Cuba	0	0	0	4	4
Dominica	0	0	0	4	4
Dominican Republic	1	0	1	4	6
Ecuador	0	2	2	10	14

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

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Egypt	0	0	0	2	2
El Salvador	0	0	0	2	2
European Union	21	15	40	58	134
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	1	1	8	11
Guyana	0	0	0	1	1
Honduras	0	2	2	2	6
Hong Kong, China	0	0	0	8	8
India	6	2	7	34	49
Indonesia	0	1	1	1	3
Israel	0	0	0	1	1
Jamaica	0	0	0	5	5
Japan	6	4	11	52	73
Kenya	0	0	0	1	1
Korea	3	4	6	25	38
Kuwait	0	0	0	1	1
Madagascar	0	0	0	1	1
Malaysia	1	0	1	0	2
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2
Mexico	5	4	7	31	47
New Zealand	0	3	6	13	22
Nicaragua	0	0	0	4	4
Nigeria	0	0	0	1	1
Norway	0	1	1	19	21
Pakistan	0	0	2	3	5
Panama	0	0	0	3	3
Paraguay	0	0	0	5	5
Peru	0	0	1	4	5
Philippines	3	0	3	1	7
Poland	0	0	1	0	1
Senegal	0	0	0	1	1
Saint Lucia	0	0	0	4	4
Saudi Arabia	0	0	0	5	5
St Kitts & Nevis	0	0	0	1	1

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
St Vincent & the Grenadines	0	0	0	3	3
Suriname	0	0	0	3	3
Swaziland	0	0	0	1	1
Switzerland	0	1	1	0	2
Chinese Taipei	0	0	0	33	33
Tanzania	0	0	0	1	1
Thailand	3	2	5	20	30
Trinidad &Tobago	0	0	0	1	1
Turkey	1	0	0	9	10
United States	33	21	71	30	155
Viet Nam	0	0	0	3	3
Total	**117**	**87**	**221**	**613**	**1038**

II. DETAILS BY YEAR OF CIRCULATION

1996

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

1997

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

1998

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

1999

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

2000

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

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

2001

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

2002

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

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

2003

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

2004

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

2005

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

2005 (CONT'D)

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

2006

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

2007

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

2008

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

2008 (CONT'D)

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

2008 (CONT'D)

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

2009

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

2010

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

2011

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

2011 (CONT'D)

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

2012

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

2012 (CONT'D)

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

2012 (CONT'D)

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

ANNEX 7

APPELLATE BODY SECRETARIAT PARTICIPATION IN TECHNICAL ASSISTANCE, TRAINING, AND OTHER ACTIVITIES IN 2012

I. TECHNICAL ASSISTANCE ACTIVITIES – 2012

Course / Seminar	Location	Dates
FAO-INFOPESCA Regional Workshop on Dispute Settlement	Tegucigalpa, Honduras	22-24 May 2012
Advanced Trade Policy Course - Dispute Settlement Module (French)	Geneva, Switzerland	25-26 June 2012
Regional Trade Policy Course - Dispute Settlement Module	Manzini, Swaziland	9-13 July 2012
Regional Workshop on Dispute Settlement for English-Speaking African Countries	Johannesburg, South Africa	28-31 August 2012
Regional Trade Policy Course – Basic Principles Module	New Delhi, India	27-28 September 2012
Islamic Development Bank Seminar on "WTO Dispute Settlement and the Developing Countries"	Istanbul, Turkey	1-3 October 2012
National Seminar on Dispute Settlement	Yogyakarta, Indonesia	9-11 October 2012
Dispute Settlement Seminar at Universidad Externado	Bogotá, Colombia	17-22 October 2012
Regional Workshop on WTO Dispute Settlement for Central and Eastern Europe, Central and the Caucasus (CEECAC)	Vienna, Austria	21-25 October 2012
Regional Trade Policy Course – Dispute Settlement Module	New Delhi, India	5-8 November 2012
Short Trade Policy Course for ALADI Members	Montevideo, Uruguay	15-16 November 2012
Advanced Trade Policy Course – Dispute Settlement Module (English)	Geneva, Switzerland	19-20 November 2012
WTO/ACWL/ICTSD Regional Workshop on Dispute Settlement	New Delhi, India	26-30 November 2012

Course / Seminar	Location	Dates
Regional Trade Policy Course for Arab Countries with IMF/CEF – Dispute Settlement Module	Kuwait City, Kuwait	1-5 December 2012
Advanced Dispute Settlement Course (Spanish)	Geneva, Switzerland	3-7 December 2012

II. OTHER ACTIVITIES – 2012

Activity	Location	Dates
ELSA Moot Court Competition (Regional Round)	Washington D.C., US	29 February- 3 March 2012
ELSA Moot Court Competition (Regional Round)	Jakarta, Indonesia	1-9 March 2012
IELPO Moot Court Competition	Barcelona, Spain	21-22 June 2012
Caribbean Academy for Law and Court Administration (CALCA) WTO Law and Policy	Port of Spain, Trinidad & Tobago	22-26 September 2012

ANNEX 8

WTO DISPUTE SETTLEMENT REPORTS AND ARBITRATION AWARDS: 1995–2012

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

Short title	Full case title and citation
Australia – Salmon	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, 3407
Australia – Salmon (Article 21.3(c))	Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU*, WT/DS18/9, 23 February 1999, DSR 1999:I, 267
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
Brazil – Aircraft (Article 21.5 – Canada)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS46/AB/RW, DSR 2000:IX, 4093
Brazil – Aircraft (Article 21.5 – Canada II)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Brazil – Desiccated Coconut	Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, 189
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
Brazil – Retreaded Tyres (Article 21.3(c))	Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres – Arbitration under Article 21.3(c) of the DSU*, WT/DS332/16, 29 August 2008, DSR 2008:XX, 8581
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443

Short title	Full case title and citation
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Aircraft (Article 21.5 – Brazil)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by Appellate Body Report WT/DS70/AB/RW, DSR 2000:IX, 4315
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, 849
Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)	Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS222/ARB, 17 February 2003, DSR 2003:III, 1187
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Autos (Article 21.3(c))	Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, 5373
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, 5757-DSR 2008:XVII, 6717
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
Canada – Dairy (Article 21.5 – New Zealand and US)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by Appellate Body Report WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865

Short title	Full case title and citation
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
Canada – Dairy (Article 21.5 – New Zealand and US II)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by Appellate Body Report WT/DS103/AB/RW2, WT/DS113/AB/RW2, DSR 2003:I, 255
Canada – Patent Term	Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093
Canada – Feed-in Tariff Program	Panel Report, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/R and Add.1, circulated to WTO Members 19 December 2012 [appeal in progress]
Canada – Patent Term	Panel Report, *Canada – Term of Patent Protection*, WT/DS170/R, adopted 12 October 2000, upheld by Appellate Body Report WT/DS170/AB/R, DSR 2000:XI, 5121
Canada – Patent Term (Article 21.3(c))	Award of the Arbitrator, *Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU*, WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
Canada – Periodicals	Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
Canada – Pharmaceutical Patents	Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, DSR 2000:V, 2289
Canada – Pharmaceutical Patents (Article 21.3(c))	Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, 3
Canada – Renewable Energy	Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R and Add.1, circulated to WTO Members 19 December 2012 [appeal in progress]
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
Chile – Alcoholic Beverages	Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303
Chile – Alcoholic Beverages (Article 21.3(c))	Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583

Short title	Full case title and citation
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, 3127
Chile – Price Band System (Article 21.3(c))	Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
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Colombia – Ports of Entry (Article 21.3(c))	Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3(c) of the DSU*, WT/DS366/13, 2 October 2009, DSR 2009:IX, 3819
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EC – The ACP-EC Partnership Agreement II	Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, DSR 2005:XXIII, 11703
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
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EC – Bananas III (Guatemala and Honduras)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695
EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 803
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943
EC – Bananas III (Article 21.3(c))	Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU*, WT/DS27/15, 7 January 1998, DSR 1998:I, 3
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EC – Chicken Cuts (Brazil)	Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295
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EC – Chicken Cuts (Article 21.3(c))	Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU*, WT/DS269/13, WT/DS286/15, 20 February 2006
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EC – Computer Equipment	Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
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EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499
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EC – Export Subsidies on Sugar (Article 21.3(c))	Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, DSR 2005:XXIII, 11581
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
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EC – Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
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EC – Hormones (Canada) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135
EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105

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EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
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EC – Scallops (Peru and Chile)	Panel Report, *European Communities – Trade Description of Scallops – Requests by Peru and Chile*, WT/DS12/R, WT/DS14/R, 5 August 1996, unadopted, DSR 1996:I, 93
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EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009
EC – Tariff Preferences (Article 21.3(c))	Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, WT/DS246/14, 20 September 2004, DSR 2004:IX, 4313
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EC – Trademarks and Geographical Indications (US)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States*, WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, 3499

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India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9

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Japan – Agricultural Products II	Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report WT/DS76/AB/R, DSR 1999:I, 315
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Japan – Alcoholic Beverages II	Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
Japan – Alcoholic Beverages II (Article 21.3(c))	Award of the Arbitrator, *Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3
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US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, 31 August 2004, DSR 2004:IX, 4591
US – Offset Act (Byrd Amendment) (India) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by India – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/IND, 31 August 2004, DSR 2004:X, 4691
US – Offset Act (Byrd Amendment) (Japan) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Japan – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/JPN, 31 August 2004, DSR 2004:X, 4771
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US – Offset Act (Byrd Amendment) (Mexico) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Mexico – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS234/ARB/MEX, 31 August 2004, DSR 2004:X, 4931
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US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))	Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12, 7 June 2005, DSR 2005:XXIII, 11619
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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
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US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
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US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343
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US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521

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