WORLD TRADE ORGANIZATION

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APPELLATE BODY

ANNUAL REPORT FOR 2017

FEBRUARY 2018

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WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
Accession Protocol	Protocol on the Accession of the Russian Federation to the WTO
AFA	adverse facts available
ALOP	appropriate level of protection
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASF	African swine fever
B&O	business and occupation
BCI	business confidential information
CONNUMs	control numbers
DDSR	WTO Digital Dispute Settlement Registry
DPM	differential pricing methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ELSA	European Law Students' Association
ESSB 5952	Engrossed Substitute Senate Bill 5952
EU	European Union
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
HSBI	highly sensitive business information
Import Licensing Agreement	Agreement on Import Licensing Procedures
NME	non-market economy
NME-wide entity	non-market-economy-wide entity
OIE	World Organisation for Animal Health
RCW	*Revised Code of Washington*
RPT	reasonable period of time
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 Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
T-T	transaction-to-transaction
URAA	Uruguay Round Agreements
USDOC	United States Department of Commerce
USTR	United States Trade Representative
Working Procedures	Working Procedures for Appellate Review

Abbreviation	Description
W-T	weighted average-to-transaction
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
W-W	weighted average-to-weighted average

FOREWORD

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

The Appellate Body was engaged in appellate proceedings throughout the whole year. It circulated reports in five disputes: *Russia – Pigs*; *US – Anti-Dumping Methodologies (China)*; *US – Tax Incentives*; *EU – Fatty Alcohols (Indonesia)*; and *Indonesia – Import Licensing*. The matters addressed by these reports included Members' terms of accession to the WTO, the SPS Agreement, the Anti-Dumping Agreement, the SCM Agreement, the Import Licensing Agreement, the GATT 1994, and the DSU. These disputes concerned momentous and delicate issues such as animal disease control, domestic tax regimes, and fair trade. The exceptionally large appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, filed in 2016, occupied a significant portion of Appellate Body Secretariat staff resources throughout 2017. The Secretariat also assisted an arbitrator in issuing her award concerning the reasonable period of time for implementation of the panel and Appellate Body reports in *US – Washing Machines*. Later in 2017, six more appeals were filed: *Russia – Light Commercial Vehicles*; *US – Large Civil Aircraft (Article 21.5 – EC)*; *EU – PET (Pakistan)*; *Indonesia – Iron or Steel Products*; *Brazil – Taxation*; and *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*. Moreover, the Secretariat that assists panels has estimated that over ten panel reports could be issued to the parties during the course of 2018.

Under normal circumstances, the size, complexity, and number of these disputes would strain the Appellate Body's capacity to its limits for a prolonged period of time. However, the current circumstances are all but normal. The second terms of office of my dear friends and distinguished colleagues Mr Ricardo Ramírez-Hernández and Mr Peter Van den Bossche expired in June and December 2017, respectively. Furthermore, Mr Hyun Chong Kim resigned from the Appellate Body on 1 August 2017. As a result, three Appellate Body seats were left vacant and need to be filled immediately, as required by Article 17.2 of the DSU. Unfortunately, despite the numerous DSB meetings held between February and December 2017, WTO Members remain unable to reach a consensus to initiate the appointment processes for three new Appellate Body members. The main points of contention include the application of Rule 15 of the Working Procedures for Appellate Review, which allows Appellate Body members who are sitting on divisions at the time of expiration of their terms of office to complete their work on the appeals to which such divisions are assigned. The vast majority of WTO Members argue that Rule 15 has been in force since the inception of the Appellate Body and has been applied numerous times without raising any concern. One delegation, however, maintains that the application of Rule 15 raises systemic concerns, and has expressed reservations to launching new selection processes as long as such concerns are not addressed by the DSB. Moreover, allegations have been made that, in certain disputes, the Appellate Body addressed issues that were not strictly necessary for its disposition of the appeal.

The ongoing stalemate, coupled with the heavy workload we are currently facing, has the potential to disrupt the effectiveness and overall functioning of the Appellate Body. Unless the seven-member composition of the Appellate Body is promptly restored, the number of active Divisions will decrease and the time necessary to dispose of appeals will extend far beyond the 60- and 90-day periods set forth in Article 17.5 of the DSU. Moreover, the fact that the Appellate Body is operating at half-capacity threatens to undermine the collegiality of its deliberative processes, as reflected in Rule 4 of the Working Procedures for Appellate Review. Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when the Appellate Body will find itself unable to fulfil its mandate. Such a scenario would deal a serious blow to the multilateral trading system. The institution of a standing judicial body tasked with reviewing panel decisions is widely considered as the crowning achievement of the Uruguay Round of negotiations. Impairing that achievement would deprive the WTO dispute settlement system of its ability to ensure the principled and consistent application of multilateral trade rules.

Faced with these daunting challenges, we are doubling down on our efforts to maintain high standards of quality and coherence in our reports. For instance, we are continuing the practice, initiated in 2015, of annexing to our reports the executive summaries of the arguments submitted by the participants and third participants, instead of summarizing them in the body of the reports themselves. We are also providing more complete descriptions of our findings and conclusions, so as to make our central reasoning more quickly accessible to those who turn first to the "findings and conclusions" section of our reports. Finally, we are striving for clarity and concision in our reasoning, so as to make the reading of our reports more "user friendly" and the use of our limited resources more efficient. In this respect, I am pleased to report that none of the Appellate Body reports circulated in 2017 exceeds 70 pages in length.

Despite these efforts, and hoping that the ongoing crisis comes to an end soon, there remains much room for improvement in the WTO dispute settlement system, and greater engagement is required to address its long-standing structural problems. As Chair of the Appellate Body, I have continued my predecessors' tradition of holding informal consultations with WTO Members, particularly those who are active users of the system, on possible further improvements to internal procedures and practices. These consultations included discussions of concerns relating to the independence and impartiality of the Appellate Body and practical concerns regarding the resources necessary to meet the growing demands of the dispute settlement system. The constructive nature of the consultations was encouraging, and persuaded me to continue on the path of broad and frequent engagement with WTO Members.

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

Ujal Singh Bhatia
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

ANNUAL REPORT FOR 2017

1 INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2017.

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

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

Proceedings under the DSU take place in stages. In the first stage, Members are required to hold consultations with a view to reaching a mutually agreed solution to the matter in dispute.[7] If these consultations fail to produce a mutually agreed solution, the dispute may advance to the adjudicative stage in which the complaining Member requests the DSB to establish a panel to examine the matter.[8] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[9] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[10] Panels shall be composed of well-qualified governmental and/or non-governmental individuals with expertise in international trade law or policy.[11] In discharging its adjudicative function, a panel is required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings 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. They shall be unaffiliated with any government. Moreover, the Appellate Body membership shall be broadly representative of the membership of the WTO. Appellate Body members elect a Chairperson to serve a one-year term, which can be extended for an additional one-year period. The Chairperson is responsible for the overall direction of Appellate Body business. Each appeal is heard by a Division of three Appellate Body members. The process for the selection of Divisions is designed to ensure randomness, unpredictability, and opportunity for all members to serve, regardless of their national origin. To ensure consistency and coherence in decision-making, Divisions exchange views with the other four members of the Appellate Body before finalizing Appellate Body reports. The Appellate Body receives legal and administrative support from its Secretariat. The conduct of members of the Appellate Body and its staff is regulated by the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[13] (Rules of Conduct). These Rules emphasize that Appellate Body members shall be independent and impartial, avoid any direct or indirect conflict of interest, and maintain the confidentiality of appellate proceedings.[14]

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

Panel and Appellate Body reports must be adopted by WTO Members acting collectively through the DSB. Under the reverse consensus rule, a report is adopted unless the DSB decides by consensus not to adopt the report.[16] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding upon the parties.

Following the adoption by the DSB of a panel or Appellate Body report that includes a finding of inconsistency of a measure of the responding Member with its WTO obligations, Article 21.3 of the DSU provides that the responding Member should, in principle, comply immediately. However, where immediate compliance is "impracticable", the responding Member shall have a "reasonable period of time" to implement the DSB's recommendations and rulings. The "reasonable period of time" may be determined by the DSB, by agreement between the parties, or through binding arbitration pursuant to Article 21.3(c) of the DSU. In such arbitration,

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

[14] Former Appellate Body members, Secretariat staff and interns are subject to Post Employment Guidelines, which facilitate compliance with relevant obligations of conduct following a term of service (WT/AB/22).

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

[16] Articles 16.4 and 17.14 of the DSU.

a guideline for the arbitrator is that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of the panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. Arbitrators have indicated that the reasonable period of time shall be the shortest time possible in the implementing Member's legal system.

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

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

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

[17] Article 22.1 of the DSU.

[18] Article 5 of the DSU.

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

[20] Articles 21 and 22 of the DSU apply *mutatis mutandis* to decisions by arbitrators.

2 COMPOSITION OF THE APPELLATE BODY

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

The second term of office of Mr Ricardo Ramírez-Hernández expired on 30 June 2017.[21] On 1 August 2017, Mr Hyun Chong Kim notified the Chairman of the Appellate Body of his intention to resign from the office of Member of the Appellate Body with immediate effect.[22] On the same day, as required by Rule 14 of the Working Procedures for Appellate Review, the Chairman of the Appellate Body informed the DSB Chairman, the Director-General, and the other Members of the Appellate Body of Mr Kim's resignation with immediate effect. The second term of office of Mr Peter Van den Bossche expired on 11 December 2017.[23]

The composition of the Appellate Body was discussed during numerous DSB meetings throughout the year. At the meeting of 25 January 2017, the DSB Chairman drew the Members' attention to the forthcoming expiration of the second terms of office of Messrs Ramírez-Hernández and Van den Bossche and called on the DSB to decide, in due course, on the appointments of two new Appellate Body members to replace them by the expiry of their second four-year terms.[24] Following that meeting, the DSB Chairman engaged in consultations with Members concerning the possible approaches to fill the upcoming vacancies. During subsequent meetings, Members could not come to an agreement as to whether the selection processes should be launched and whether they should be merged. Several delegations showed support for a single selection process to fill both positions at the same time by the end of June 2017, while two delegations expressed their preference for undertaking two independent processes.[25] At the meeting of 22 May 2017, the European Union and a group of Latin American Members put on the agenda two separate proposals to launch the selection processes. The former covered the replacement of both Messrs Ramírez-Hernández and Van den Bossche, while the latter addressed the replacement of Mr Ramírez-Hernández alone.[26] Members remained unable to find an agreement on this matter.[27]

At the DSB meeting of 20 July 2017, the DSB Chairman observed that Mr Ramírez-Hernández's seat had become vacant since 1 July 2017. The Chairman also informed the DSB that Mr Ramírez-Hernández had been authorized by the Appellate Body, in accordance with Rule 15 of the Working Procedures for Appellate Review (Rule 15), to complete the disposition of the appeals to which he had been assigned prior to the expiration of his term of office.[28] At subsequent DSB meetings, numerous Members expressed their concern at the DSB's inability to find an agreement to launch the selection processes for new Appellate Body Members.[29]

At the DSB meeting of 31 August 2017, the DSB Chairman drew the DSB's attention to the resignation of Mr Kim from the Appellate Body on 1 August 2017 and to the fact that the Division had completed its work on the Appellate Body report in DS442 on 31 July 2017. He also noted that this created an immediate vacancy on the Appellate Body. The Chairman added that, pursuant to Article 17.2 of the DSU, the person appointed to replace Mr Kim shall hold office for the remainder of his term. All Members agreed that the immediate resignation of Mr Kim was the "necessary and appropriate" course of action given his appointment with the government of Korea. However, one delegation argued that a Division member hearing an appeal must still be an Appellate Body

[21] On the same day, the Chairman of the Appellate Body notified by letter the Chairman of the DSB that, in accordance with Rule 15 of the Working Procedures for Appellate Review, the Appellate Body had authorized Mr Ricardo Ramírez-Hernández to complete the disposition of the appeals to which he had been assigned before his term expired. The participants and third participants in the appeals concerned were informed on the same day.

[22] See WT/DSB/73.

[23] On 24 November, the Chairman of the Appellate Body notified by letter the Chairman of the DSB that, in accordance with Rule 15 of the Working Procedures for Appellate Review, the Appellate Body had authorized Mr Peter Van den Bossche to complete the disposition of the appeals to which he had been assigned before the expiry of his term on 11 December 2017. The participants and third participants in the appeals concerned were informed on the same day.

[24] See WT/DSB/M/391.

[25] See WT/DSB/M/392; WT/DSB/M/394; WT/DSB/M/396.

[26] See WT/DSB/M/397.

[27] See WT/DSB/M/397; WT/DSB/M/398.

[28] See WT/DSB/M/399.

[29] See WT/DSB/M/401.

member at the time of the circulation of the Appellate Body report. As a result of Mr Kim's resignation, the Chairman reported that the DSB was faced with three vacancies on the Appellate Body, and called on the DSB to open three selection processes as soon as possible.[30]

At the DSB meetings of 29 September and 23 October 2017, many Members reiterated their concerns at the DSB's continued inability to find a consensus on the proposals to launch the selection processes. At the DSB meeting of 22 November 2017, a group of 52 Members (including the European Union and its member States) presented a joint proposal for the immediate initiation of the three selection processes to fill the three Appellate Body seats left vacant by the expiration of the terms of office of Messrs Ramírez-Hernández and Van den Bossche and by the resignation of Mr Kim. The proponents stressed how, for the seventh consecutive time, a draft proposal on the procedures to carry out the selection process had been submitted to the DSB, and recalled the legal obligation under Article 17.2 of the DSU to fill Appellate Body vacancies as they arise. However, the DSB remained unable to reach a consensus as to the launch of the three selection processes.[31] On 24 November 2017, the Chairman of the Appellate Body notified the DSB Chairman that Mr Peter Van den Bossche had been authorized by the Appellate Body, in accordance with Rule 15, to complete the disposition of the appeals to which he had been assigned prior to the expiration of his term of office on 11 December 2017. On 24 November 2017, the Appellate Body issued a communication containing a background note on Rule 15.[32]

Table 1: Composition of the Appellate Body in 2017

Name	Nationality	Term(s) of office
Ujal Singh Bhatia	India	2011-2015 2015-2019
Thomas R. Graham	United States	2011-2015 2015-2019
Ricardo Ramírez-Hernández*	Mexico	2009-2013 2013-2017
Hyun Chong Kim**	Korea	2016-2017
Shree Baboo Chekitan Servansing	Mauritius	2014-2018
Peter Van den Bossche*	Belgium	2009-2013 2013-2017
Hong Zhao	China	2016-2020

* Ricardo Ramírez-Hernández and Peter Van den Bossche's terms as Appellate Body members ended on 30 June and 11 December 2017, respectively. Pursuant to Rule 15 of the Working Procedures, they have been authorized to complete the disposition of appeals they had been assigned to while being a Member of the Appellate Body.

** Hyun Chong Kim resigned from the Appellate Body, effective 1 August 2017.

Pursuant to Rule 5.1 of the Working Procedures, the members of the Appellate Body elected Mr Ujal Singh Bhatia to serve as Chair of the Appellate Body from 1 January to 31 December 2017.[33] On 13 December 2017, Mr Ujal Singh Bhatia was re-elected to serve a second term as Chair as of the Appellate Body, from 1 January 2018 until 31 December 2018.[34]

Biographical information about the members of the Appellate Body is provided in Annex 4. A list of former Appellate Body members and Chairpersons is provided in Annex 5.

The Appellate Body receives legal and administrative support from the Appellate Body Secretariat, in accordance with Article 17.7 of the DSU. As at 31 December 2017, the Secretariat comprised a Director, nineteen lawyers, one administrative assistant, and six support staff. Werner Zdouc has been Director of the Appellate Body Secretariat since 2006.

[30] See WT/DSB/M/400.
[31] See WT/DSB/M/403.
[32] See Annex 2 below.
[33] See WT/DSB/72.
[34] WT/DSB/75.

3 APPEALS

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

Eight panel reports concerning eight matters were appealed in 2017, and the Appellate Body's work on one appeal filed in 2016 continued through the year. Two of the appeals filed in 2017 related to compliance proceedings, while all remaining disputes related to original proceedings. "Other appeals" were filed pursuant to Rule 23(1) of the Working Procedures in six out of the eight disputes. Table 2 sets out further information regarding appeals filed in 2016. Further information on the number of appeals filed each year since 1996 is provided in Annex 9.

The overall average of panel reports that have been appealed from 1996 to 2017 is 70%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 7.

Table 2: Appeals filed and pending in 2017

Panel report appealed	Date of appeal	Appellant [a]	Document symbol	Other appellant [b]	Document symbol
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	13 October 2016	European Union	WT/DS316/29	United States	WT/DS316/30
EU – Fatty Alcohols (Indonesia)	10 February 2017	Indonesia	WT/DS442/5	European Union	WT/DS442/6
Indonesia – Import Licensing Regimes	17 February 2017	Indonesia	WT/DS477/11 WT/DS478/11	---	---
Russia – Commercial Vehicles	20 February 2017	Russian Federation	WT/DS479/6	European Union	WT/DS479/7
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	29 June 2017	European Union	WT/DS353/27	United States	WT/DS353/28
EU – PET (Pakistan)	30 August 2017	European Union	WT/DS486/6	Pakistan	WT/DS486/7
Indonesia – Iron or Steel Products	28 September 2017	Indonesia	WT/DS490/5 WT/DS496/6	Chinese Taipei	WT/DS490/6
Brazil – Taxation	28 September 2017	Brazil	WT/DS472/8 WT/DS497/6	European Union Japan	WT/DS472/9 WT/DS497/7
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	1 December 2017	Mexico	WT/DS381/45	---	---

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

Appellate Body Reports

Six Appellate Body reports concerning five matters were circulated in 2017, the details of which are summarized in Table 3. As of the end of 2017, the Appellate Body had circulated a total of 150 reports.

Table 3: Appellate Body reports circulated in 2017

Case	Document symbol	Date circulated	Date adopted by the DSB
Russia – Pigs (EU)	WT/DS475/AB/R	23 February 2017	21 March 2017
US – Anti-Dumping Methodologies (China)	WT/DS471/AB/R	11 May 2017	22 May 2017
US – Tax Incentives	WT/DS487/AB/R	4 September 2017	22 September 2017
EU – Fatty Alcohols (Indonesia)	WT/DS442/AB/R	5 September 2017	29 September 2017
Indonesia – Import Licensing Regimes	WT/DS477/AB/R WT/DS478/AB/R	9 November 2017	22 November 2017

Table 4 below shows which WTO agreements were addressed in the Appellate Body reports circulated in 2017.

Table 4: WTO Agreements addressed in Appellate Body reports circulated in 2017

Case	Document symbol	WTO agreements addressed
Russia – Pigs (EU)	WT/DS475/AB/R	DSU SPS Agreement
US – Anti-Dumping Methodologies (China)	WT/DS471/AB/R	Anti-Dumping Agreement DSU
US – Tax Incentives	WT/DS487/AB/R	SCM Agreement DSU
EU – Fatty Alcohols (Indonesia)	WT/DS442/AB/R	Anti-Dumping Agreement DSU
Indonesia – Import Licensing Regimes	WT/DS477/AB/R WT/DS478/AB/R	Agreement on Agriculture GATT 1994 DSU

The findings and conclusions contained in the Appellate Body reports circulated in 2017 are summarized below.

3.1 Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/AB/R

This dispute concerned restrictions imposed by Russia in 2014 on the importation of live pigs, pork, and certain pig products from the European Union, following outbreaks of African swine fever (ASF) in certain regions within the European Union.

ASF is a highly contagious disease of pigs, warthogs, European wild boar, and American wild pigs caused by the African swine fever virus. The relevant applicable standards relating to ASF have been developed by the World Organisation for Animal Health (OIE). In particular, recommendations relating to ASF are contained in the OIE's Terrestrial Code, which aims to prevent the spread of disease through international trade in animals and their products. As of early 2014, ASF was not present in the European Union, with the exception of the island of Sardinia. This situation changed with the outbreak of ASF in Lithuania in January 2014, followed by outbreaks in Poland, Latvia, and Estonia. ASF has been present in certain areas of Russia since 2007.

Following the ASF outbreak in Lithuania in January 2014, Russia refused to accept imports of the products at issue from any European Union (EU) member State, thereby imposing an "EU-wide ban". In addition, Russia imposed "country-specific bans" on imports of the products at issue from

Estonia, Latvia, Lithuania, and Poland. The EU-wide ban applied to live pigs and other non-treated pig products, whereas the country-specific bans covered both heat-treated and non-treated pig products. The European Union challenged both the EU-wide ban and the country-specific bans, alleging that these measures were inconsistent with Articles 2.2, 2.3, 3.1, 3.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 7, and 8 and Annexes B and C to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

The Panel made a number of preliminary findings with respect to the challenged measures. First, it found that the European Union had demonstrated the existence of the alleged EU-wide ban as a composite measure. The Panel concluded that the EU-wide ban was a measure susceptible to challenge under the WTO dispute settlement mechanism. Moreover, the Panel found no limitations in the Protocol on the Accession of the Russian Federation to the WTO (Accession Protocol) to assessing the merits of the European Union's claims brought in respect of the EU-wide ban. The Panel also considered that the four country-specific bans fell within its terms of reference, even though two of them – i.e. those on imports from Latvia and Estonia – had been adopted subsequent to the European Union's panel request.

With regard to the European Union's claims under the SPS Agreement, the Panel found, first, that Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF and that, therefore, the measures at issue were not inconsistent with Russia's obligation to recognize such concepts under Article 6.2 of the SPS Agreement. Second, the Panel found that, as of 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that: (i) there were ASF-free areas in the European Union, both inside and outside of the four affected member States; and (ii) the ASF-free areas in Estonia, Lithuania, and Poland, as well as the ASF-free areas within the European Union outside of the four affected member States, were likely to remain so. By contrast, the Panel found that, as of 11 September 2014, the European Union had failed to provide the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that the ASF-free areas in Latvia were likely to remain so. Third, the Panel found that Russia had failed to ensure adaptation of the measures at issue to the SPS characteristics of the ASF-free areas in Estonia, Latvia, Lithuania, and Poland, as well as the areas within the European Union outside of the four affected member States. Therefore, the Panel concluded that the measures at issue were inconsistent with Article 6.1 of the SPS Agreement.

In addition, the Panel made certain unappealed findings, including: that the measures at issue were not based on, and did not conform to, the relevant international standards, and were thus inconsistent with Articles 3.1 and 3.2 of the SPS Agreement; that, in the process of considering the European Union's requests for recognition of ASF-free areas, Russia made excessive requests to the European Union for information, and thereby acted inconsistently with Article 8 and Annex C(1)(c) and C(1)(a) to the SPS Agreement; that the requirements of Article 5.7 of the SPS Agreement were not met, and that therefore Russia was not entitled to provisionally adopt the measures at issue pursuant to that provision; that Russia did not base its measures on a risk assessment, thus breaching Articles 2.2, 5.1, and 5.2 of the SPS Agreement; that the measures at issue were more restrictive than necessary to achieve Russia's appropriate level of protection, and were therefore inconsistent with Articles 2.2 and 5.6 of the SPS Agreement; and that the measures arbitrarily and unjustifiably discriminated between Members where identical or similar conditions prevail, inconsistent with Article 2.3 of the SPS Agreement.

On appeal, the participants limited their claims to the Panel's findings concerning the attribution of the EU-wide ban to Russia and Article 6 of the SPS Agreement. In particular, Russia challenged the Panel's findings that the EU-wide ban was attributable to Russia and that there was no limitation, in Russia's terms of accession to the WTO, to assessing the merits of the European Union's claims regarding the EU-wide ban. Russia also claimed that the Panel erred in its interpretation of Article 6.3 of the SPS Agreement by finding that the European Union had provided the necessary evidence to objectively demonstrate to Russia that there were ASF-free areas in the European Union inside and outside the four affected member States, and that the ASF-free areas in Estonia, Lithuania, and Poland, as well as the ASF-free areas outside the four affected member States, were likely to remain so. Finally, Russia alleged that the Panel erred in its interpretation of the relationship between Articles 6.1 and 6.3 of the SPS Agreement by finding that Russia had failed to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of the ASF-free areas within the Latvian territory, despite having previously found that the European Union had failed to provide the necessary evidence to objectively demonstrate that these

areas were likely to remain ASF-free. The European Union, for its part, appealed the Panel's findings that Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and that, therefore, the measures at issue were not inconsistent with Article 6.2 of the SPS Agreement.

3.1.1 The attribution of the EU-wide ban to Russia

Russia claimed that the Panel erred in finding that the EU-wide ban was attributable to Russia. In particular, Russia submitted that the content of the veterinary certificates it required for importation of the products at issue was not set out in Russia's domestic legislation, but rather in the veterinary certificates bilaterally agreed with the European Union. Russia further asserted that the Panel failed to recognize the sequence of steps envisaged in these certificates, whereby the European Union would first have to issue a valid certificate before Russia may recognize the validity of the certificate and allow imports. Finally, Russia argued that the Panel failed to give legal effect to the validity of the existing bilateral veterinary certificates as stipulated in Russia's terms of accession to the WTO.

The Appellate Body recalled that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. With this in mind, the Appellate Body noted that, although the European Union had referred, in its panel request, to the requirement to provide proper veterinary certificates in order to import the products at issue, the European Union's challenge with respect to the EU-wide ban was directed at Russia's decision, either through action or omission, to deny the importation of the products at issue. The Appellate Body agreed with the Panel that it was Russia's action of enforcing the requirement of EU-wide freedom from ASF by rejecting consignments of the products at issue that constituted a measure attributable to Russia. For the Appellate Body, it was immaterial that the condition in the bilateral veterinary certificates upon which Russia's decision was based may have been developed in conjunction with, or may have involved prior action on the part of, the European Union. Similarly, it was irrelevant that the issuance of a certificate by the European Union preceded Russia's recognition of the validity of that certificate. Indeed, irrespective of the events preceding Russia's conduct, Russia undeniably undertook actions to deny the importation of the products at issue, and it was these actions that comprised the measure attributable to Russia.

Next, the Appellate Body addressed Russia's argument that its terms of accession to the WTO precluded a finding that the bilateral veterinary certificates were inconsistent with Russia's obligations under the SPS Agreement. The Appellate Body considered Russia's terms of accession as addressing which certificate would remain in effect, until amended or replaced, in trade relations between WTO Members and Russia. The Appellate Body drew a distinction between, on the one hand, the bilateral veterinary certificates – which required, *inter alia*, certain factual attestations regarding the disease status in the exporting country – and, on the other hand, the WTO-consistency of actions taken by the importing country. For the Appellate Body, the relevant issue was not whether the bilateral veterinary certificates between the European Union and Russia were themselves WTO-consistent, but rather whether a particular SPS measure – in this case, the EU-wide ban, which was taken on the basis of the disease status in the European Union – was consistent with Russia's obligations under Article 6 of the SPS Agreement.

The Appellate Body further recalled that the main and overarching obligation to ensure that measures are adapted to regional SPS characteristics, as set out in the first sentence of Article 6.1 of the SPS Agreement, is not static, but rather ongoing, thereby requiring that SPS measures be adjusted over time so as to establish and maintain their continued suitability in respect of the SPS characteristics of the relevant areas. For the Appellate Body, the fact that a WTO Member has adapted its measures to the SPS characteristics of an area at a specific point in time may not ensure that such adaptation remains adequate when the particular SPS characteristics of that area evolve. Therefore, even if one were to maintain that the condition of EU-wide freedom from ASF may have been reflective of the SPS situation at the time the bilateral veterinary certificates were originally agreed, this did not rule out the possibility that the SPS characteristics of the relevant areas could have changed over time. Thus, irrespective of the commitment in Russia's terms of accession to the WTO regarding which certificate would be operative in the conduct of certain trade into Russia from other WTO Members, the Appellate Body held that Russia remained under an ongoing obligation, pursuant to Article 6 of the SPS Agreement, to adapt its measures to regional SPS characteristics.

Based on the foregoing, the Appellate Body upheld the Panel's findings that the EU-wide ban was attributable to Russia and that there was no limitation, in Russia's terms of accession to the WTO, on the Panel's assessment of the European Union's claims in respect of the ban.

3.1.2 Article 6.3 of the SPS Agreement

Russia raised two claims concerning the Panel's interpretation of Article 6.3. First, Russia submitted that the Panel erred in not finding that this provision requires consideration of the scientific and technical evidence relied upon by the importing Member, as well as the importing Member's assessment of the evidence submitted by the exporting Member, in light of the importing Member's appropriate level of protection (ALOP). Second, Russia alleged that the Panel erred in not finding that Article 6.3 contemplates a certain period of time for the importing Member to evaluate and verify the evidence submitted by the exporting Member.

The Appellate Body rejected Russia's first claim. In particular, the Appellate Body considered that, while the evidence relied upon by the importing Member and the importing Member's assessment thereof are essential to the process of adaptation of measures to regional SPS characteristics, they are addressed by the second sentences of Articles 6.1 and 6.2, and not by Article 6.3.

The Appellate Body noted important interlinkages among the paragraphs of Article 6. The main and overarching obligation is set forth in the first sentence of Article 6.1, according to which Members shall ensure that their measures are adapted to the SPS characteristics of the areas from which the products at issue originate and to which they are destined. The remainder of Article 6 elaborates on aspects of that obligation and sets forth the respective steps that importing and exporting Members must undertake in this connection. The Appellate Body further noted that the second sentence of Article 6.1 requires a Member to evaluate all evidence relevant to "assessing" the SPS characteristics of an area. This assessment provides the basis, and therefore constitutes a prerequisite, for the adaptation of that Member's measures pursuant to the first sentence of Article 6.1. The assessment of the SPS characteristics of an area within the meaning of the second sentence of Article 6.1 may be conducted as part of a Member's risk assessment pursuant to Articles 5.1 through 5.3 of the SPS Agreement. Further, the Appellate Body held that, pursuant to the second sentence of Article 6.2, a Member must determine the pest or disease status of the relevant area whenever such a specific SPS characteristic is relevant for the adaptation of a measure under the first sentence of Article 6.1. Finally, the Appellate Body highlighted that Article 6.3 addresses the particular situation where an *exporting* Member claims that areas within its territory are pest- or disease-free or of low pest or disease prevalence.

Based on these observations, the Appellate Body found that, when an exporting Member claims that a certain area within its territory is pest- or disease-free or of low pest or disease prevalence, the importing Member must evaluate all the evidence relevant to making a "determination" as to the pest or disease status of that area. To this end, the importing Member will have to examine and verify the evidence provided by the exporting Member. Also, where relevant, the importing Member may analyse data gathered through on-site visits to the area concerned and rely upon any other information that it may have acquired from other sources, including from competent international organizations. The importing Member's "determination" is addressed by the second sentence of Article 6.2, and forms part of that Member's "assess[ment]" of the SPS characteristics of that area within the meaning of the second sentence of Article 6.1. By contrast, the importing Member's evaluation of the relevant evidence is *not* covered by Article 6.3.

In addition, the Appellate Body explained that a panel's review of an exporting Member's compliance with Article 6.3 is limited to determining whether the evidence provided by that Member is of a nature, quantity, and quality sufficient to enable the importing Member ultimately to make an objective "determination" as to the pest or disease status of the relevant areas in light of the circumstances of each case. It is not for the panel to determine for itself, based on the evidence provided by the exporting Member, whether the relevant areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence. The Appellate Body considered that, despite some ambiguity in the language used in the Panel's reasoning, the Panel properly understood its role in reviewing the evidence submitted by the European Union to Russia pursuant to Article 6.3.

With respect to its second claim of error, Russia alleged that the Panel erred in not finding that Article 6.3 contemplates a certain period of time for the importing Member to evaluate and verify the evidence submitted by the exporting Member. The Appellate Body recognized that the process whereby the importing Member evaluates all pertinent evidence in respect of the relevant areas may require a certain period of time to be carried out. Yet, the Appellate Body found, contrary to Russia's argument, that the importing Member's evaluation of evidence is not addressed by Article 6.3, which sets forth disciplines for the *exporting* Member, but rather by the second sentences of Articles 6.1 and 6.2. Likewise, the period of time taken by the importing Member to conduct such evaluation is not covered by Article 6.3 but, rather, it is subject to the second sentences of Articles 6.1 and 6.2. In turn, the appropriate length of such period of time is informed by the disciplines of Article 8 and Annex C(1)(a) to the SPS Agreement.

Based on the foregoing, the Appellate Body upheld the Panel's findings that, as of 11 September 2014, the European Union had provided the necessary evidence to objectively demonstrate to Russia, pursuant to Article 6.3 of the SPS Agreement, that: (i) there were ASF-free areas in the European Union, both inside and outside of the four affected member States; (ii) the ASF-free areas in Estonia, Lithuania, and Poland, as well as the ASF-free areas within the European Union outside the four affected member States, were likely to remain so.

3.1.3 The relationship between Articles 6.1 and 6.3 of the SPS Agreement

Russia further claimed that the Panel erred in its interpretation of the relationship between Articles 6.1 and 6.3 of the SPS Agreement. In particular, according to Russia, the Panel erred in finding that an importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in a situation where the exporting Member has failed to provide the necessary evidence in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.

The Appellate Body recalled its ruling in *India – Agricultural Products* that, when the importing Member has received a request from an exporting Member to recognize an area within its territory as disease-free, the exporting Member will be able to establish that the importing Member's failure to recognize and determine that disease-free area, and to adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it undertook the steps prescribed in Article 6.3. Thus, the exporting Member's compliance or non-compliance with Article 6.3 will, in many cases, have implications for the importing Member's ability to assess the SPS characteristics of areas located within the exporting Member's territory and to adapt its measures accordingly, as required by Article 6.1. The Appellate Body also recalled its observation in *India – Agricultural Products* that, in certain situations, an importing Member may be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1 even in the absence of an objective demonstration by an exporting Member under Article 6.3. In these cases, the importing Member's violation of Article 6.1 would not necessarily be contingent on the exporting Member's compliance with Article 6.3.

Turning to the Panel's analysis in respect of the ban on imports of the products at issue from Latvia, the Appellate Body recalled that the dispute arose from the European Union's request for Russia to recognize areas both outside and inside each of the four affected EU member States as ASF-free and as likely to remain so, and to adapt its SPS measures accordingly. As the Panel had found that the European Union had failed to provide the necessary evidence to demonstrate that the ASF-free areas within Latvia were likely to remain so, the Appellate Body considered that the Panel should have evaluated the potential implications of that finding for the question of whether Russia had complied with its obligation to adapt its ban on imports of the products at issue from Latvia to the SPS characteristics of those areas.

As the Panel did not include any such reasoning in its report, the Appellate Body found that the Panel erred in finding that Russia had failed to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of the ASF-free areas within the Latvian territory. However, the Appellate Body also noted the Panel's unappealed finding that Russia had failed to adapt its measure to the SPS characteristics of areas within the Russian territory to which the products at issue are destined, and considered that finding to constitute a sufficient ground to affirm the Panel's conclusion that the ban on imports of the products at issue from Latvia was inconsistent with Article 6.1 of the SPS Agreement.

3.1.4 Article 6.2 of the SPS Agreement

The European Union alleged that the Panel erred in finding that Russia recognized the concepts of pest- and disease-free areas and areas of low pest or disease prevalence with respect to ASF. In particular, the European Union took issue with the Panel's finding that Article 6.2 requires merely an abstract recognition of the concept of regionalization. For the European Union, a concrete measure post-dating the regulatory framework can in fact contradict the formal regulatory framework, effectively deny regionalization, and thus amount to actual non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

The Appellate Body recalled that Article 6.2 addresses a specific aspect of the main and overarching obligation, set out in the first sentence of Article 6.1, to adapt measures to regional SPS characteristics. In particular, the concepts of pest- or disease-free areas and areas of low pest or disease prevalence constitute a subset of the regional SPS characteristics that are relevant under Article 6.1. The Appellate Body also noted that Article 6.2 does not specify any particular manner in which a Member must recognize the concept of regionalization and that, therefore, Members enjoy a degree of latitude in determining how to do so. According to the Appellate Body, the assessment of whether a Member has complied with Article 6.2 may involve scrutiny of the specific steps and acts that the Member has or has not taken in light of the SPS characteristics of the relevant areas, as well as of broader aspects of the importing Member's regulatory regime governing SPS matters. Specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be relevant in the analysis of whether an importing Member complies with its obligation under Article 6.2.

Further, the Appellate Body attached significance to the fact that Article 6.3 envisages that an exporting Member may make a claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence. This suggests that an importing Member must provide an effective opportunity for the exporting Member to make such claim and thus render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. This may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence. All such elements may be relevant to the assessment of a Member's compliance with the obligation to recognize the relevant concepts pursuant to Article 6.2. Different elements may contribute to different degrees to the obligation of the Member to recognize the relevant concepts. Accordingly, the Appellate Body did not see Article 6.2 as an obligation to acknowledge the concept of regionalization as an abstract idea, but rather as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

The Appellate Body thus disagreed with the Panel that the obligation in Article 6.2 is separate from, and less exigent or less stringent than, that of Article 6.1 and that it requires merely an acknowledgement of the concept of regionalization in the form of an abstract idea. The Appellate Body also considered that the Panel erred in finding itself precluded from taking into account, in its analysis under Article 6.2, specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Accordingly, the Appellate Body reversed the Panel's finding that Russia recognized the concept of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF, and that therefore the bans on the imports of the products at issue were not inconsistent with Article 6.2 of the SPS Agreement.

The Appellate Body then turned to the question of whether it could complete the legal analysis as to whether Russia recognized the concept of regionalization in the first sentence of Article 6.2. The Appellate Body reviewed the elements of Russia's domestic regulations in respect of ASF, and considered that none of these instruments provided an effective opportunity for the European Union to make the claim that areas within its territory were ASF-free, thus failing to render operational the concept of regionalization. At the same time, the Appellate Body noted that, because the Panel had found that Russia complies with the obligation in Article 6.2 by acknowledging the concept of regionalization as an abstract idea, and because the Panel considered itself to be precluded from taking into account specific instances of recognition of the concept of regionalization by Russia, the Panel did not explore whether or to what extent Russia otherwise provided an effective opportunity for the European Union to make a claim that areas within the European Union were pest- or disease free, and thus rendered operational the concept

of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF. Given the absence of Panel findings in this respect, the Appellate Body considered that it was not in a position to complete the legal analysis and determine whether or not Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF.

3.2 Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R

This dispute concerned three sets of measures relating to the United States Department of Commerce (USDOC)'s conduct of anti-dumping investigations against China: (i) the use of the weighted average-to-transaction (W-T) methodology in dumping margin calculations; (ii) the treatment of multiple companies as a non-market-economy-wide entity (NME-wide entity); and (iii) the manner in which the USDOC determined anti-dumping duty rates for such an entity as well as the level of duty rates.

Under the first set of measures, China challenged the USDOC's use of the W-T methodology in four anti-dumping proceedings involving exports from China, consisting of three challenged investigations and an administrative review. Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) enables an investigating authority to have recourse to the W-T methodology in instances where it: (i) identifies "a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and (ii) provides an explanation as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average (W-W) or transaction-to-transaction (T-T) comparison. These two conditions are referred to below as the "pattern clause" and the "explanation clause" respectively.

In the three challenged investigations, the USDOC used the "Nails test" to find a pattern of export prices that differ significantly among different purchasers, regions, or time periods. This test consisted of two sequential steps and was conducted on the basis of different models, also referred to as control numbers (CONNUMs). The first step, called the "standard deviation test", was intended to find a pattern of prices that differ among purchasers, regions, or time periods. For the first step, the USDOC would first examine whether the weighted-average price to the alleged target in a particular CONNUM (the alleged target price) was one standard deviation below the weighted–average export price in that CONNUM (the CONNUM-specific weighted-average price). After repeating this exercise across all examined CONNUMs, if the volume of sales in CONNUMs where the alleged target price was below the CONNUM-specific weighted-average export price exceeded 33% of the total volume of the exporter's sales to the alleged target, the USDOC would move on to the second step of the Nails test.

The second step, called the "price gap test", was intended to establish whether the price differences identified were "significant". Under this step, the USDOC would calculate, on a CONNUM-specific basis, the alleged target price gap by considering the difference between the alleged target price and the next highest weighted-average non-target price. It would also calculate, for the same CONNUM, the weighted-average non-target price gap by considering the weighted average of the gaps between individual non-target weighted-average prices. In calculating this weighted average non-target price gap, the USDOC disregarded non-target prices that were lower than the alleged target price. The USDOC would then examine whether the alleged target price gap exceeded the weighted-average non-target price gap. After repeating this exercise across all examined CONNUMs, if all CONNUMs where the alleged target price gap was wider than the weighted-average non-target price gap exceeded 5% of the total volume of the sales to the alleged target, the USDOC would conclude that the price differences identified were significant.

Applying the Nails test in the three investigations at issue, the USDOC determined patterns of export prices that differed significantly among purchasers in one investigation and among time periods in two investigations. The USDOC then evaluated the difference between the dumping margins calculated using the W-W methodology (without zeroing) and those calculated using the W-T methodology (with zeroing). The USDOC considered that the difference in margins revealed that the W-W methodology concealed differences in price patterns between the targeted and non-targeted groups. This was the explanation provided by the USDOC for the "explanation clause" in Article 2.4.2 of the Anti-Dumping Agreement. On this basis, the USDOC applied

the W-T methodology with zeroing to all export transactions of the Chinese exporters involved in the three challenged investigations.

China claimed several inconsistencies with Article 2.4.2 of the Anti-Dumping Agreement with regard to the first set of measures. First, China alleged that the USDOC's use of the Nails test to identify a "pattern of prices which differ significantly" contained four quantitative flaws, two programing errors, certain qualitative issues, and an impermissible reliance on purchaser or time period averages. China also challenged the USDOC's explanations for using the W-T methodology. China further challenged the USDOC's application of the W-T methodology to all export transactions, and the use of zeroing. Finally, relying on Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), China contested the USDOC's use of zeroing in the calculation of anti-dumping duties in the relevant administrative review.

In relation to the three challenged investigations, the Panel found that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in two investigations by disregarding non-target prices that were lower than the alleged target price under the price gap test (the alleged fourth quantitative flaw with the Nails test), and by failing to consider evidence on *all* non-target prices making up the weighted average non-target price gap (the first programming error). The Panel also found that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by applying the W-T methodology to all export transactions, and by using zeroing in the dumping margin calculations. In addition, the Panel found that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by premising the explanations under the second sentence of this provision on the use of the W-T methodology with zeroing, and by failing to provide an explanation as to why the T-T methodology could not take into account appropriately the significant differences in the relevant export prices. The Panel dismissed China's remaining claims under Article 2.4.2, including in relation to the first, second, and third alleged quantitative flaws with the Nails test; the alleged qualitative issues with the Nails test; and the USDOC's use of purchaser or time period averages to establish the existence of a pattern in the three challenged investigations. In relation to the relevant administrative review, the Panel found that the United States acted inconsistently with Article 9.3 of the Anti-Dumping and Article VI:2 of the GATT 1994 by using zeroing in the dumping margin calculations when applying the W-T methodology.

The second set of measures concerned what China termed the "Single Rate Presumption". According to China, this consists of a presumption that all exporters from a non-market economy (NME) country comprise a single entity under common government control, and the assignment, by the USDOC, of a single margin of dumping and anti-dumping duty rate to that entity. In order to rebut the USDOC's presumption and obtain an individually determined margin of dumping, China submitted that an exporter must prove, through a "Separate Rate Test", an absence of government control, both in law and in fact, over its export activities. China claimed that the alleged Single Rate Presumption is inconsistent with Articles 6.10, 9.2, and 9.4 of the Anti-Dumping Agreement "as such" and as applied in various anti-dumping investigations and administrative reviews. Examining the evidence on the record, the Panel concluded that the Single Rate Presumption is a norm of general and prospective application that can be challenged "as such" in WTO dispute settlement. The Panel concluded that, under the Single Rate Presumption, the USDOC does not make an objective affirmative determination as to whether one or more exporters have a relationship with the State such that they can be considered a single entity. Accordingly, the Panel found that the Single Rate Presumption is inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement "as such" because it subjects NME exporters to a single dumping margin and duty rate, unless the exporter rebuts the presumption of *de jure* and *de facto* governmental control over its export operations.

In relation to China's "as applied" claims against the second set of measures, the Panel found that the evidence on the record shows that the USDOC applied the Single Rate Presumption in each of the challenged determinations. The Panel concluded that this application was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement for the same reasons that it had found this measure to be inconsistent "as such" with these provisions. In light of its findings under Articles 6.10 and 9.2, the Panel exercised judicial economy and made no findings in relation to China's "as such" and "as applied" claims under Article 9.4 of the Anti-Dumping Agreement.

Under the third set of measures, China challenged certain other aspects of the USDOC's methodologies for determining anti-dumping duty rates for NME-wide entities. In particular, China challenged what it referred to as the Adverse Facts Available (AFA) Norm. China contended that, where the USDOC considered that an NME-wide entity failed to cooperate to the best of its ability, the USDOC would systematically select the facts that were adverse to the interests of that entity, rather than the facts that best replaced the missing information. China claimed that the USDOC's practice is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement "as such" and as applied in certain determinations. In addition, China claimed that the manner in which the USDOC determined a single anti-dumping duty rate for the country-wide entity and the level of such duty in certain anti-dumping determinations was inconsistent with Articles 6.1, 6.8, and 9.4, and paragraphs 1 and 7 of Annex II to the Anti-Dumping Agreement.

In relation to China's "as such" claims against the third set of measures, the Panel found that the evidence on the record did not support China's assertion that the alleged AFA Norm has prospective application because it was insufficient to show the degree of security and predictability typically associated with rules or norms. Having found that China did not demonstrate the existence of a rule or norm of general and prospective application, the Panel did not deem it necessary to address China's "as such" claims under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.

In relation to China's "as applied" claims against the third set of measures, the Panel recalled that the anti-dumping determinations at issue had already been found to be inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement in relation to the Single Rate Presumption. The Panel stated that the issue of whether an anti-dumping duty rate is determined in a WTO-consistent manner cannot be assessed without considering the exporter or entity for which it is determined. Thus, the Panel exercised judicial economy and made no findings with respect to China's "as applied" claims under Articles 6.1, 6.8, and 9.4 and paragraphs 1 and 7 of Annex II to the Anti-Dumping Agreement.

On appeal, China challenged the Panel's findings in relation to Article 2.4.2 of the Anti-Dumping Agreement regarding: (i) the first and third alleged quantitative flaws with the Nails test; (ii) the consideration of certain qualitative factors when determining whether prices differ "significantly"; and (iii) the USDOC's use of weighted-average export prices to establish the existence of a "pattern". In addition, China claimed that the Panel erred in suggesting that an investigating authority may combine comparison methodologies to establish margins of dumping.

In relation to the alleged AFA Norm, China appealed the Panel's finding that China had not demonstrated that the alleged AFA Norm constitutes a rule or norm of general and prospective application. In this respect, China made two requests for completion. First, China requested the Appellate Body to complete the analysis and find that the alleged AFA Norm constitutes a rule or norm of general and prospective application that can be challenged "as such" in WTO dispute settlement. Second, China requested the Appellate Body to complete the legal analysis and find that the alleged AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.

3.2.1 Claims regarding the USDOC's application of the Nails test and the W-T methodology in the three challenged investigations

3.2.1.1 The first and third alleged quantitative flaws

China claimed that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting its claim in respect of two alleged quantitative flaws with the Nails test, namely, the first and third alleged quantitative flaws. Moreover, China claimed that the Panel failed to apply the proper standard of review under Article 17.6(i) of the Anti-Dumping Agreement. Consequently, China requested the Appellate Body to reverse the Panel's findings pertaining to the first and third alleged quantitative flaws. China further requested the Appellate Body to complete the legal analysis and find that the USDOC acted inconsistently with the pattern clause in the three challenged investigations, by failing to find, through an objective and unbiased evaluation of the facts, "a pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2.

Turning to China's claim pertaining to the first alleged quantitative flaw, the Appellate Body recalled that this alleged flaw relates to the standard deviation test applied by the USDOC in the three challenged investigations, which aimed to identify whether there were export price differences among different purchasers or time periods. Under that test, the USDOC determined, for each CONNUM, whether the alleged target price was one standard deviation below the CONNUM-specific weighted-average price.

On appeal, China argued that a test involving the concept of standard deviation, such as the Nails test, does not allow the investigating authority to draw "valid conclusions" unless the data form a normal or a single-peaked and symmetrical distribution. According to China, when the data distribution is not normal or single-peaked and symmetrical, large quantities of sales (sometimes more than 50%) may fall below the one standard deviation threshold. China further argued that the Nails test "routinely" discerned large quantities of sales below the one standard deviation threshold. For these reasons, China submitted that the United States acted inconsistently with the pattern clause by applying the Nails test in the three challenged investigations without assessing whether the data distribution was normal or at least single-peaked and symmetric.

Recalling that the first condition set forth in the second sentence of Article 2.4.2 is that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", the Appellate Body considered that investigating authorities enjoy a margin of discretion regarding the methods or tools they wish to use in establishing the existence of a pattern. Irrespective of the method used, however, investigating authorities are required to identify a pattern of export prices within the meaning of the second sentence of Article 2.4.2 and consistent with their obligations under the Anti-Dumping Agreement. The Appellate Body further observed that neither the text of the second sentence of Article 2.4.2 nor the relevant context suggests how many export prices may fall within a pattern under the second sentence of Article 2.4.2 in proportion to the number of export prices outside the pattern.

Based on the foregoing, the Appellate Body considered that the fact that a large number of export prices may fall below the one standard deviation threshold does not necessarily preclude an investigating authority from finding that the export prices to the "target" differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2. Accordingly, the Appellate Body considered that China had not established that the standard deviation test as applied by the USDOC in the three challenged investigations is *only* capable of identifying prices that differ from other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2 where the distribution of the export price data is normal, or single-peaked and symmetrical. The Appellate Body thus found that China had not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 in rejecting China's claim in respect of the first alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

Turning to China's claim regarding the third alleged quantitative flaw, the Appellate Body recalled that this alleged flaw relates to the price gap test applied by the USDOC in the three challenged investigations in order to determine whether the differences identified under the standard deviation test were significant. Under that test, the USDOC would examine, on a CONNUM-specific basis, whether the alleged target price gap was wider than the weighted-average non-target price gap.

On appeal, China claimed that the Panel was wrong to dismiss its argument that, even assuming the existence of a normal distribution, the USDOC's attribution of significance to wider price gaps in the tail of the price distribution compared to price gaps closer to the mean merely confirmed an inherent feature of such distributions, rather than identifying prices that differ "significantly". China had submitted before the Panel that, in terms of statistics, in the case of any "peaked" data distribution with "tails", the gap between any two given prices located at the tail is inherently wider than the gaps at the peak. China clarified on appeal that the third alleged quantitative flaw arises in situations in which there is a tail to the left of the mean, irrespective of whether the data distribution is normal, or single-peaked and symmetrical. Thus, China argued that the USDOC's failure to determine if the data had tails to the left of the mean meant that the conclusions reached by the USDOC in every case were random or arbitrary, and that the USDOC failed to identify a "pattern of export prices which differ significantly" because it failed to consider how the export prices were distributed.

Recalling that in WTO dispute settlement the burden of proof rests on the party that asserts the affirmative of a claim or defence, the Appellate Body observed that, as per China's submissions, the third alleged quantitative flaw arises where the alleged target price gap is based on prices located at the left tail of the data distribution. In light of this and the "as applied" nature of China's claims, the Appellate Body considered that China could not successfully bring a claim of inconsistency with the second sentence of Article 2.4.2 unless it showed that the relevant data distributions in each of the three challenged investigations had a left tail and that the alleged target price gap was based on prices located at that tail.

As the Appellate Body recalled, the Panel considered that the third alleged quantitative flaw rests on the assumption that, in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution of the export price data and the weighted-average non-target price gap was based on prices located nearer to the peak of that distribution. As the Appellate Body further recalled, the Panel found that China had not shown that this assumption is "factually correct insofar as the three challenged investigations are concerned", and the Panel rejected China's claim on this basis. The Appellate Body considered that this was sufficient ground for the Panel to reject China's "as applied" claim in respect of the third alleged quantitative flaw with the Nails test. Therefore, the Appellate Body found that China had not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 in rejecting China's claim in respect of the third alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

Finally, the Appellate Body turned to China's claim that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement in dismissing its claim regarding the first and third alleged quantitative flaws with the Nails test. The Appellate Body observed that China's claim was neither about the Panel's determination of whether the USDOC's establishment of the facts was proper, nor was it about the Panel's determination of whether the USDOC's evaluation of those facts was unbiased and objective. Rather, China appeared merely to take issue with the Panel's dismissal of its claim in respect of the first and third alleged quantitative flaws, without advancing any argument that was separate and different from its arguments under the second sentence of Article 2.4.2. The Appellate Body thus found that China had not established that the Panel failed to comply with Article 17.6(i) in relation to both the first and third alleged quantitative flaws with the Nails test.

Having made these findings under Article 2.4.2 and 17.6 of the Anti-Dumping Agreement, the Appellate Body upheld the Panel's finding that China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations insofar as this finding relates to the first and third alleged quantitative flaws with the Nails test.

3.2.1.2 Qualitative issues

China claimed that that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because it failed to recognize that investigating authorities are required to consider objective market factors in determining whether relevant pricing differences are "significant". According to China, although investigating authorities may not be required to consider an exporter's subjective motivation or intent behind the observed price differences, they are required to consider relevant "objective market factors", such as seasonality or market–driven fluctuations in the costs of production.

Recalling its findings in *US – Washing Machines*, the Appellate Body noted that the term "significantly" in the pattern clause has both quantitative and qualitative dimensions. In that case, the Appellate Body considered that the significance of price differences may be affected by "objective market factors", such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. The Appellate Body clarified that "objective market factors" are relevant to the identification of a pattern within the meaning of Article 2.4.2, insofar as they affect the significance of the price differences and not because they provide reasons for the price differences. Thus, the words "significantly" and "pattern" in the second sentence of Article 2.4.2 do not imply an examination into the cause of (or reasons for) the differences in prices and the text of this provision does not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with "targeted dumping". As the Appellate Body further

explained, "objective market factors" may assist an investigating authority in determining whether price differences are significant, understood as "important, notable or consequential".

In this dispute, the Appellate Body considered the Panel's reference to "the circumstances surrounding an investigation" and to "the nature of the product under investigation and the relevant industry" to show that the Panel considered that a qualitative assessment of significance under the second sentence of Article 2.4.2 involves the consideration of factors such as those that the Appellate Body mentioned as examples of "objective market factors".

The Appellate Body then turned to China's arguments about market-driven fluctuations in the costs of production and seasonality, which according to China are relevant qualitative factors to be taken into account to assess significance. The Appellate Body observed that a decline in the costs of production is not concerned with the significance of export price differences but rather with the very reasons for, or cause of, such differences. The Appellate Body therefore did not agree with China that a decline in production costs should form part of the investigating authority's qualitative analysis in assessing the significance of price differences under the pattern clause.

Regarding seasonality, to the extent that seasonal variations in the prices of goods explain why export prices vary over time periods, the Appellate Body considered that they relate to the "reasons" for the price differences and thus need not be considered under the pattern clause. The Appellate Body added, however, that to the extent that seasonal price variations – which are inherent in the nature of a product, the industry at issue, or the market structure – speak to the significance, or lack thereof, of such price differences, they may be relevant to the qualitative assessment under the pattern clause of whether identified differences in export prices differ "significantly".

Based on the foregoing, the Appellate Body considered that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to "targeted dumping", in order to assess whether export prices differ "significantly". It also considered that, while the Panel did not explicitly refer to "objective market factors", the Panel correctly concluded that an investigating authority should undertake a qualitative analysis of the significance of export price differences.

The Appellate Body therefore upheld the Panel's findings that the USDOC was not required to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant within the meaning of the pattern clause and that, accordingly, China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations because of the alleged qualitative issues with the Nails test.

3.2.1.3 Determination of a "pattern" based on averages

China claimed that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to the three challenged investigations because it found that this provision allowed the USDOC to determine a pattern on the basis of averages. For China, the second sentence of Article 2.4.2 requires that a pattern be determined only on the basis of individual export prices. Furthermore, China contended that the USDOC's use of averages in the three challenged investigations was inherently biased because it increased the likelihood of finding a pattern under Article 2.4.2, and was thus inconsistent with this provision. In this respect, China also contended that the Panel's evaluation of the USDOC's determination was contrary to the standard of review under Article 17.6(i) of the Anti-Dumping Agreement. The United States responded that Article 2.4.2 does not prohibit the use of averages under the pattern clause, and that China's claim under Article 17.6(i) must fail because China's arguments are merely consequential on, or made redundant by, its substantive arguments under Article 2.4.2.

Addressing China's claim under Article 2.4.2, the Appellate Body observed that the text of the pattern clause does not prescribe a specific method for identifying a "pattern", in particular whether individual export transaction prices or average prices must be used. The finding of a pattern is not centred on the price relationship among the different export transactions falling within the pattern, i.e. the transactions to the "targeted" purchaser, region, or time period.

Rather, the existence of a pattern depends on the price relationship between the prices for one group, i.e. the "targeted" transactions, and the prices for another group, i.e. the "non-targeted" transactions. The Appellate Body explained that the pattern clause focuses on the price differences *among* different purchasers, regions, or time periods, not the differences *within* the prices for the "targeted" purchaser, region, or time period. As a result, an investigating authority may rely on prices of individual export transactions or average prices in order to find a pattern, provided that the pattern meets the requirements stipulated in the pattern clause. The Appellate Body thus agreed with the Panel's conclusion that the pattern clause provides investigating authorities with discretion in relation to whether a pattern determination is to be based on individual export transaction prices or average prices.

The Appellate Body added that, where *all* the relevant individual export transaction prices are averaged using weighted-average prices by purchasers, regions, or time periods, the differences within the prices for a given purchaser, region, or time period are accounted for in those averages. A pattern determined on the basis of averages is still based on a collection of individual export prices that form a regular and intelligible form or sequence of export prices that differ significantly, in the sense that those prices pertain to one or more purchasers, regions, or time periods, and are significantly lower than the prices for the remaining purchasers, regions, or time periods. The Appellate Body thus agreed with the Panel that, when a pattern is determined through the use of averages, the pattern itself will consist of individual export transactions.

The Appellate Body disagreed with China that the reference to "prices of individual export transactions" in the first part of the second sentence of Article 2.4.2 directly informs or limits *how* a pattern is to be identified in the pattern clause. The Appellate Body observed that this phrase appears only in the first part of the second sentence, which provides that "[a] normal value established on a weighted average basis may be compared to prices of *individual export transactions*". For the Appellate Body, the second sentence of Article 2.4.2 has two distinct parts serving different purposes: (i) the first part clarifies that a normal value may be compared to prices of "individual export transactions" in order to establish the existence of margins of dumping; and (ii) the second part of the second sentence deals with the conditions that have to be met for an investigating authority to have recourse to the W-T methodology.

China further alleged that the USDOC's use of averages in the three challenged investigations was inherently biased because it systematically drew the one-standard-deviation threshold closer to the mean as compared to where the threshold would have been had the USDOC calculated it on the basis of individual export transaction prices. China contended that, as a consequence of this bias, there was an increased likelihood that export sales to the "target" fell below the one-standard-deviation threshold. In turn, this increased the likelihood that the USDOC would find, in the three challenged investigations, the existence of a pattern under the second sentence of Article 2.4.2.

The Appellate Body agreed with the Panel that China's arguments were directly related to China's view that the USDOC should have calculated the standard deviation "on an examination of individual export prices, as mandated by the treaty". Recalling the discretion afforded in Article 2.4.2 to investigating authorities, the Appellate Body agreed with the Panel's finding that China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by establishing the relevant pattern on the basis of averages as opposed to individual export transaction prices. The Appellate Body also noted the Panel's statement that, even if it were true that the numerical value of the standard deviation would have been higher if the USDOC had relied on individual export transactions in the three challenged investigations, the Panel could not "find that the USDOC's determination was biased on that basis". The Appellate Body agreed with the Panel statement to the extent that the Panel considered that China had not demonstrated that the USDOC's use of averages in the three challenged investigations was biased.

Finally, the Appellate Body turned to China's claim under Article 17.6(i) of the Anti-Dumping Agreement. China claimed that the Panel failed to comply with Article 17.6(i) because the Panel endorsed a WTO-inconsistent test that biased the outcome towards systematically increasing the likelihood of finding a pattern under Article 2.4.2. The Appellate Body considered that China did not identify, much less challenge, a specific instance of the Panel's assessment of the facts. Rather, China mostly recast the arguments that it made before the Panel under Article 2.4.2. In addition, China did not advance arguments on appeal that were separate

and different from its arguments concerning the alleged error in the Panel's interpretation of Article 2.4.2. Thus, the Appellate Body considered that China had not demonstrated that the Panel failed to comply with Article 17.6(i).

Based on the foregoing, the Appellate Body found that the Panel did not err in its interpretation and application of the second sentence of Article 2.4.2 to the three challenged investigations when examining the USDOC's use of purchaser or time period averages under the Nails test. Furthermore, it found that China had not established that the Panel had failed to comply with Article 17.6(i). Consequently, the Appellate Body upheld the Panel's finding that China had not established that the United States acted inconsistently with the second sentence of Article 2.4.2 in the three challenged investigations by determining the existence of a "pattern" on the basis of average prices, instead of individual export transaction prices.

3.2.1.4 Whether comparison methodologies may be combined to establish dumping margins

In reaching its conclusion that the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by using zeroing under the W-T methodology in the three challenged investigations – a finding that was not appealed – the Panel added that it was not suggesting that the options under Article 2.4.2 are limited. In particular, the Panel had stated that where an investigating authority applies the W-T methodology to the export transactions falling within the pattern and one of the two normal methodologies to the export transactions falling outside the pattern, and the results of the calculations for the export transactions falling outside the pattern are negative, it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let that negative result offset the positive result (i.e. dumping) found within the pattern.

On appeal, China claimed that this interpretation is erroneous because it is premised on the understanding that an investigating authority may apply the W-T methodology to "pattern transactions" and the W-W or T-T methodology to "non-pattern transactions", and then combine the results of these comparison methodologies to establish dumping margins. China thus requested the Appellate Body to declare this statement by the Panel to be moot and of no legal effect.

The Appellate Body recalled its explanation in *US – Washing Machines* that, in keeping with its function of allowing an investigating authority to effectively address "targeted dumping", the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions", to the exclusion of "non-pattern transactions". This is to avoid that the "targeted dumping" identified from the consideration of "pattern transactions" be "re-masked", if negative comparison results arising from "non-pattern transactions" were considered.

In *US – Washing Machines*, the Appellate Body also found that the second sentence of Article 2.4.2 does not permit an investigating authority to conduct separate comparisons for "pattern transactions" under the W-T methodology and for "non-pattern transactions" under the W-W or T-T methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result, or aggregate it with the W-T results for the "pattern transactions" if it yields an overall positive comparison result.[35] In that case, the Appellate Body thus concluded that, while the second sentence allows an investigating authority to establish the existence of margins of dumping by comparing a "normal value established on a weighted average basis" with "pattern transactions" only, Article 2.4.2 does not permit the combining of comparison methodologies for the purposes of establishing dumping and margins of dumping in accordance with the second sentence.

As in *US – Washing Machines*, the Appellate Body noted that the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T

[35] In that case, the Appellate Body was faced with the USDOC's practice of applying the W-T methodology to certain transactions and the W-W methodology to the remaining transactions and disregarding or setting to zero the intermediate comparison result arising from the W-W methodology if it were negative.

methodology only to "pattern transactions" and that Article 2.4.2 does not permit the combining of comparison methodologies. The Appellate Body thus declared moot the Panel's statements at issue to the extent that they were premised on the understanding that Article 2.4.2 permits the combining of comparison methodologies (e.g. W-T to pattern transactions and W-W to non-pattern transactions) to establish dumping margins.

3.2.2 Claims regarding the AFA Norm

3.2.2.1 Rules or norms of general and prospective application

Before the Panel, China challenged the WTO consistency of the alleged AFA Norm "as such". China contended that the alleged AFA Norm was an unwritten rule or norm of general and prospective application. The Panel found that China could not have challenged this alleged measure "as such" because China did not demonstrate the AFA Norm had general and prospective application. On appeal, China claimed that the Panel erred in its articulation and application of the legal standard for establishing that a rule or norm has "prospective application". According to China, the Panel erroneously required that the future application of a rule or norm be demonstrated with "certainty" for it to have "prospective application".

The Appellate Body recalled that, in principle, any act or omission attributable to a WTO Member can be a measure for the purposes of dispute settlement proceedings. Therefore, a broad range of measures can be challenged in WTO dispute settlement. The Appellate Body also recalled that the distinction between challenges "as such" and challenges "as applied" neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures susceptible to challenge, and that the specific measure at issue in a dispute, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the challenged measure. A challenge may be raised with respect to measures that are neither individual instances of application of a measure, nor rules or norms of general and prospective application, but share certain attributes with both. In this sense, "measures", within the meaning of Articles 3.3., 4.4, and 6.2 of the DSU, need not be compartmentalized into categories in order to be challengeable in WTO dispute settlement.

Noting that this appeal concerned an "as such" challenge to an unwritten rule or norm of general and prospective application, the Appellate Body recalled that, when making this type of challenge, a complainant must establish (i) that the rule or norm is attributable to the responding Member; (ii) its precise content; and (iii) that it has general and prospective application. Observing that the participants had not appealed the Panel findings concerning the precise content of the unwritten alleged AFA Norm and that it is attributable to the United States, the Appellate Body focused its analysis on the elements of "general" and "prospective application".

In relation to "general application", the Appellate Body found that a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators. In relation to "prospective application", the Appellate Body explained that a rule or norm has "prospective application" to the extent that it applies in the future. In this respect, the Appellate Body did not consider that a complainant is required to show with "certainty" that a measure will apply in future situations.

According to the Appellate Body, any measure, including rules or norms, written or unwritten, may be modified or withdrawn in the future. The Appellate Body considered that this mere possibility does not remove the prospective nature of that measure. Where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors including the existence of an underlying policy, which is implemented by the rule or norm. In addition, the more frequent, consistent, and extended the repetition of conduct is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy. In this respect, relevant evidence may include proof of the systematic application of the challenged rule or norm. Where ascertainable, the design, architecture, and structure of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future are also relevant in establishing the

prospective nature of that rule or norm. The Appellate Body emphasized that the examination of whether a rule or norm has general and prospective application may vary from case to case and did not exclude that additional factors may be relevant in this assessment depending on the particular facts and specific circumstances of the case at hand.

The Appellate Body found that the Panel erred in finding that China had not demonstrated that the alleged AFA Norm is a norm of general and prospective application. The Appellate Body noted that the Panel considered that "the future application of a measure must achieve a certain degree of security and predictability typically associated with rules or norms." The Panel found that such "certainty" of the prospective or future application of the alleged AFA Norm was not supported by record evidence. The Appellate Body considered that, by requiring "certainty" of future application, the Panel's examination of the prospective nature of the alleged AFA Norm was not consistent with the legal standard for establishing the prospective application of a rule or norm. The Appellate Body therefore reversed the Panel's findings that China had not demonstrated that the alleged AFA Norm is a norm of general and prospective application.

3.2.2.2 China's request for completion – general and prospective application

China requested the Appellate Body to complete the analysis and find that the alleged AFA Norm has general and prospective application. China argued that the alleged AFA Norm has general application as it does not relate to specific economic operators, but rather to the general class of economic operators that the USDOC could potentially include within an NME-wide entity. China further contended that applying the correct legal standard to the relevant factual findings of the Panel demonstrates that the alleged AFA Norm has prospective application. The United States responded that the Appellate Body should not complete the analysis, given the lack of relevant findings by the Panel and uncontested facts on the record.

With respect to the "general application" of the alleged AFA Norm, the Appellate Body noted the unappealed Panel finding concerning the precise content of the alleged AFA Norm suggests that this norm is a measure of general application because it affects an unidentified number of economic operators. The Appellate Body also noted the connection between the alleged AFA Norm and the Single Rate Presumption. The Panel found that the Single Rate Presumption has general application because it applies to all "NME exporters" involved in original investigations and administrative reviews conducted by the United States. The Appellate Body noted that the application of the Single Rate Presumption may result in the establishment of NME-wide entities, which, in turn, will be subject to the alleged AFA Norm where the USDOC finds that they have failed to cooperate to the best of their ability. Thus, the Appellate Body considered that the Panel's finding concerning the Single Rate Presumption supports the conclusion that the alleged AFA Norm has general application. Finally, the Appellate Body considered that the 73 anti-dumping determinations on the record also support the conclusion that the alleged AFA Norm has general application, since they cover a wide range of products and companies. In light of the above, the Appellate Body concluded that the alleged AFA Norm has general application because it affects an unidentified number of economic operators.

With respect to the "prospective application" of the alleged AFA Norm, the Appellate Body noted the Panel's statement that, in the USDOC's view, selecting the highest margin from any segment of the proceedings in cases of non-cooperation reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less. The Appellate Body also found relevant the Panel's observation that, in several determinations, the USDOC referred to its "practice" of ensuring that the margin is sufficiently adverse as to effectuate the purpose of the facts available role to induce respondents to provide the USDOC with complete and accurate information in a timely manner. The Appellate Body considered that these statements mean that the alleged AFA Norm implements, or is part of, an underlying policy.

The Appellate Body also noted the Panel's observation of the USDOC's descriptions in relation to the alleged AFA Norm of a "practice", "standard practice", or "normal practice", which has consistently been upheld by the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit. The Appellate Body agreed with the Panel that the USDOC's conduct amounted to more than mere repetition of conduct and that the invariable application of the alleged AFA Norm during a period of over 12 years might create expectations for

economic operators that the norm will continue to apply in the future, and that prior practice may provide the USDOC with administrative guidance for future actions. Thus, the Appellate Body considered that the Panel made certain findings and statements that lead to the conclusion that the alleged AFA Norm has prospective application, namely, that the alleged AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that it implements an underlying policy, provides administrative guidance, and creates expectations among economic operators. Thus, the Appellate Body concluded that the alleged AFA Norm has "prospective application".

The Appellate Body recalled that the Panel findings concerning the precise content of the alleged AFA Norm and that this alleged measure is attributable to the United States had not been appealed. The Appellate Body also noted that it had found that the alleged AFA Norm has both general and prospective application. On this basis, the Appellate Body found that the alleged AFA Norm is a rule or norm of general and prospective application that can be challenged "as such" in WTO dispute settlement.

3.2.2.3 China's request for completion – Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement

Having found that the AFA Norm is a rule or norm of general and prospective application, the Appellate Body turned to China's request for the Appellate Body to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. China argued that the AFA Norm prompts the USDOC to draw adverse inferences and select adverse facts as a response to a single factor – i.e. non-cooperation – without establishing that such inferences can reasonably be drawn and that such facts are the "best" information available in the particular circumstances. The United States responded that the Appellate Body should dismiss China's request for completion because China's claims under Article 6.8 and Annex II are outside the Panel's terms of reference, the Appellate Body is not in a position to complete the analysis, China's claims are without merit, and findings on appeal would not contribute to a positive resolution of the dispute.

In relation to the Panel's terms of reference, the United States submitted that China's panel request does not identify the precise obligations alleged to have been breached by the United States; rather, it refers to an entire portion of the Anti-Dumping Agreement – namely, Annex II – that contains multiple obligations. The Appellate Body recalled that merely listing articles in the panel request may fall short of the standard in Article 6.2 of the DSU where the listed articles establish multiple distinct obligations. In this respect, the Appellate Body has examined the narrative of a panel request when considering whether the panel request as a whole sufficiently identifies the particular obligations that form the legal basis of the complaint. The Appellate Body noted that China's panel request alleges that "the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources." The Appellate Body observed that paragraph 7 of Annex II to the Anti-Dumping Agreement contains similar wording, and that it is the only paragraph in Annex II that concerns an investigating authority's obligation to exercise special circumspection when basing findings on information from a secondary source. The Appellate Body thus found that the reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" that comports with the standard set forth in Article 6.2 of the DSU.

In relation to China's claim under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, the Appellate Body recalled that, when relying on facts available, an investigating authority must use those facts available that reasonably replace the necessary information that an interested party failed to provide with a view to arriving at an accurate determination. Ascertaining which "facts available" reasonably replace the missing "necessary information" calls for a process of reasoning and evaluation of all substantiated facts on the record. In such a process, no substantiated facts on the record can be *a priori* excluded from consideration. In addition, an investigating authority may be called upon to draw inferences from the evidence before it in order to reach a conclusion. The manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of "facts available". Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination, and thus cannot be made on the basis of procedural circumstances alone.

The Appellate Body noted that the Panel made no findings on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II. In particular, the Panel did not explore the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing information. The Appellate Body also observed that China's and the United States' arguments on appeal mostly concern whether the USDOC relied on non-cooperation as the only relevant procedural circumstance when resorting to "facts available". China and the United States did not sufficiently engage on the extent to which, under the AFA Norm, the USDOC selects facts that reasonably replace the missing "necessary information" in order to arrive at an accurate determination. The Appellate Body considered that, for an evaluation of the conformity of the AFA Norm with Article 6.8 and paragraph 7 of Annex II, it would need to examine the process of reasoning and evaluation of all substantiated facts on the record adopted by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". Given the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal, the Appellate Body considered that it was unable to evaluate the process that the USDOC undertakes for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination. For the reasons above, the Appellate Body declined China's request for it to complete the analysis in relation to whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II.

3.3 Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R

This dispute concerns seven measures consisting of tax-related provisions for civil aircraft provided by the state of Washington in the United States, as amended by Engrossed Substitute Senate Bill 5952 (ESSB 5952). ESSB 5952, which is codified in the *Revised Code of Washington* (RCW), amends and extends certain tax measures established in 2003, which were measures at issue in the dispute *US – Large Civil Aircraft (2nd complaint)*.

Before the Panel, the European Union challenged the following seven aerospace tax measures: (i) a reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes; (ii) a credit for the B&O tax for pre-production development of commercial airplanes and components; (iii) a credit for the B&O tax for property taxes on commercial airplane manufacturing facilities; (iv) an exemption from sales and use taxes for certain computer hardware, software, and peripherals; (v) an exemption from sales and use taxes for certain construction services and materials; (vi) an exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and (vii) an exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes.

The European Union identified two conditions set out in ESSB 5952 – referred to as the First and Second Siting Provisions – that govern the availability of the abovementioned aerospace tax measures. These conditions relate to a decision on the initial siting of a significant commercial airplane manufacturing program in the state of Washington (defined as an obligation to commence manufacture of both a commercial airplane and fuselages and wings in Washington), as well as to the future siting outside Washington of any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program. Each of the aerospace tax measures is extended, and certain others are also amended, by ESSB 5952, which, according to the First Siting Provision, takes effect contingent upon the siting of a significant commercial airplane manufacturing program in Washington. Moreover, if no such siting occurred by the specified date (30 June 2017), the possibility for the amendment and extension of the measures to take effect would lapse. Before the Panel, both parties agreed that the First Siting Provision had been fulfilled with respect to Boeing's 777X program and, as a result, the measures are in effect. The Second Siting Provision concerns the continued availability of the B&O aerospace tax rate for the version or variant of the commercial airplane that is the basis of the First Siting Provision. The Second Siting Provision triggers the loss of that subsidy if any final assembly or wing assembly of that commercial airplane is located outside of Washington.

The European Union requested the Panel to find that each of the aerospace tax measures constitutes *de jure* and/or *de facto* a subsidy that is prohibited, pursuant to Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because it is contingent on the use of domestic over imported goods. The European Union further requested,

pursuant to Article 4.7 of the SCM Agreement, that the Panel recommend that the United States withdraw the subsidies without delay.

The Panel found that each of the aerospace tax measures at issue constitutes a subsidy within the meaning of Article 1 of the SCM Agreement. In addressing the European Union's *de jure* claims, the Panel considered the First and the Second Siting Provisions separately and together. The Panel concluded that the European Union had not demonstrated that, on its own, the First Siting Provision makes the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods. The Panel also concluded that the European Union had not demonstrated that the Second Siting Provision, on its own, makes the challenged B&O aerospace tax rate *de jure* contingent upon the use of domestic instead of imported goods. The Panel further found that the European Union had not demonstrated that, acting together, these provisions make the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods. With respect to the European Union's *de facto* challenge, the Panel concluded that the siting provisions in ESSB 5952, and in particular the prospective modalities of operation of the Department of Revenue's discretion under the Second Siting Provision, make the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X program *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

Pursuant to Article 4.7 of the SCM Agreement, and taking into account the nature of the prohibited subsidy found in this dispute, the Panel recommended that the United States withdraw the subsidy without delay and within 90 days.

3.3.1 Interpretation of Article 3.1(b) of the SCM Agreement

On appeal, the United States claimed that the Panel erred in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of domestic over imported wings for the 777X. In particular, according to the United States, the Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibits subsidies conditional on the domestic siting of production activities.

The Appellate Body observed that the SCM Agreement distinguishes between two categories of subsidies: prohibited subsidies (Part II of the Agreement) and actionable subsidies (Part III of the Agreement), and that only subsidies contingent upon export performance within the meaning of Article 3.1(a) or contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) are prohibited *per se* under Article 3 of the SCM Agreement. The Appellate Body recalled its earlier findings that the legal standard for establishing the existence of "contingency" under Article 3.1(b) is the same as under Article 3.1(a). Specifically, a subsidy would be prohibited under Article 3.1(b) if it is "conditional" or "dependent for its existence on" the use of domestic over imported goods, and therefore, if the use of those goods were a condition for receiving the subsidy.

Concerning the meaning of the terms in Article 3.1(b), the Appellate Body observed that the term "use" refers to the action of using or employing something, and that it may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the production of a good. The Appellate Body further considered that the term "goods" can be read as a synonym for "products", may refer to any type of good that may be used by the subsidy recipient, and concerns goods that should be at least potentially tradable. Moreover, for the Appellate Body, the interpretation of the terms "domestic" and "imported" can be informed by Article III:4 of the GATT 1994. Thus, as a general matter, "domestic" goods can be understood as goods originating within the relevant Member's territory and "imported" goods as goods that cross the border into that Member's territory. Finally, the Appellate Body observed that the term "over" refers to the use of domestic goods in preference to, or instead of, imported goods.

The Appellate Body then recalled that the term "contingent" covers contingency both in law and in fact and that the legal standard is the same for *de jure* and *de facto* contingency. While the existence of *de jure* contingency is demonstrated on the basis of the very words of the relevant measure granting the subsidy or by necessary implication therefrom, the existence of *de facto* contingency must be inferred from the total configuration of the facts constituting and surrounding

the granting of the subsidy, none of which on its own is likely to be decisive in any given case. The Appellate Body noted that relevant factors in determining *de facto* contingency include the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy, that provide the context for understanding the measure's design, structure, and modalities of operation. The Appellate Body understood the analysis of *de jure* and *de facto* contingency as a continuum, and observed that a panel should conduct a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalize *de jure* and *de facto* analyses, in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods. According to the Appellate Body, in each case, an assessment of whether a subsidy is contingent within the meaning of Article 3.1(b) requires a thorough analysis of whether the conditional relationship between the granting of the subsidy and the use of domestic over imported goods is objectively observable on the basis of a careful and rigorous scrutiny of all the relevant evidence, especially where the alleged contingency is not clearly expressed in the language used in the relevant legal instrument.

The Appellate Body highlighted that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" *per se* but rather the granting of subsidies contingent upon the "use", by the subsidy recipient, of domestic over imported goods, and reasoned that subsidies that relate to domestic production are not, for that reason alone, prohibited under Article 3 of the SCM Agreement. The Appellate Body noted in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy. The Appellate Body further observed that Article III:8(b) of the GATT 1994 comports with this understanding, insofar as it makes clear that the provision of subsidies to domestic producers only, and not to foreign ones, does not in itself constitute a breach of Article III. However, the Appellate Body stressed that, even if the granting of a subsidy is exempt from the GATT national treatment obligation by virtue of it being paid exclusively to domestic producers, it may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.

Additionally, the Appellate Body recalled its finding that *de facto* contingency under Article 3.1(a) of the SCM Agreement, and in particular whether a subsidy is "in fact tied to … anticipated exportation", can be determined by assessing whether "the granting of the subsidy [is] geared to induce the promotion of future export performance by the recipient" and "provides an incentive to skew anticipated sales towards exports". The Appellate Body took the view that this test would not answer the question of whether the measure requires the recipient to use domestic over imported goods as a condition for receiving the subsidy.

The Appellate Body concluded that the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result* in the use of more domestic and fewer imported goods, but whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.

3.3.2 Whether the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement

The European Union claimed that, in its *de jure* assessment of the First and Second Siting Provisions, the Panel erroneously interpreted Article 3.1(b) of the SCM Agreement to mean that a prohibited contingency would exist only where the measure "*per se* and necessarily exclude[s]" any use of imported goods, and thereby confined the applicability of Article 3.1(b) to those situations where the subsidy recipient is required to use domestic goods to the complete exclusion of imported goods.

The Appellate Body agreed with the European Union's contention that the existence of contingency under Article 3.1(b) is not limited to cases where the measure requires the subsidy recipient to use domestic goods to the complete exclusion of imported goods, insofar as Article 3.1(b) does not require demonstrating any particular quantity or level of displacement of imported goods by

domestic goods in order to determine the existence of contingency. The Appellate Body therefore turned to examine whether the Panel indeed articulated such a legal standard in its analysis.

The Appellate Body recalled the Panel's finding that, by their terms, both the First and Second Siting Provisions speak of "siting" and a commitment to "manufacture" or "assemble" certain goods, and are silent as to the "use" of any imported or domestic goods. The Appellate Body also noted the Panel's conclusion that a reading under which Boeing would be required to use domestic over imported goods was just one among several possible readings of these provisions. Having considered other possible readings of the terms of both provisions, the Panel concluded that "[t]he contingency on siting certain production activities within the state of Washington [under the First Siting Provision] does not entail any explicit, or any necessarily implied, requirement to use domestic goods", and that "[n]o express or obvious contingency results from the terms used in the [Second Siting Provision], nor can one be derived inevitably from its terms."

When read in this context, the Appellate Body understood the Panel's statements challenged by the European Union as referring to the "implications" of those terms and merely recognizing that a condition requiring the use of domestic over imported goods could not be "necessarily" derived from the language of the First and Second Siting Provisions. In particular, in the Appellate Body's view, the phrase "*per se* and necessarily exclude" links back to the Panel's understanding of the words "necessary implication" as referring to contingency that must "result inevitably from the words actually used in the legislation", or that "any other interpretation would be unreasonable". In this light, the Appellate Body understood the Panel to have simply recognized that, based on both the words actually used in the First and Second Siting Provisions and by the necessary implication from those words, no *de jure* requirement existed for Boeing to use domestic over imported goods. Moreover, recalling the European Union's assertions before the Panel, the Appellate Body considered that, in making its statement that the First and Second Siting Provisions do not "*per se* and necessarily exclude" the possibility for Boeing to use goods from outside Washington, the Panel was not articulating a legal standard, but was rather addressing certain contentions advanced by the European Union.

The European Union also argued that, since the Panel recognized that the legal standard reflected in the term "contingent" is the same for both *de jure* and *de facto* contingency, and having erred in its *de jure* contingency analysis under Article 3.1(b), the Panel also erred in its interpretation of Article 3.1(b) in the context of its *de facto* contingency analysis of the First Siting Provision. The Appellate Body noted that the Panel focused its analysis on the "actual operation" of the First Siting Provision and its conclusion that the First Siting Provision does not demonstrate *de facto* contingency was based on the absence of any "factual evidence in the Department of Revenue's determination or in how Boeing will organize the sourcing for the production of the 777X indicating a *de facto* requirement to use any domestic goods, including wings or fuselages". Accordingly, in the Appellate Body's view, the Panel simply found that the additional evidence before it confirmed its understanding of the First Siting Provision in the context of its *de jure* contingency analysis, and was insufficient to establish inconsistency under Article 3.1(b).

The Appellate Body rejected the European Union's claims that the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement in the context of its *de jure* contingency analyses of the First and Second Siting Provisions, as well as its *de facto* contingency analysis of the First Siting Provision.

3.3.3 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement in the context of its *de jure* contingency analysis in respect of the First Siting Provision

The European Union claimed that the Panel's finding that the First Siting Provision does not, expressly or by necessary implication, require the use of domestic over imported goods constitutes an error in the application of Article 3.1(b) of the SCM Agreement. In the European Union's view, since the First Siting Provision requires Boeing "to establish the 777X production program in Washington State, '*in which*' the wings and fuselages are to be integrated", and since "at least some 777X wings and fuselages" have to be manufactured in Washington, the provision "appropriates Boeing's commercial decision-making, leaving it with precisely one option if it wants to benefit from billions of US dollars in subsidies – to use at least some of the wings and fuselages manufactured in Washington State, *in* the final assembly of the 777X in Washington State."

The Appellate Body began by recalling that the Panel's finding that, even if the terms actually used in the First Siting Provision do not preclude a scenario in which wings and fuselages manufactured in Washington "were 'used' in the final assembly of 777X commercial airplanes in the state of Washington", two other "possible and equally reasonable" readings of these terms existed that would allow the manufacturer to benefit from the subsidies. The Appellate Body also noted that the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may *result* in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out *a condition requiring* the use of domestic over imported goods. Thus, whether any reading of the First Siting Provision "would allow the subsidy recipient to avail itself of the subsidy without the use of domestic over imported wings and fuselages, at least for some aircraft for some time" did not directly address the issue of contingency under Article 3.1(b). For the Appellate Body, even if, under all scenarios discussed by the Panel, Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of *de jure* conditionality, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods.

In this light, the Appellate Body noted the Panel's finding that the condition set out in the terms of the First Siting Provision does not relate to the *use* of domestic or imported goods but rather to the *siting* of certain manufacturing activities in Washington, and agreed with the Panel that the fact that the terms actually used in the First Siting Provision do not preclude a scenario in which "wings and fuselages manufactured in the state of Washington were 'used' in the final assembly of 777X commercial airplanes in the state of Washington … is not the same as concluding that it is a requirement or condition for the subsidies that necessarily derives from those terms." Moreover, the Appellate Body considered that the two "alternative" readings of the First Siting Provision by the Panel confirm that the conditionality established on the basis of its terms is linked to the *manufacture* of wings and fuselages, and that the *use* of those products in the final assembly of the 777X is not a condition for receiving the subsidy, but is rather a consequence of the requirement to manufacture them domestically. According to the Appellate Body, the absence of any express language in the First Siting Provision, or any necessary implication therefrom, that would relate to a condition requiring the use of domestic over imported goods in the First Siting Provision, coupled with the fact that it "involves a one-time decision on the initial establishment, but not the continuation, of certain manufacturing activities", were particularly relevant considerations for the Panel's ultimate conclusion that "[t]he contingency on siting certain production activities within the state of Washington does not entail any explicit, or any necessarily implied, requirement to use domestic goods."

The Appellate Body therefore rejected the European Union's claim that the Panel erred in its application of Article 3.1(b) of the SCM Agreement in finding that the First Siting Provision does not make the aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

3.3.4 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement, or under Article 11 of the DSU, in the context of its *de jure* contingency analysis in respect of the Second Siting Provision

The European Union further claimed that the Panel erred in its application of Article 3.1(b) of the SCM Agreement by unduly restricting the scope of the evidence from which it assessed *de jure* contingency in respect of the Second Siting Provision, and in particular by failing to rely on the United States' "admission" that, "if the completed fuselages and wings were produced outside the United States and then imported, [the Washington Department of Revenue] would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered".

Before addressing the issue of the scope of evidence relevant to a *de jure* or *a de facto* analysis, the Appellate Body recalled that the relevant question under Article 3.1(b) is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and relevant factual circumstances. The factual circumstances potentially relevant to an assessment of whether a subsidy is *de facto* contingent in the circumstances of this case could include, for example, the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry.

The Appellate Body noted that both import substitution subsidies and other subsidies that relate to domestic production may have adverse effects in respect of imported goods. Subsidies contingent upon import substitution, by their nature, adversely affect competitive conditions of imported products. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods downstream and adversely affecting imports. In the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both "produce" and "use" the subsidized inputs in the production of the subsidized final good. Such subsidies would have consequences for the subsidized producers' input-sourcing decisions to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities. This is even more so in instances where the subsidized input is specialized in nature or where vertical integration between the upstream and downstream stages of the production chain exists. However, while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods.

At the same time, whether a subsidy is contingent upon the use of domestic over imported goods is to be "*inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy". In particular, factual circumstances, where relevant, may form part of the context for understanding the measure's design, structure, and modalities of operation in a particular market, all of which may assist in discerning whether or not a *de facto* contingency exists. The design and structure of a measure granting a subsidy may be adapted to factual circumstances such as a multi-stage production process where specialized inputs and final goods are subsidized, or where the production chain is vertically integrated. The modalities of a measure so designed or structured may then operate, such that conditions for eligibility or access to the subsidy may entail a condition requiring the use of domestic over imported goods. However, whether a subsidy is merely conditional upon the domestic production of certain goods or upon the use by the subsidy recipient of domestic over imported goods should be assessed on a case-by-case basis.

The Appellate Body then recalled that the Panel found that the Second Siting Provision is not *de jure* contingent upon the use of domestic over imported goods and, in analysing whether it entails a *de facto* contingency, posed a series of questions to the United States in respect of certain counterfactual scenarios. The Appellate Body noted that the Panel considered the United States' responses to be "significant in understanding *the modalities of operation* of the conditions of the Second Siting Provision", which were subject to the Washington Department of Revenue's administrative discretion, and its conclusion that "the *likely actions* of the relevant administrative agency in response to possible factual scenarios are *indicative* of whether, in practice, a subsidy would remain available so long as a manufacturer used domestic goods, while that same subsidy would be terminated if a manufacturer used those same goods from a foreign source." For the Appellate Body, while it is conceivable that the United States' responses to the Panel's questions may have shed light on the necessary implication of the terms of the Second Siting Provision, they may have been equally relevant for understanding the measure's design, structure, and modalities of operation in the context of the relevant factual circumstances. While recognizing that the Panel compartmentalized its *de jure* and *de facto* contingency analyses, the Appellate Body did not consider that the Panel erred in considering the United States' responses to its questions in the context of examining the design, structure, and modalities of operation of the Second Siting Provision in the context of the relevant factual circumstances.

The European Union also claimed that, by adopting in the context of its *de jure* analysis an interpretation of the Second Siting Provision "devoid of any evidentiary basis", the Panel failed to make an objective assessment of the matter under Article 11 of the DSU, in particular by stating that "the terms 'any final assembly or wing assembly' [in the Second Siting Provision] are explicitly tied, and arguably limited, to the specific assembly operations that were 'the basis of a siting' under the First Siting Provision". The Appellate Body agreed with the European Union that the words of the Second Siting Provision do not appear to limit its scope of application to the relocation of specific assembly operations that were the basis of a siting under the First Siting Provision. However, the Appellate Body considered that, in making the statements with which the European Union takes issue, the Panel merely described one possible situation under which the Second Siting Provision would be activated. In any event, the Appellate Body did not consider that

the Panel's statements were critical for its ultimate finding that the Second Siting Provision does not demonstrate *de jure* contingency upon the use of domestic over imported goods, and disagreed with the European Union's contention that the Panel's understanding of the Second Siting Provision is "devoid of any evidentiary basis".

In view of the above, the Appellate Body rejected the European Union's claim that the Panel erred in the application of Article 3.1(b) of the SCM Agreement in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate *de jure* contingent upon the use of domestic over imported goods. The Appellate Body also rejected the European Union's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate *de jure* contingent upon the use of domestic over imported goods.

3.3.5 Whether the Panel erred in its *de facto* contingency analysis under Article 3.1(b) of the SCM Agreement

The United States claimed that the Panel erred in the interpretation and application of Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate is *de facto* contingent upon the use of domestic over imported goods. In particular, the United States argued that the Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement because: (i) Boeing does not and will not "use" wings to produce the 777X; (ii) it did not address the meaning of the terms "domestic" or "imported" and did not conduct "a meaningful analysis" as to whether wings resulting from wing assembly in Washington would necessarily be "domestic"; and (iii) improperly used hypothetical scenarios to determine what would trigger the Second Siting Provision. The United States also argued that the Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibited subsidies conditional upon the domestic siting of production activities.

The Appellate Body noted that, in respect of the Second Siting Provision, the question at issue was whether, notwithstanding that the measure itself expressly concerns only the siting of certain manufacturing and assembly operations, which was found not to demonstrate *de jure* contingency, a condition requiring the use of domestic over imported goods nevertheless exists on a *de facto* basis. The Appellate Body recalled that, by its express terms, the Second Siting Provision is triggered in the event of a determination by the Washington Department of Revenue that final assembly or wing assembly "has been sited" outside Washington, and thus the condition contained in the measure concerns the siting or location of the relevant assembly activities.

Thereafter, the Appellate Body recalled the relevant aspects of the Panel's analysis of the European Union's claim of *de facto* contingency. The Appellate Body noted that, the Panel evaluated relevant circumstances relating to the Second Siting Provision, in particular, the circumstances in which the provision would be triggered. Noting that "the conditionality in the Second Siting Provision is phrased in the negative", the Panel understood the Second Siting Provision to set forth the factual circumstances that would, if they arose, cause Boeing's 777X aircraft program to lose access to the subsidy. It was thus clear to the Panel that so long as such "siting" does not happen, the Second Siting Provision "remains dormant, operating passively as a deterrent to safeguard the *status quo*" that satisfied the First Siting Provision. For the Panel, this "passive, deterrent nature of the measure" raised "the question as to what sorts of factual evidence could inform the analysis of whether ongoing access to the B&O aerospace tax rate … is contingent *de facto* on the use of domestic over imported 777X wings." At the time of the Panel's assessment, the Second Siting Provision had not been triggered, and therefore no evidence existed as to its actual operation and as to what would trigger the Second Siting Provision.

The Panel therefore observed that it was "confronted by the counterfactual question of what would trigger the Second Siting Provision". The Panel considered "particularly relevant the discretion granted" to the Washington Department of Revenue to terminate the availability of the B&O aerospace tax rate if it determines that Boeing has 'sited' assembly of wings outside of Washington. The Panel underscored that the exercise of discretion granted to the Washington Department of Revenue would be inconsistent with Article 3.1(b) of the SCM Agreement if, in practice, it resulted in the termination of the B&O aerospace tax rate for the 777X program on the basis of a determination that Boeing, by virtue of using imported 777X wings, had "sited" 777X wing assembly outside the state of Washington.

In an effort to understand what would trigger the Second Siting Provision, the Panel posed two questions to the United States (Panel questions Nos. 40 and 80) based on hypothetical scenarios. Under the first scenario, the Panel asked whether the Second Siting Provision would be triggered if, assuming *arguendo* that it was possible for Boeing to purchase completed wings, Boeing would continue manufacturing wings itself in Washington and, in addition, would purchase wings from another manufacturer in Washington. In response to this scenario, the United States indicated that, since the question implies that no siting took place outside Washington, the Department of Revenue likely would not determine that the Second Siting Provision had been triggered. Under the second hypothetical scenario, the Panel asked whether the Second Siting Provision would be triggered if Boeing would continue manufacturing wings in Washington and, in addition, would purchase them from another producer outside of Washington. In response, the United States noted that, assuming *arguendo* that it is possible for Boeing to import completed fuselages and wings for use in the production of the 777X, if the completed fuselages and wings were produced outside the United States and then imported, the Washington Department of Revenue would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered.

The Appellate Body recalled that, on the basis of the United States' answers to Panel questions 40 and 80, the Panel concluded that "the *only* decision by Boeing to source wings which it would then 'use' in producing the 777X that *would not* trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings." On this basis, the Panel found that no wings can "be sourced by Boeing from outside the state of Washington without the consequence of activating the Second Siting Provision". The Appellate Body noted, however, that the Panel did not address in its analysis the relevance of the United States' response to Panel question 7, in which the United States noted that a single instance of assembly outside Washington would not trigger the Second Siting Provision.

In evaluating the Panel's assessment of the Second Siting Provision, the Appellate Body took note of the Panel's key conclusion that the United States' responses clarify that the Second Siting Provision is "not only aimed at" preventing the siting of assembly operations outside of Washington, but "also concerns the 'use' of certain goods, and specifically the origin of those goods". The Appellate Body did not consider that a statement by the Panel that a measure may "concern" the domestic or imported origin of goods is in itself sufficient to establish the existence of *de facto* contingency to use domestic over imported goods within the meaning of Article 3.1(b). Rather, for the Appellate Body the question is whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation, in light of the relevant factual circumstances that provide the context for understanding the measure and its operation. The Appellate Body considered that other statements by the Panel underscored its understanding that the operation of the siting condition under the measure at issue may relate only to certain *consequences* for the importation of goods. Thus, the Appellate Body did not consider that the Panel's analysis and reasoning were sufficient to establish that the way the Second Siting Provision operates with respect to the siting of production and assembly makes the B&O aerospace tax rate *de facto* contingent upon the use of domestic over imported goods.

With respect to the United States' responses to the counterfactual scenarios posed by the Panel, the Appellate Body first observed that using counterfactual or hypothetical scenarios is a permissible tool of legal analysis in WTO dispute settlement, and that the absence of evidence pertaining to the actual application of a measure should not preclude the possibility for a Member to challenge a law that has not yet been applied. The Appellate Body recalled, in this respect, that critical parts of the Panel's reasoning depended on whether the exercise of discretion by the Washington Department of Revenue would trigger the Second Siting Provision, and the United States' responses were, therefore, of central importance for the Panel's conclusion regarding *de facto* contingency. However, the Appellate Body expressed concern about the limited consideration the Panel gave to the United States' responses to the Panel's questions and the conclusions the Panel drew from them. In particular, the Appellate Body noted that the questions posed by the Panel were conjectural and based on *arguendo* assumptions. It also noted the probabilistic nature of the United States' response about how the Washington Department of Revenue might exercise its discretion if certain hypothetical factual circumstances were to arise in the future.

The Appellate Body further took note of some of the United States' statements made in response to the Panel's questions. First, the Appellate Body recalled the United States' statement that whether fuselages and wings are imported is "irrelevant" for purposes of the Second Siting Provision because it is the siting of production activities, not the domestic or imported character of goods, that determines whether or not the Second Siting Provision would be triggered. Second, the Appellate Body recalled the United States' observation that, even if importation of completed 777X wings and fuselages were technically possible, not all importation of such structures would carry the consequence that the United States outlined, for there could be a scenario in which assembly would still occur in Washington, but the export of such structures for non-assembly operations and the subsequent importation of those structures would not trigger the Second Siting Provision. Third, the Appellate Body recalled the United States' separate response to the Panel that an isolated instance of final assembly or wing assembly outside Washington may not trigger the Second Siting Provision.

The Appellate Body underscored that the Panel did not refer in its Report to any of the above-mentioned statements, either in its description of the United States' responses to the Panel's questions, or when it reasoned its finding of de facto contingency. Given the Panel's near sole reliance on the United States' responses to Panel questions Nos. 40 and 80, the Appellate Body stated that it would have expected the Panel to have conducted a more careful analysis and provided an explanation as to how it could justify its singular reliance on the United States' responses in light of the various caveats in those responses. The Appellate Body therefore did not see that the Panel, in its analysis of *de facto* contingency, properly established that the Second Siting Provision, in addition to the conditions relating to the siting of production activities, also entails a condition requiring the use of domestic over imported goods.

The Appellate Body thus reversed the Panel's finding that the B&O aerospace tax rate is *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. The Appellate Body also reversed the Panel's finding that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.

Having reversed the Panel's finding of inconsistency under Article 3.1(b) of the SCM Agreement, the Appellate Body made no recommendation in this dispute, and noted that the Panel's recommendation pursuant to Article 4.7 of the SCM Agreement on the basis of that finding of inconsistency cannot stand.

3.4 Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R

This dispute concerned anti-dumping duties imposed by the European Union on 8 November 2011 on imports of certain fatty alcohols and their blends originating in Indonesia. In particular, this dispute focused on the EU authorities' treatment of one of the investigated Indonesian exporters, PT Musim Mas, in the underlying anti-dumping investigation. Before the Panel, Indonesia claimed that the anti-dumping measures imposed by the European Union in its Final Determination (Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011) were inconsistent with Articles 2.3, 2.4, 3.1, 3.5, and 6.7 of the Anti-Dumping Agreement.

Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement concerned a downward adjustment that the EU authorities made to the export price of PT Musim Mas for payments made by PT Musim Mas to ICOF-S, a related trading company based in Singapore. The EU authorities established that PT Musim Mas paid ICOF-S a mark-up for sales made by ICOF-S on behalf of PT Musim Mas to customers in the European Union. The EU authorities considered that, in respect of certain export sales by PT Musim Mas, ICOF-S performed functions similar to those of an agent working on a commission basis. Hence, the EU authorities found that the mark-up paid by PT Musim Mas to ICOF-S represented a payment for a service for which there was no corresponding pricing component on the domestic side. The EU authorities thus characterized this mark-up as a commission paid in respect of export sales to the European Union, and treated it as a difference affecting price comparability for which a downward adjustment to the export price was warranted. The EU authorities made this adjustment of their own volition and not at the request of any of the interested parties in the investigation.

Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement related to the on-the-spot investigations conducted by the EU authorities at the premises of PT Musim Mas in Indonesia and at certain of its related companies, including ICOF-S in Singapore. These visits occurred in the course of November 2010.

On 12 November 2016, about a month before the Panel Report was circulated to all WTO Members, the anti-dumping measures imposed pursuant to the Final Determination expired.

The European Union requested the Panel to issue a preliminary ruling that its jurisdiction to decide this case had lapsed, pursuant to Article 12.12 of the DSU, following the alleged suspension of Panel proceedings for more than 12 months. The European Union alleged that, following the establishment but prior to the composition of the Panel, the Permanent Mission of Indonesia had communicated a "request" to the WTO Secretariat on 11 July 2013 with a view to suspending the work of the Panel in the sense of the first sentence of Article 12.12 of the DSU. Given the ambiguity concerning the meaning and intention of Indonesia's communication, the Panel found that the European Union had not demonstrated that Indonesia did, in fact, make a "request" in the sense of the first sentence of Article 12.12 of the DSU. The Panel found, in the absence of such a request, that its work had not been suspended in the sense of Article 12.12 of the DSU and, consequently, that the authority for the establishment of the Panel had not lapsed.

Before the Panel, Indonesia claimed that the EU authorities acted inconsistently with Articles 2.4 and 2.3 of the Anti-Dumping Agreement by making an improper allowance for a factor that did not affect price comparability. Indonesia challenged the decision by the EU authorities to treat a mark-up paid by an Indonesian producer (PT Musim Mas) to its related trader (ICOF-S) as a difference affecting price comparability, resulting in a downward adjustment to the export price. In particular, Indonesia claimed that the EU authorities had mischaracterized the mark-up as a trading commission. Indonesia argued that the mark-up was, rather, a transfer of funds between PT Musim Mas and ICOF-S that was simply an allocation, or shifting, of funds (profits) from one pocket to another within a single economic entity. In Indonesia's view, this meant that the EU authorities had adjusted the export price for a factor that did not affect price comparability. As a consequence, the allowance led to an unfair comparison between the export price and the normal value and was thus inconsistent with Article 2.4 of the Anti-Dumping Agreement. Indonesia also made a consequential claim under Article 2.3 of the Anti-Dumping Agreement.

The Panel rejected Indonesia's argument that the existence of what Indonesia labelled a "single economic entity" is dispositive of whether a given payment is a difference that affects price comparability under Article 2.4. Rather, in the Panel's view, the dividing line between: (i) an internal allocation of funds within a single economic entity; and (ii) an expense that is linked to either the export side or the domestic side, or to both sides but with different amounts, such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case. The Panel further considered that Indonesia had not established any asymmetry between the export price and the normal value with which it was compared. Finally, the Panel held that the EU authorities' treatment of a payment made by another investigated Indonesian exporter to its related trading company did not undermine the explanations given for their treatment of PT Musim Mas' payments to ICOF-S. Having rejected the grounds on which Indonesia based its claim under Article 2.4 of the Anti-Dumping Agreement, the Panel concluded that Indonesia had not demonstrated that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction for a factor that did not affect price comparability. As Indonesia's claim under Article 2.3 of the Anti-Dumping Agreement was consequential to its claim under Article 2.4, the Panel also concluded that Indonesia had not demonstrated that the EU authorities acted inconsistently with Article 2.3.

Indonesia also claimed that the European Union had acted inconsistently with Article 6.7 of the Anti-Dumping Agreement by failing to disclose to PT Musim Mas the results of on-the-spot investigations conducted at its premises and at the premises of its related companies, including ICOF-S. The Panel found that the EU authorities had failed to explain those parts of the questionnaire response or other information supplied for which supporting evidence was requested. The EU authorities had also failed to explain whether: (i) any further information was requested; (ii) the producer made available the evidence and additional information requested; and (iii) the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified company in, *inter alia*, its questionnaire response. The Panel

therefore concluded that the EU authorities had not made available or disclosed the "results of any such investigations" to PT Musim Mas, as required by Article 6.7 of the Anti-Dumping Agreement.

Finally, Indonesia claimed that the EU authorities had acted inconsistently with Article 3.5 of the Anti-Dumping Agreement by concluding that imports of fatty alcohols caused material injury to the domestic industry without separately analysing two other known factors also causing injury, namely, the economic crisis, and issues related to the European Union's domestic industry's access to raw materials. Indonesia further claimed that the EU authorities had, as a consequence, acted inconsistently with Article 3.1 of the Anti-Dumping Agreement by failing to conduct an "objective examination" on the basis of "positive evidence". The Panel found that Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in their analysis of the "economic crisis factor" by: (i) failing adequately to separate and distinguish the injurious effects of the economic crisis from those of the dumped imports; (ii) erring in their determination of the year of commencement of the economic crisis; or (iii) failing to address certain arguments and evidence presented by interested parties during the investigation. Further, the Panel found that Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to address the domestic industry's access to raw materials, since this did not constitute an other "known factor" within the meaning of Article 3.5. In addition, in view of the quality and quantity of the evidence provided by PT Musim Mas, Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 by failing to address explicitly the raw material price fluctuations during the economic crisis.

3.4.1 Determination of dumping – Article 2.4 of the Anti-Dumping Agreement

Indonesia appealed the Panel's finding that Indonesia had not demonstrated that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction for a factor that did not affect price comparability. Indonesia contended that the Panel erred in its interpretation and application of Article 2.4 in assessing whether the EU authorities' downward adjustment to PT Musim Mas' export price was proper. Indonesia also argued that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU in its analysis of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement. Consequently, Indonesia requested the Appellate Body to reverse the Panel's conclusion under Article 2.4 of the Anti-Dumping Agreement. Indonesia also requested the Appellate Body to complete the legal analysis and find that the EU authorities acted inconsistently with Article 2.4 by applying an incorrect legal standard in their decision to make a downward adjustment to PT Musim Mas' export price.

Indonesia's appeal was primarily premised on its argument that the key question in deciding how to treat revenues and expenses of related companies is whether those companies form part of a "single economic entity". Indonesia asserted that, in its interpretation of Article 2.4, the Panel did not address whether the existence of a single economic entity or the relationship between parties could affect the determination of whether a factor affected price comparability, even though Indonesia's arguments identified that as a key issue. Indonesia also maintained that the Panel erred in stating that it was not convinced that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference that affects price comparability under Article 2.4. The European Union highlighted that Article 2.4 does not contain any textual element suggesting that the fact that a trader and the exporter are related or constitute a single economic entity plays a decisive role for the purpose of making an adjustment in order to ensure a fair comparison. The European Union also argued that Indonesia's claims on appeal were based on an incomplete and incorrect reading of the Panel Report.

The Appellate Body observed that the focus of Article 2.4 of the Anti-Dumping Agreement is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the fairness of that comparison. To this end, investigating authorities are required to make due allowance for differences affecting price comparability. There are no differences affecting price comparability that are precluded, as such, from being the object of an allowance. Instead, the need to make due allowances must be assessed in light of the specific circumstances of each case. The Appellate Body considered the Panel's articulation of the legal standard under Article 2.4 to be consonant with its understanding of this provision. For the Appellate Body, the existence of a close relationship between transacting companies would be pertinent to the extent that it affects the relevant transactions in such a way as to affect the

comparability of the export price and the normal value. Thus, the Appellate Body considered that the Panel did not err in rejecting Indonesia's argument that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference that affects price comparability under Article 2.4. Accordingly, the Appellate Body found that Indonesia had not demonstrated that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement.

Having so found, the Appellate Body clarified the limits of its finding. The Appellate Body stressed that it was not ruling, nor did it consider that the Panel had ruled, that the nature and degree of affiliation between related companies are irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. The Appellate Body also did not rule, in the abstract, on the circumstances in which an inquiry into the nature of the relationship between transacting entities will suffice or be determinative of the issue of whether allowances should be made pursuant to Article 2.4 of the Anti-Dumping Agreement.

With respect to Indonesia's claim that the Panel erred in its application of Article 2.4 to the facts of this case, the Appellate Body first observed that several of Indonesia's claims of error were predicated on the Appellate Body's acceptance of Indonesia's view as to the correct interpretation of Article 2.4. Given that the Appellate Body did not find that the Panel erred in its interpretation of Article 2.4, or that the existence of a single economic entity is dispositive of whether a given mark-up qualifies as a difference that affects price comparability under Article 2.4, the Appellate Body considered it unnecessary to examine further these aspects of Indonesia's claim. Instead, the Appellate Body confined its review to Indonesia's claims that the Panel erred: (i) in its review of whether the EU authorities' explanations revealed a sufficient evidentiary basis for treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability; and (ii) in its evaluation and rejection of Indonesia's argument that the allowance resulted in an asymmetrical comparison with the normal value.

The Appellate Body considered that the Panel's review of the EU authorities' evaluation was properly focused on whether that evaluation was consistent with Article 2.4 of the Anti-Dumping Agreement. The Appellate Body was of the view that the Panel did not err in finding that the EU authorities had a sufficient evidentiary basis for establishing that the mark-up paid by PT Musim Mas to ICOF-S in connection with export sales to the European Union was a difference affecting price comparability under Article 2.4. Moreover, contrary to Indonesia's argument, the Appellate Body considered that the Panel's reasoning did not imply that, when confronted with transactions between closely affiliated parties, investigating authorities may replace the expenses actually incurred with the expenses that would have been incurred had the producing entity obtained the service from an independent provider. Accordingly, the Appellate Body found that Indonesia had not demonstrated that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement to the facts of this case.

With respect to Indonesia's claim that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU, the Appellate Body rejected Indonesia's arguments that the Panel: (i) improperly concluded that the EU authorities had complied with Article 2.4 before it even addressed Indonesia's arguments; (ii) repeatedly engaged in a *de novo* review of the record evidence; and (iii) ignored or summarily dismissed key evidence and arguments by Indonesia. Thus, the Appellate Body found that Indonesia had not demonstrated that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement or Article 11 of the DSU in its analysis of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement.

Consequently, the Appellate Body upheld the Panel's finding that Indonesia had not demonstrated that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement, by treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability, and making a downward adjustment to the export price for that reason.

3.4.2 Disclosure of results of on-the-spot investigations – Article 6.7 of the Anti-Dumping Agreement

The European Union appealed the Panel's finding that the EU authorities acted inconsistently with Article 6.7 of the Anti-Dumping Agreement because they failed to make available or disclose the results of the on-the-spot investigations conducted on the premises of PT Musim Mas and its related companies. In particular, the European Union alleged that the Panel erred by interpreting Article 6.7 as imposing an obligation to provide a document setting out a complete description of the verification process.

This claim raised the question of the scope of the "results" of the on-the-spot investigation to be disclosed to the interested parties pursuant to Article 6.7 of the Anti-Dumping Agreement. The European Union argued that Article 6.7 requires that the "essential factual outcomes" of the on-the-spot investigations be disclosed. Indonesia responded that the European Union conflated the requirements of Article 6.7 regarding the disclosure of the results of verification visits and of Article 6.9 regarding the disclosure of essential facts. Indonesia argued that these concepts are different, and that the results to be disclosed pursuant to Article 6.7 are not limited to the "essential" results of the verification visit.

The Appellate Body found that on-the-spot investigations are one mechanism that investigating authorities may employ in satisfying their duty, under Article 6.6 of the Anti-Dumping Agreement, to ensure the accuracy of information supplied by interested parties. When on-the-spot investigations are conducted, Article 6.7 requires that the firms subject to such visits be provided with the "results", or outcomes, of this verification process. The Appellate Body further held that the scope of the on-the-spot investigations and the ensuing results to be communicated to the investigated firms vary from case to case and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigations. Furthermore, the Appellate Body explained that the disclosure of the "results" of the on-the-spot investigation must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in such a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.

The Appellate Body then turned to assess whether the Panel erred in its interpretation of Article 6.7 of the Anti-Dumping Agreement. The Appellate Body concluded that the Panel did not err in finding that investigating authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. The Appellate Body also considered that the "results" of the verification include whether the producer made available the evidence and additional information requested and whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies. The Appellate Body clarified that, while disclosure of this information will typically be required, additional information may need to be disclosed in some cases, and less information may suffice in others.

With respect to the application of Article 6.7 in this dispute, the Appellate Body noted the Panel's finding that the documents relating to the on-the-spot investigations provided by the EU authorities in this case were insufficient to allow PT Musim Mas to understand whether the EU authorities had or had not been able to confirm the accuracy of the information supplied. The Appellate Body considered that the Panel had correctly assessed whether the documents provided to PT Musim Mas could have enabled it to understand whether the EU authorities had or had not been able to confirm the accuracy of the information supplied. Consequently, the Appellate Body upheld the Panel's finding that the EU authorities failed to make available or disclose the "results of any such investigations" to PT Musim Mas, and therefore acted inconsistently with Article 6.7 of the Anti-Dumping Agreement.

3.4.3 Expiration of the measure at issue – Articles 3 and 19 of the DSU

The European Union requested the Appellate Body to dismiss Indonesia's appeal in its entirety as inconsistent with Article 3 of the DSU because it related to an expired measure. The European Union explained that it sought a finding that the dispute had been resolved and that the relevant issues had therefore become moot. As a separate matter, the European Union requested a finding by the Appellate Body that the Panel had erred in making a recommendation pursuant to Article 19.1 of the DSU when the measure at issue had expired.

Indonesia responded that the Appellate Body's jurisdiction is governed by Article 17 of the DSU and that, pursuant to Article 17.12 of the DSU, the Appellate Body shall address each of the issues raised in accordance with Article 17.6 of the DSU in appellate proceedings. Indonesia argued that the Appellate Body would fail to comply with this duty if it were to decline to rule on Indonesia's appeal. Furthermore, with respect to the European Union's allegation that the Panel erred in making a recommendation even though the measure at issue had expired, Indonesia argued that the expiry of the measure at issue had occurred too late in the proceedings to be taken into account by the Panel. Therefore, the Panel did not err in making a recommendation with respect to the measure at issue.

The Appellate Body began by noting that it was uncontested by the participants that the measure at issue expired in November 2016, following issuance of the final report to the parties but before circulation of the Panel Report to WTO Members. The Appellate Body then recalled that appellate review is governed primarily by Article 17 of the DSU. In particular, the Appellate Body noted that Article 17.4 stipulates that the parties to the dispute may appeal a panel report, and that it does not impose limitations on parties' rights to appeal a panel report.

The Appellate Body reviewed various arguments raised by the European Union and noted that they reflected different permutations of the proposition that a dispute no longer exists after the withdrawal of the measure at issue. However, the Appellate Body recalled that in past cases it had expressly rejected the proposition that the repeal of a measure necessarily constitutes a "satisfactory settlement of the matter", and noted that benefits accruing to a Member may be impaired by measures whose legislative basis has expired. In addition, the Appellate Body recalled that it had recognized the fact that a measure has expired is not dispositive of the question of whether a panel can address claims in respect of that measure. The Appellate Body considered that the expiry of the measure at issue did not, in itself, render it unnecessary for the Appellate Body to rule on Indonesia's appeal. The Appellate Body also pointed to the discretion enjoyed by panels to decide how to take into account subsequent modifications to, or the repeal of, the measure at issue, including the discretion to make findings with respect to an expired measure, or not. The Appellate Body rejected a number of additional arguments made by the European Union based on various paragraphs of Article 3 of the DSU. The Appellate Body highlighted that, in its appeal, Indonesia did not request an interpretation in the abstract. Rather, Indonesia requested the reversal of the Panel's specific finding that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement. The Appellate Body considered that, in seeking review of the Panel's interpretation of a specific provision of the covered agreements, Indonesia's appeal was no different from other appeals brought before the Appellate Body.

Ultimately, the Appellate Body found that, in appealing the Panel Report notwithstanding the expiry of the measure at issue, Indonesia did not act inconsistently with Article 3 of the DSU. Accordingly, the Appellate Body rejected the European Union's requests to find it unnecessary to rule on the matter raised in Indonesia's appeal or to declare moot and of no legal effect all of the findings and conclusions made by the Panel.

Turning to the question of whether the Panel erred in making a recommendation with respect to an expired measure, the Appellate Body noted that Article 19.1 of the DSU stipulates that panels and the Appellate Body "shall recommend" that the Member concerned bring the measure into conformity with the covered agreements when they conclude that a measure is inconsistent with a covered agreement and attached significance to the fact that Article 19.1 is expressed in mandatory terms.

At the same time, the Appellate Body recalled that it had previously found that the expiry of the measure at issue may affect what recommendations a panel may make. However, the Appellate Body noted that prior cases differed from the present case in that the Panel in the present case made *no* finding on, or mention of, the expiry of the measure at issue in the Panel Report. The Appellate Body considered that, absent any finding or acknowledgement by the Panel that the measure at issue was no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements.

Accordingly, the Appellate Body concluded that the Panel did not err in making a recommendation pursuant to Article 19.1 of the DSU.

3.4.4 Suspension of the work of the Panel – Article 12.12 of the DSU

The European Union requested the Appellate Body to reverse the Panel's findings that: (i) the European Union had not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU; (ii) the work of the Panel had not been suspended; and (iii) the authority for the establishment of this Panel had not lapsed.

The Appellate Body began by noting that the European Union's claim of error on appeal raised the question of whether panel proceedings may be suspended before panel composition has been completed. The Appellate Body interpreted Article 12.12 in the context of the DSU and concluded that a panel's work can be suspended pursuant to Article 12.12 only once the panel has been composed.

The Appellate Body noted that Article 12.12 does not further qualify or elaborate upon the word "panel". In particular, the provision does not refer to an "established" or "composed" panel. The first sentence of Article 12.12 does, however, identify both a request from the complaining party and the exercise of discretion by a panel in the form of a decision to suspend its work as conditions for the suspension of panel proceedings. The Appellate Body also saw merit in the observation made by Indonesia and the United States that, in general, the articles of the DSU proceed sequentially, from the initial phases of the dispute settlement process through to its final stages, and that, therefore, the word "panel" in any given provision must be interpreted taking into consideration the location of the provision within the overall sequence and structure of the DSU. In this vein, the Appellate Body noted that Article 12.12 of the DSU relating to the suspension of panel proceedings comes after Article 8 relating to the composition of panels. The Appellate Body concluded that the fact that Article 12.12 envisages that discretion be exercised, as well as the placement of Article 12.12 in the overall structure of the DSU, suggests that only a composed panel can decide to suspend panel proceedings.

Turning to the Panel's analysis, the Appellate Body noted that the Panel had not addressed the legal question of whether panel proceedings may be suspended before panel composition has been completed. Instead, the Panel had focused on the question of whether the European Union had established that Indonesia's 13 July 2013 email requesting "to suspend the meeting" constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU. However, the Appellate Body found that any request contained in the communication from Indonesia to the Panel could not have triggered the beginning of the 12-month period provided for under Article 12.12 because no panel had been composed that could have taken a decision on a request for suspension.

In light of these considerations, the Appellate Body considered that the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed. Thus, the Appellate Body declared moot and of no legal effect the Panel's first finding, namely, that the European Union had not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12.

At the same time, the Appellate Body explained that the Panel proceedings could not have been suspended at that point, because the Panel had not yet been composed. For this reason, the Appellate Body considered that the Panel did not err in making its second and third findings,

namely, that the Panel's work had not been suspended and that its authority had not lapsed, and consequently the Appellate Body upheld these findings.

3.4.5 The Panel's treatment of certain information as BCI

The European Union argued that, with respect to five paragraphs of its Report, the Panel acted inconsistently with Articles 10.1, 11, 12.1, and 12.7 of the DSU, as read together with paragraphs 1 and 9 of the Panel's BCI Procedures, by erroneously treating certain information as BCI. The European Union also contended that the Panel consequently erred by redacting that information from its Report. The European Union alleged that the information was already in the public domain, and the Panel's BCI Procedures precluded the Panel from treating as BCI information in the public domain.

The European Union's appeal concerned five references in the Panel Report to information that the Panel had treated as BCI pertaining to details of the relationship between PT Musim Mas and ICOF-S. The Appellate Body was of the view that, in light of the Panel's consideration of the appropriate extent of BCI protection based upon the parties' interim review comments, the company-specific nature of the information, and the expiry of the measure at issue, an examination of whether the Panel should have included the information in question in the circulated version of its Report was not necessary to secure a positive solution to this dispute. For these reasons, the Appellate Body found it unnecessary to rule on whether the Panel erroneously designated certain information as BCI and consequently erred by redacting that information from the Panel Report.

3.5 Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R and WT/DS478/AB/R

This dispute concerns 18 measures imposed by Indonesia on the importation of horticultural products as well as animals and animal products. These 18 measures comprise: (i) discrete elements of Indonesia's import licensing regime for horticultural products (Measures 1 through 8); (ii) Indonesia's import licensing regime for horticultural products as a whole (Measure 9); (iii) discrete elements of Indonesia's import licensing regime for animals and animal products (Measures 10 through 16); (iv) Indonesia's import licensing regime for animals and animal products as a whole (Measure 17); and (v) the requirement whereby importation of horticultural products, animals, and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand (Measure 18).

These 18 measures were challenged as quantitative import restrictions on agricultural products by New Zealand and the United States. Before the Panel, New Zealand and the United States claimed that the 18 measures imposed by Indonesia are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Moreover, they claimed that Measures 6, 14, and 15 are inconsistent with Article III:4 of the GATT 1994. Finally, to the extent that these measures are subject to the disciplines of the Agreement on Import Licensing Procedures (Import Licensing Agreement), they claimed that Measures 1 and 11 are inconsistent with Article 3.2 of the Import Licensing Agreement, or, alternatively, with Article 2.2 a) of that Agreement.

Indonesia requested the Panel to reject these claims in their entirety. In particular, Indonesia argued that the measures at issue are not inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In addition, Indonesia raised defences under Article XX(a), (b), and (d) of the GATT 1994 with respect to the claims of violation under Articles XI:1 and III:4 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia also invoked Article XI:2(c)(ii) of the GATT 1994 as a defence with respect to the claims of violation under Article XI:1 concerning Measures 4, 7, and 16.

As a preliminary matter, the Panel addressed the issue of the order of analysis of New Zealand's and the United States' claims. The Panel noted that all 18 measures at issue had been challenged under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, with New Zealand and the United States bringing identical claims under both provisions. The Panel considered that Article XI:1 of the GATT 1994 is the provision that deals specifically with quantitative restrictions. The Panel further observed that Article 4.2 of the Agreement on

Agriculture, on the contrary, has a broader scope and refers to measures other than quantitative restrictions. The Panel thus decided to commence its examination with the claims under Article XI:1, rather than under Article 4.2.

The Panel added that, if the measures were to be justified under Article XX of the GATT 1994, it would not need to analyse the claims under Article 4.2 of the Agreement on Agriculture. This is because the second part of footnote 1 to Article 4.2 excludes from the scope of this provision those measures maintained under other general, non-agriculture-specific provisions of the GATT 1994. In this context, the Panel noted Indonesia's argument that, because New Zealand and the United States had failed to provide evidence that the challenged measures are not justified under Article XX, the Panel could not, as a matter of law, rule in the co-complainants' favour under Article 4.2. The Panel, however, considered that it was for Indonesia to establish the defence under Article XX of the GATT 1994.

Turning to its analysis under Article XI:1, the Panel addressed Indonesia's argument under Article XI:2(c)(ii) of the GATT 1994 that this provision excludes Measures 4, 7, and 16 from the scope of Article XI:1. The Panel disagreed with Indonesia and considered that Indonesia could not rely upon Article XI:2(c)(ii) to exclude Measures 4, 7, and 16 from the scope of Article XI:1 because, with respect to agricultural measures, Article XI:2(c) has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture.

The Panel then found that each of the 18 measures at issue is inconsistent with Article XI:1 of the GATT 1994 because, by virtue of its design, architecture, and revealing structure, it constitutes either a restriction having a limiting effect on importation or a prohibition on importation.

Specifically, the Panel found that:

a. Measures 1 through 7, 9, and 11 through 17 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a restriction having a limiting effect on importation;

b. Measures 8 and 10 are inconsistent with Article XI:1 because, by virtue of their design, architecture, and revealing structure, they constitute a prohibition on importation; and

c. Measure 18 is inconsistent *as such* with Article XI:1 because, by virtue of its design, architecture, and revealing structure, it constitutes a restriction having a limiting effect on importation.

Having found that Indonesia's measures are inconsistent with Article XI:1, the Panel addressed Indonesia's defences under Article XX(a), (b), or (d) of the GATT 1994. The Panel found that Indonesia had failed to demonstrate that the 18 measures at issue are justified under Article XX. Specifically, the Panel found that:

a. Indonesia had failed to demonstrate that Measures 1, 2, and 3 are justified under Article XX(d) of the GATT 1994;

b. Indonesia had failed to demonstrate that Measure 4 is justified under Article XX(b) of the GATT 1994;

c. Indonesia had failed to demonstrate that Measures 5 and 6 are justified under Article XX(a), (b), and (d) of the GATT 1994;

d. Indonesia had failed to demonstrate that Measure 7 is justified under Article XX(b) of the GATT 1994;

e. Indonesia had failed to demonstrate that Measure 8 is justified under Article XX(b) of the GATT 1994; and

f. Indonesia has failed to demonstrate that Measures 9 through 18 are justified under Article XX(a), (b), or (d) of the GATT 1994, where appropriate.

In light of these findings under Articles XI:1 and XX of the GATT 1994, the Panel exercised judicial economy under Article 4.2 of the Agreement on Agriculture. The Panel indeed declined to rule on the claims under Article 4.2 because it considered that its findings pertaining to the inconsistency of Measures 1 through 18 with Article XI:1 and the absence of justification under Article XX(a), (b), or (d) ensured the effective resolution of this dispute.

The Panel equally declined to rule on New Zealand's claims under Article III:4 of the GATT 1994 and the co-complainants' claims under Article 3.2 of the Import Licensing Agreement because its earlier findings in respect of the relevant measures ensure the effective resolution of this dispute. The Panel further declined to rule on the United States' claims under Article III:4 of the GATT 1994 and the co-complainants' claims under Article 2.2(a) of the Import Licensing Agreement because the United States and the co-complainants, respectively, had failed to make a *prima facie* case.

Indonesia filed its appeal on 17 February 2017, and raised four main claims of legal error by the Panel:

a. First, Indonesia challenged the Panel's decision to commence its analysis with the claims under Article XI:1 of the GATT 1994, rather than under Article 4.2 of the Agreement on Agriculture.

b. Second, Indonesia claimed that the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

c. Third, Indonesia submitted an alternative claim of legal error. Indonesia claimed that, if the Appellate Body were to find that the Panel did not err by addressing the claims under Article XI:1 of the GATT 1994, rather than the claims under Article 4.2 of the Agreement on Agriculture, then the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture as far as agricultural measures are concerned.

d. Finally, Indonesia claimed that the Panel erred in finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Article XX of the GATT 1994. In this context, Indonesia challenged the sequence of analysis applied by the Panel under Article XX in respect of these measures.

New Zealand and the United States did not appeal any of the Panel findings, and the Appellate Body addressed Indonesia's four sets of claims in turn in its Report. In so doing, the Appellate Body also addressed Indonesia's related claims that the Panel committed errors under Article 11 of the DSU.

3.5.1 The Panel's decision to commence its legal analysis with the claims under Article XI:1 of the GATT 1994

On appeal, Indonesia claimed that the Panel erred by deciding to commence its legal analysis with the claims raised under Article XI:1 of the GATT 1994. Indonesia argued that the Panel should have applied Article 21.1 of the Agreement on Agriculture to determine that Article 4.2 of that Agreement was *lex specialis*, so that Article 4.2 should have been applied to the exclusion of Article XI:1. According to Indonesia, the Panel should have found that the Agreement on Agriculture prevails over the GATT 1994, because Article XI:1 and Article 4.2 concern the same matter, and Article 4.2 contains provisions dealing specifically with the measures at issue from both a substantive and a procedural perspective. Indonesia thus requested the Appellate Body to reverse the Panel's decision to start its analysis with Article XI:1 and the Panel's findings that the 18 measures at issue are inconsistent with this provision.

First, the Appellate Body examined the relationship between Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture in light of Article 21.1 of the Agreement on Agriculture.

Pursuant to Article 21.1 of the Agreement on Agriculture, "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]." The Appellate Body noted Indonesia's argument

that Article 21.1 does not require a "conflict", but means that the Agreement on Agriculture applies to the exclusion of the GATT 1994 to the extent that the Agreement on Agriculture contains provisions dealing specifically with the same matter. The Appellate Body recalled its findings in *EC – Export Subsidies on Sugar* and *EC – Bananas III*, in which it interpreted Article 21.1 to mean that the provisions of the Agreement on Agriculture prevail in the event of a "conflict" between provisions of the Agreement on Agriculture and provisions of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A. Therefore, in light of this jurisprudence, the Appellate Body disagreed with Indonesia's interpretation of Article 21.1.

The Appellate Body assessed next whether Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are in conflict. Although Article 4.2 generally applies to a broader range of measures and a narrower scope of products than Article XI:1, the Appellate Body observed that both provisions prohibit Members from maintaining quantitative import restrictions on agricultural products. The Appellate Body further observed that a measure constituting a quantitative import restriction on agricultural products would be inconsistent with both Article XI:1 and Article 4.2; and that such findings of inconsistency would result in the same implementation obligations under either provision, that is, to bring the measure into conformity with those provisions.

The Appellate Body concluded that, to the extent that they apply to the claims challenging the 18 measures at issue as quantitative restrictions, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture contain the same substantive obligations, namely, the obligation not to maintain quantitative import restrictions on agricultural products. In other words, had the Panel decided to commence its analysis with Article 4.2 rather than Article XI:1, it would have, in essence, conducted the same analysis to determine whether the 18 measures at issue are "quantitative import restrictions" within the meaning of Article 4.2. Referring to its conclusion regarding Indonesia's second claim on appeal, the Appellate Body added that Article XI:1 and Article 4.2 are subject to the same exceptions under Article XX of the GATT 1994, and the same burden of proof applies under Article XX, regardless of whether it is invoked in relation to Article XI:1 or Article 4.2.

On this basis, the Appellate Body considered that Article 4.2 of the Agreement on Agriculture does not apply to the exclusion of Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Rather, both provisions contain the same substantive obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively.

Second, the Appellate Body examined whether the Panel should have followed a mandatory sequence of analysis between Article 4.2 and Article XI:1. As recalled above, the Panel decided to begin its analysis under Article XI:1, because it considered that Article XI:1 is more specific with respect to quantitative restrictions than Article 4.2. Referring to its reports in *Canada – Wheat Exports and Grain Imports* and *Canada – Renewable Energy / Canada – Feed-in Tariff Program,* the Appellate Body considered that the Panel may have been required to follow a particular sequence if, for instance, addressing Article 4.2 first would have led to a different substantive outcome than commencing the analysis with Article XI:1.

Having recalled that the obligations of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are substantively and procedurally the same insofar as they apply to the measures at issue, the Appellate Body considered that the analysis that the Panel would have conducted under Article 4.2 as to whether the measures at issue are prohibited quantitative import restrictions is the same as the analysis that the Panel had conducted under Article XI:1 of the GATT 1994. The Appellate Body specified that, had the Panel commenced its analysis with Article 4.2, it would have equally examined whether the measures are justified under Article XX of the GATT 1994, as provided for in footnote 1 to Article 4.2, and reached the same conclusions under Article XX. Furthermore, had the Panel commenced its analysis with Article 4.2 and found that the measures at issue are inconsistent with that provision and not justified under Article XX of the GATT 1994, it could have equally chosen to exercise judicial economy with respect to the claims under Article XI:1. The Appellate Body therefore considered that commencing the analysis with Article XI:1 rather than with Article 4.2 had no repercussions for the substance of the analysis.

In addition, while the Appellate Body noted Indonesia's argument that the Panel should have concluded that Article 4.2 applies more specifically to agricultural products, it considered that reaching a conclusion as to the relative specificity of either Article XI:1 or Article 4.2 would not be determinative for resolving the dispute. The Appellate Body concluded that there is no mandatory sequence of analysis between Article 4.2 and Article XI:1 in this dispute. Rather, the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion.

Third, turning to Indonesia's claim that the Panel acted inconsistently with Article 11 of the DSU because it failed to make an objective assessment of the applicability of Article 4.2 of the Agreement on Agriculture, the Appellate Body noted that Indonesia essentially reiterated some of the arguments it presented in support of its substantive claim. According to the Appellate Body, Indonesia hence failed to present any arguments under Article 11 of the DSU that were separate from the ones it had submitted in support of its substantive claim. The Appellate Body therefore rejected Indonesia's claim under Article 11 of the DSU.

In light of the foregoing, the Appellate Body upheld the Panel's decision, in paragraph 7.33 of the Panel Report, to commence its examination with Article XI:1 of the GATT 1994.

3.5.2 Whether the Panel erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture

The Appellate Body next addressed Indonesia's claim on appeal regarding the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture.

Before turning to the substance of Indonesia's claim, the Appellate Body noted that New Zealand and the United States submitted that, if the Appellate Body were to uphold the Panel's findings under Article XI:1 of the GATT 1994, it need not make a finding with respect to the issue of the burden of proof under Article 4.2 of the Agreement on Agriculture for the purpose of resolving the present dispute. Nevertheless, the Appellate Body decided to address this issue, stating that it is intertwined with the issue of the order of analysis of the claims under Article XI:1 and Article 4.2 and their dispositions. According to the Appellate Body, if there is a difference between Article XI:1 and Article 4.2 in terms of the burden of proof with respect to Article XX of the GATT 1994, the Appellate Body would then be required to assess further whether such a difference amounts to a "conflict" within the meaning of Article 21.1 of the Agreement on Agriculture in order to determine whether the Panel erred in applying Article XI:1, and not Article 4.2, to the challenged measures. The Appellate Body further noted that, if there is such a difference between Article XI:1 and Article 4.2, the Appellate Body would also be required to assess whether starting the analysis with Article XI:1, rather than with Article 4.2, resulted in a failure to structure the analysis in the proper logical sequence that had repercussions for the substance of the analysis itself.

As regards the substance of Indonesia's claim, Indonesia submitted that the burden of proof under Article XX of the GATT 1994 must shift to the complainant in the context of Article 4.2 of the Agreement on Agriculture. Indonesia noted that, while the first part of footnote 1 to Article 4.2 describes the type of measures that are subject to the obligation under Article 4.2, the second part of footnote 1 provides that measures maintained under "general, non-agriculture-specific provisions of GATT 1994", including Article XX, are not inconsistent with Article 4.2. Accordingly, in Indonesia's view, a party presenting a claim under Article 4.2 is required to establish that the measure falls within the "scope" of this provision by addressing *both* the first and second parts of footnote 1 to Article 4.2.

The Appellate Body first recalled that Article 4.2 prohibits Members from maintaining, resorting to, or reverting to "measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 to Article 4.2 in turn provides that:

> [t]hese measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties … but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific

provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

The Appellate Body observed that the first part of footnote 1 contains an "illustrative list" of the categories of measures prohibited under Article 4.2 and that the second part provides that certain other measures are not included. The Appellate Body further observed that Article XX of the GATT 1994 is one of the "other general, non-agriculture-specific provisions of GATT 1994" referred to in the second part of footnote 1.

The Appellate Body then recalled the general principle expressed in *US – Wool Shirts and Blouses* that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". The Appellate Body also noted that it has been well established through WTO jurisprudence that Article XX of the GATT 1994 is an affirmative defence, with respect to which the respondent bears the burden of establishing a *prima facie* case. On this basis, the Appellate Body proceeded to assess whether the allocation of the burden of proof as it applies under Article XX is changed by virtue of the incorporation of this provision into Article 4.2 through the reference contained in the second part of footnote 1 to Article 4.2.

The Appellate Body observed that Article 4.2 of the Agreement on Agriculture and footnote 1 thereto do not contain any express indication that Article XX of the GATT 1994 is no longer an affirmative defence when it is applied through the reference in the second part of footnote 1. Nor does Article 4.2 or footnote 1 expressly provide that the complainant bringing a claim under this provision must establish that the challenged measure is not maintained under Article XX or under any of the other "provisions" referred to in the second part of footnote 1. The Appellate Body noted in particular that, while the phrase "but not" in the second part of footnote 1 makes clear that "measures" prohibited under Article 4.2 do not include measures maintained under one of the "provisions" mentioned in the second part of footnote 1, this phrase is neutral as to the allocation of the burden of proof under these "provisions", including under Article XX.

The Appellate Body noted Indonesia's argument that a party presenting a claim under Article 4.2 is required to establish that the measure falls within the "scope" of this provision by addressing *both* the first and second parts of footnote 1. The Appellate Body disagreed with Indonesia, stating that the characterization of a particular provision as a "derogation limiting the scope" does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision. The Appellate Body also disagreed with Indonesia that the absence of explicit language such as "exceptions" or "exemptions" in Article 4.2 supports the conclusion that Article XX cannot be an "exception" in the context of Article 4.2.

In light of the above, the Appellate Body considered that there is no textual basis for the proposition that the burden of proof under Article XX of the GATT 1994 is shifted to the complainant by virtue of the incorporation of this provision into the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture. Rather, in the Appellate Body's view, given that footnote 1 to Article 4.2 incorporates Article XX by reference without modifying the nature of this provision as an affirmative defence, it would follow that the burden of proof under Article XX remains with the respondent in the context of Article 4.2. The Appellate Body considered this interpretation to be consistent with the general principle that the burden of proof rests upon the party who asserts the *affirmative* of a particular claim or defence, because it is the respondent who benefits from a showing that the measure *additionally* satisfies the requirements of Article XX and therefore is not prohibited under Article 4.2.

The Appellate Body also recalled that in *US – Clove Cigarettes* it had found in the context of Article 2.12 of the Agreement on Technical Barriers to Trade (TBT Agreement) that the burden of proof in respect of a particular provision should be assessed in light of the overarching logic and function of that provision. The Appellate Body considered that the overarching logic and function of Article XX of the GATT 1994 of striking a balance between Members' obligations and rights remain the same in the context of Article 4.2 of the Agreement on Agriculture, in that Article XX recognizes Members' rights to pursue certain legitimate policy objectives as juxtaposed to their obligations under Article 4.2 to liberalize trade by converting certain market access barriers into ordinary customs duties.

Finally, the Appellate Body addressed Indonesia's argument that the allocation of the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture should be informed by certain other provisions of the covered agreements, including Articles 2.2 and 2.4 of the TBT Agreement. According to Indonesia, these provisions convert exceptions under Article XX into positive obligations, thereby shifting the burden of proof to the complainant. The Appellate Body disagreed with Indonesia that Articles 2.2 and 2.4 provide relevant context for examining the allocation of the burden of proof under Article XX referred to in footnote 1 to Article 4.2. The Appellate Body stated that there is no textual basis to characterize Article 2.2 or Article 2.4 as converting exceptions under Article XX into positive obligations, as neither of these provisions contains a specific reference to Article XX. In addition, the Appellate Body observed that Article 2.2 is dissimilar to the second part of footnote 1 to Article 4.2 because, while Article 2.2 is a positive rule establishing an obligation in itself, the function of the second part of footnote 1 is to *exempt* certain measures from the prohibition of certain market access barriers. The Appellate Body also disagreed that Article 2.4 is similar to the second part of footnote 1 to Article 4.2, stating that, unlike the second part of footnote 1, Article 2.4 recognizes an "autonomous right" of a Member to set its own level of protection.

Having concluded that Indonesia had failed to demonstrate that the burden of proof under Article XX of the GATT 1994 is modified in the context of Article 4.2 of the Agreement on Agriculture, the Appellate Body turned to Indonesia's related claim on appeal that the Panel had acted inconsistently with Article 11 of the DSU because it had failed to make an objective assessment of which party bears the burden of proof with respect to the second element of footnote 1 to Article 4.2. The Appellate Body rejected Indonesia's claim, stating that Indonesia had not put forward specific arguments in support of its claim under Article 11 that were different from the arguments in support its claim under Article 4.2 and footnote 1 thereto.

In light of the foregoing, the Appellate Body upheld the Panel's finding, in paragraph 7.34 of the Panel Report, that the burden of proof under Article XX of the GATT 1994 referred to in the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture rests on Indonesia.

3.5.3 Indonesia's alternative claim that the Panel erred in finding that Article XI:2(c) of the GATT 1994 has been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture

Next, the Appellate Body addressed Indonesia's alternative claim on appeal that, if the Appellate Body were to find that the Panel did not err by addressing the claims under Article XI:1 of the GATT 1994, rather than the claims under Article 4.2 of the Agreement on Agriculture, then the Panel erred in finding that Indonesia cannot invoke Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7, and 16 from the scope of Article XI:1 because Article XI:2(c) has been rendered "inoperative" with respect to agricultural measures by Article 4.2.

The Appellate Body first addressed the preliminary issue raised by the United States that the Appellate Body need not reach a finding with respect to Indonesia's alternative claim. The United States argued that making findings on the interpretation of Article XI:2(c) of the GATT 1994 is not necessary to resolve the present dispute because Indonesia had not requested completion of the legal analysis, and Indonesia had not even attempted to establish before the Panel that its measures are maintained under Article XI:2(c)(ii). The Appellate Body observed that Indonesia's appeal concerning the legal status of Article XI:2(c) falls within the scope of appellate review stipulated in Articles 17.6 and 17.12 of the DSU. The Appellate Body further stated that, while its ruling on Article XI:2(c) may not directly change the recommendations and rulings by the DSB with respect to Article XI:1 of the GATT 1994, the question as to whether Indonesia can in the future invoke Article XI:2(c)(ii) to justify or exempt any compliance measure taken with respect to Measures 4, 7, and 16 could affect the manner in which it can comply with the recommendations and rulings by the DSB. On this basis, the Appellate Body decided to address the substance of Indonesia's alternative claim.

The Appellate Body began its analysis by recalling the Panel's finding. The Panel considered that, while the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture exempts measures maintained under "general, non-agriculture-specific provisions of GATT 1994" from the prohibition of quantitative import restrictions under Article 4.2, measures maintained under Article XI:2(c) of the GATT 1994 are not exempted because it is an *agriculture-specific* provision.

On this basis, the Panel found that Article XI:2(c) has been rendered "inoperative" with respect to agricultural measures because, by virtue of Article 21.1 of the Agreement on Agriculture, the provisions of the GATT 1994, including Article XI:2(c), "shall apply subject to" the provisions of that Agreement, including Article 4.2. On appeal, Indonesia argued that the Panel's interpretation of Article XI:2(c) is in error because the Panel should have focused on the *first* part of footnote 1 rather than its *second* part in reaching its conclusion as to the applicability of Article XI:2(c). Indonesia asserted in particular that Article XI:2(c) informs the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2, such that agricultural measures that satisfy the requirements of Article XI:2(c) are not "quantitative import restrictions" within the meaning of the first part of footnote 1. Thus, in Indonesia's view, the prohibition of quantitative import restrictions under Article 4.2 does not conflict with the permission of certain import restrictions under Article XI:2(c).

The Appellate Body observed that, while the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture is not defined in that Agreement, a plain reading of this term suggests that it refers to any restriction on the importation of an agricultural product that is related to its quantity. The Appellate Body further recalled that Article XI:1 "lays down a general obligation to eliminate quantitative restrictions". Paragraph 2 of Article XI, in turn, provides that "[t]he provisions of paragraph 1 of this Article shall not extend to" the types of measures stipulated in subparagraphs 2(a) to 2(c). As relevant in this appeal, Article XI:2(c)(ii) exempts from the obligation under Article XI:1 those import restrictions on agricultural and fisheries products that are necessary to the enforcement of certain governmental measures that operate to remove a temporary surplus of certain domestic products.

The Appellate Body noted that Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 contain essentially the same prohibitions of *quantitative restrictions* as far as the importation of agricultural products is concerned. The Appellate Body thus agreed that the term "quantitative import restrictions" in the first part of footnote 1 to Article 4.2 should be interpreted in light of the prohibition of quantitative restrictions under Article XI:1. With respect to the relationship between Article 4.2 and Article XI:2(c), however, the Appellate Body observed that there is no express language in Article XI or Article 4.2 that suggests that the derogations under Article XI:2(c) are relevant not only to the prohibition under Article XI:1 but also to the prohibition under Article 4.2. In particular, the Appellate Body noted that, while the second part of footnote 1 provides that "measures" prohibited under Article 4.2 do not include measures maintained under "general, non-agriculture-specific provisions of GATT 1994", Article XI:2(c) does not qualify as a "general, non-agriculture-specific provision[]" because its application is limited to *agricultural* and fisheries products in express terms.

The Appellate Body also noted that, while Article XI:2 of the GATT 1994 provides that the obligation under Article XI:1 shall not extend to "[i]mport restrictions" mentioned in subparagraph 2(c), these "[i]mport restrictions" are not disqualified from being *quantitative restrictions*. The Appellate Body considered that, because the word "quantitative" in the title of Article XI informs the interpretation of the words "prohibitions" and "restrictions" in both Article XI:1 and Article XI:2, the reference to "[i]mport restrictions" in Article XI:2(c) is clearly a reference to a certain specified class of measures that fall within *quantitative (import) restrictions*, but are exempted from the *prohibition* under Article XI:1. In the Appellate Body's view, this confirms the interpretation that the term "quantitative import restrictions" in footnote 1 to Article 4.2 of the Agreement on Agriculture is broad enough to encompass *both* quantitative (import) restrictions falling under Article XI:1 *and* "[i]mport restrictions" referred to in Article XI:2(c).

In light of the foregoing, the Appellate Body rejected Indonesia's interpretation that measures maintained under Article XI:2(c) of the GATT 1994 are not "quantitative import restrictions" within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. The Appellate Body then recalled that the second part of footnote 1 excludes agriculture-specific exceptions such as Article XI:2(c) from measures that are not prohibited under Article 4.2 and that accordingly the "prohibition" in Article 4.2 is in conflict with the "permission" under Article XI:2(c). The Appellate Body thus found that, by virtue of Article 21.1 of the Agreement on Agriculture, which provides that the provisions of the GATT 1994 "shall apply subject to" those of the Agreement on Agriculture, Article XI:2(c) cannot be applied to justify or exempt measures that fall within the prohibition of quantitative import restriction under Article 4.2, because there is a conflict between Article XI:2(c) and Article 4.2.

The Appellate Body further noted that, by stating that "Indonesia cannot rely upon Article XI:2(c)(ii) of the GATT 1994 to exclude Measures 4, 7 and 16 from the scope of Article XI:1" in paragraph 7.60 of its Report, the Panel had considered that Indonesia cannot rely on Article XI:2(c) not only with respect to the co-complainants' claims under Article 4.2 of the Agreement on Agriculture, but also with respect to their claims under Article XI:1 of the GATT 1994. In this regard, the Appellate Body pointed to the fact that Indonesia had not demonstrated that Measures 4, 7, and 16 satisfy all the elements of Article XI:2(c)(ii), and thus the Panel's findings of inconsistency of these measures with Article XI:1 would remain undisturbed. The Appellate Body further observed that the Panel's findings that Measures 4, 7, and 16 are *quantitative restrictions* on the importation of agricultural products inconsistent with Article XI:1 would, without requiring much more, lead to the conclusion that these measures also fall within the prohibition of quantitative import restrictions under Article 4.2. The Appellate Body considered that, under these circumstances, Indonesia cannot maintain, resort to, or revert to Measures 4, 7, or 16 regardless of whether Article XI:2(c) is being invoked in relation to Article XI:1 or Article 4.2. The Appellate Body thus concluded that its finding that Indonesia cannot rely on Article XI:2(c) to justify or exempt its measures with respect to the prohibition of quantitative import restrictions under Article 4.2 would provide sufficient guidance for the purpose of resolving the present dispute, including in relation to the implementation by Indonesia of the recommendations and rulings by the DSB.

Accordingly, the Appellate Body upheld the Panel's finding, in paragraph 7.60 of the Panel Report, to the extent that it stated that, by virtue of Article 21.1 of the Agreement on Agriculture, Article XI:2(c) of the GATT 1994 cannot be relied upon to justify or exempt measures falling within the prohibition of quantitative import restrictions under Article 4.2 of the Agreement on Agriculture.

3.5.4 Indonesia's claim under Article XX of the GATT 1994

Finally, the Appellate Body addressed Indonesia's claim that the Panel erred in finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Article XX of the GATT 1994. Indonesia challenged the sequence of analysis applied by the Panel under Article XX in respect of these measures because the Panel assessed these measures only under the *chapeau* of Article XX, without first examining whether these measures were provisionally justified under the relevant paragraphs of Article XX. Indonesia claimed that Article XX sets out a "mandatory" sequence of analysis, requiring panels to assess first, whether the measure at issue is provisionally justified under the relevant paragraphs of Article XX and, second, whether the provisionally justified measure complies with the requirements of the *chapeau* of Article XX.

The Appellate Body first recalled the relevant Panel's findings and conclusions. As the Appellate Body observed, the Panel assessed Measures 1 through 8 individually under the relevant paragraphs of Article XX and concluded that each of these measures is not provisionally justified under Article XX(a), (b), or (d). By contrast to its findings with respect to Measures 1 through 7, the Panel found that there is a relationship between Measure 8 and the protection of one of the objectives protected under Article XX, but that Measure 8 is not necessary to protect that objective. Unlike for Measures 1 through 7, the Panel considered that its finding that Measure 8 is not provisionally justified could be appealed. The Panel thus decided to assume *arguendo* that Measure 8 is provisionally justified and to examine whether this measure is applied in a manner consistent with the *chapeau* of Article XX. As the Appellate Body further observed, rather than focusing exclusively on Measure 8 in its analysis under the *chapeau*, the Panel in fact addressed Measures 1 through 17 under the *chapeau* of Article XX. The Panel found that Indonesia had failed to demonstrate that its import licensing regimes for horticultural products and animals and animal products as a whole, and the individual measures therein (i.e. Measures 1 through 17), are applied in a manner consistent with the *chapeau* of Article XX. In light of this finding, and without having assessed Measures 9 through 17 under the relevant paragraphs of Article XX, the Panel found that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b), or (d), as appropriate.

As the Appellate Body summarized, whereas the Panel assessed first whether Measures 1 through 8 are provisionally justified under Article XX(a), (b), or (d), the Panel assessed Measures 9 through 17 only under the *chapeau* of Article XX, and, on this sole basis, dismissed Indonesia's defences in respect of these measures.

The Appellate Body started its analysis by recalling that Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations. It then observed that Article XX is made up of two main parts: (i) ten paragraphs, which enumerate the various categories of governmental acts, laws, or regulations that WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization; and (ii) the *chapeau*, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX. The Appellate Body recalled that the function of the *chapeau* of Article XX is to prevent abuse of the exceptions specified in the paragraphs of that provision, and to ensure that a balance is struck between the right of a Member to invoke an exception under Article XX and the substantive rights of other Members under the GATT 1994.

Based on the relationship between the *chapeau* of Article XX and the paragraphs thereof, the Appellate Body considered that Article XX sets out a two-tier test, involving, first, an assessment of whether the measure falls under at least one of the ten exceptions listed in the paragraphs of Article XX, and, second, an assessment of whether the measure satisfies the requirements of the *chapeau* of that provision. According to the Appellate Body, this sequence reflects the fact that considering first the measure at issue under the applicable paragraphs of Article XX provides panels with the necessary tools to assess that measure under the *chapeau* of Article XX. In particular, the Appellate Body recalled that, in the analysis under the applicable paragraph, panels determine whether the objective of the measure at issue is one that is protected under the paragraphs of Article XX: if the measure is found to be provisionally justified under one of the paragraphs of Article XX, that objective is then relevant in assessing the measure under the *chapeau*. Moreover, the Appellate Body considered that other elements of the analysis under the applicable paragraphs of Article XX might be relevant in assessing a measure under the *chapeau*.

In support of its interpretation, the Appellate Body recalled that it had set out the sequence of analysis under Article XX in a number of previous reports. Moreover, the Appellate Body recalled its finding in *US – Shrimp* that this sequence "reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX". The Appellate Body also recalled that it had previously recognized, in *Brazil – Retreaded Tyres* and *EC – Seal Products*, that the objective that is found to justify provisionally the measure at issue under a paragraph of Article XX is a relevant consideration to assess whether there is "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" pursuant to the *chapeau* of Article XX.

The Appellate Body accepted that, depending on the particular circumstances of the case at hand, including the way in which the defence is presented, a panel might be able to identify and analyse the elements under the applicable paragraphs of Article XX that are relevant to assess the requirements of the *chapeau* even when the sequence of analysis under Article XX has not been followed. Therefore, as the Appellate Body further considered, depending on the particular circumstances of the case, a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the *chapeau*. However, the Appellate Body stressed the importance of following the normal sequence of analysis under Article XX. In particular, it considered that the task of assessing a particular measure under the *chapeau* so as to prevent the abuse of the exceptions provided for in Article XX is rendered difficult where the panel has not first identified and examined the specific exception at issue. The Appellate Body reiterated that following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau* in respect of a particular measure. Moreover, it considered that a finding that a Member has failed to comply with the requirements of the applicable paragraph of Article XX may not have the same implications regarding implementation as compared to a finding that a Member has failed to comply with the requirements of the *chapeau*.

Having made these observations, the Appellate Body noted Indonesia's contention that it would not be possible to complete the legal analysis to determine whether Measures 9 through 17 are in fact justified. The Appellate Body further noted that, even if it was to accede to Indonesia's request on appeal and reverse the Panel's findings and conclusions under Article XX in respect of Measures 9 through 17 without completing the legal analysis, the Panel's findings that these measures are inconsistent with Article XI:1 of the GATT 1994 would remain undisturbed.

For this reason, the Appellate Body considered that a ruling on Indonesia's claim under Article XX is unnecessary for the purposes of resolving this dispute. Therefore, the Appellate Body declined to rule on Indonesia's claim and declared the Panel's finding that Indonesia had failed to demonstrate that Measures 9 through 17 are justified under Articles XX(a), (b), or (d) of the GATT 1994, as appropriate, in paragraph 7.830 of the Panel Report, moot and of no legal effect.

4 PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

A total of 22 WTO Members participated at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated in 2017. 6 Members participated at least once as the main participants, and 20 Members participated, at least once, as third participants.

As of the end of 2017, 77 of the 164 WTO Members had participated in appeals in which Appellate Body reports were circulated between 1996 and 2017. Further information on the participation of WTO Members in appeals is provided in Annex 9.

5 PROCEDURAL ISSUES ARISING IN APPEALS

This section summarizes the procedural issues that were addressed in the Appellate Body reports circulated in 2017.

5.1 Treatment of confidential information

In *EU – Fatty Alcohols (Indonesia),* Indonesia requested the Appellate Body Division hearing the appeal to adopt specific modalities for the treatment of certain information designated as business confidential information (BCI). Indonesia expressed the view that the requested modalities are provided for under Article 18.2 of the DSU. The European Union indicated that it shared Indonesia's understanding of Article 18.2 of the DSU.

The Division informed the participants that it did not share their understanding of Article 18.2 of the DSU. The Division explained that, to the extent that the participants wanted the Division to undertake specific procedural steps not expressly contemplated under the DSU or the Working Procedures, they needed to request the specific treatment sought and explain why the information in question warranted special and additional protection.

Subsequently, Indonesia addressed a letter to the Division making two requests. First, Indonesia requested the Division to adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of BCI in the respective appellate proceedings. Second, Indonesia requested leave to modify the executive summaries of its appellant's submission by replacing certain information enclosed within double brackets of that executive summary with non-confidential information. Having received no objections from the European Union and the third participants, the Division issued a Procedural Ruling informing the participants of the decision to accord additional protection, on specified terms, to the following information in the respective appellate proceedings: (i) the information marked by the participants as BCI and enclosed within double brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and in the Panel record. In addition, the Division accepted Indonesia's request for leave to amend the executive summary of its appellant's submissions.

In *US – Anti-Dumping Methodologies (China)*, the Appellate Body noted that it had not received any request to adopt additional working procedures for the protection of BCI. At the oral hearing, the Presiding Member of the Division noted that, while the Panel record contained BCI, under the circumstances, the Division would assume that all information in this appeal shall be treated as confidential in accordance with Article 18.2 of the DSU. The Appellate Body noted that it had in the past highlighted the need to distinguish between the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU and the additional layer of protection of sensitive business information that a panel may choose to adopt. The Appellate Body further emphasized that, absent any request from the participants, procedures for additional protection of BCI do not apply in appellate proceedings. The Appellate Body noted that, because, in this dispute, no request for additional protection of BCI was made on appeal, only the general layer of confidentiality under the provisions of the DSU applied.

In *US – Tax Incentives*, the Appellate Body received a joint letter from the European Union and the United States requesting the Division hearing this appeal to adopt additional procedures to protect BCI. The European Union and the United States argued that BCI procedures were needed in these proceedings to avoid the undue risk of detrimental disclosure of particularly sensitive confidential information provided by the United States to the Panel.

The Division hearing the appeal decided to suspend the deadlines that would otherwise apply under the Working Procedures for the filing of submissions and other documents in this appeal and invited the third parties to comment in writing on the request by the European Union and the United States.

Australia submitted that it did not object to the joint request, provided that the proposed procedures were not implemented in a manner that unduly restricted the ability of third participants to gain reasonable access to information, or to engage in meaningful participation in the proceedings. Taking into account the arguments made by the participants and the comments by Australia, the Chair of the Appellate Body, on behalf of the Division, issued a

Procedural Ruling on adopting additional procedures to protect the confidentiality of BCI in these appellate proceedings. The Procedural ruling set out, in particular, rules for: (i) designating information as BCI; (ii) treatment of BCI by the Appellate Body Members and the Appellate Body Secretariat Staff; (iii) referring to BCI in the Appellate Body Report and removing any BCI that is inadvertently included in the report; (iv) designating "BCI-Approved Persons" by the participants and third participants and filing an objection to such a designation; (v) viewing of the BCI versions of the submissions and the Panel Report by the Third Participant BCI-Approved Persons; and (vi) protecting BCI from unauthorized disclosure at the oral hearing.[36]

5.2 Transition

On 30 June 2017, the Appellate Body informed the participants and third participants in *Indonesia – Import Licensing* and *EU – Fatty Alcohols (Indonesia)* that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Mr Ricardo Ramírez-Hernández who had been assigned to serve on the Divisions hearing these appeals before his term expired on 30 June 2017, to complete the disposition of these appeals.

On 24 November 2017, the Appellate Body informed the participants and third participants in several appeals that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB on the same day of the Appellate Body's decision to authorize Mr Peter Van den Bossche who had been assigned to serve on the Divisions hearing these appeals before his term expired on 11 December 2017, to complete the disposition of these appeals.

5.3 Time limits for the filing of written submissions

In *US – Anti-Dumping Methodologies (China)*, the United States requested the Appellate Body Division hearing the appeal to extend the time period for filing a Notice of Other Appeal and other appellant's submission, and as a consequence the time periods for filing appellees' and third participants' submissions, pursuant to Rule 16(2) of the Working Procedures. Having received comments from China and the European Union, the Division issued a Procedural Ruling, in which it came to the conclusion that strict adherence to the time periods set out in the Working Procedures would result in manifest unfairness in the particular circumstances of this case. Accordingly, the Division extended the time periods for filing a Notice of Other Appeal and other appellant's submission, if any; the appellee's submission(s); and the third participants' submissions. Subsequently, the United States informed the Appellate Body, China, and the third participants that it had decided not to file an other appeal.

In *US – Tax Incentives*, the Chair of the Appellate Body received a communication from the United States requesting that the Division hearing the appeal modify the deadline for the filing of the United States' appellant's submission. The United States maintained that exceptional circumstances in these proceedings justified an extension of the deadline. The Chair, on behalf of the Division hearing the appeal, invited the European Union and the third parties to comment on the United States' request. The European Union indicated that it did not, in principle, oppose the United States' request, but observed that the United States had had more than five months since receipt of the final Panel Report to prepare its appellant's submission, and that the time periods in this dispute were subject to the expedited treatment required by Article 4.12 of the SCM Agreement. The Chair, on behalf of the Division, issued a Procedural Ruling in which the Division observed that: (i) under normal circumstances – i.e. where the schedule had not been revised to allow for additional procedures to protect BCI – the United States would have already prepared and filed its appellant's submission; (ii) at the time of the request for additional procedures to protect BCI, the United States had not requested more time to prepare the contents of its appellant's submission; (iii) the scheduling of the deadlines for the United States' submissions in this appeal and in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* (DS316) would not impede its ability to finalize the submissions; (iv) there had already been a delay in the deadline due to the WTO's end-of-year closure; and (v) the

[36] Similar Procedural Rulings regarding the protection of BCI and HSBI (highly sensitive business information) were adopted in two other appeals that were pending in 2017: *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* and *United States – Large Civil Aircraft (Article 21.5 – EU)*.

United States itself had indicated that its appellant's submission would not be exceptionally lengthy. For these reasons, the Division declined the United States' request.

5.4 Request for harmonization of appeals schedules

In *US – Tax Incentives*, the Appellate Body received a letter from the European Union referring to an imminent appeal in this dispute, to the ongoing appeal in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* (DS316), and to the anticipated appeal in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* (DS353). The European Union requested that the schedules for these three appeals be harmonized to the greatest extent possible and that the hearings be sufficiently proximate in time, so that a particular matter would not be effectively disposed of in one appeal before the related matter is heard in one of the other appeals. The United States submitted that the European Union's request was not supported by the DSU or the Working Procedures, and would result in delays in the proceedings, but that it remained open to proposals to set deadlines for submissions and dates for oral hearings in a way that would allow the participants and third participants in each dispute to advocate effectively their positions on appeal, and for the Appellate Body to consider fully the issues raised. The Appellate Body issued a letter indicating that it would bear in mind the European Union's request, as well as the comments received, during the appellate proceedings in these three disputes.

5.5 Requests regarding the conduct of the oral hearing

In *Russia – Pigs*, the Appellate Body Division hearing this appeal received a letter from Russia requesting that the Division allow simultaneous English-to-Russian interpretation at the oral hearing. Russia explained that government officials intending to participate in the oral hearing did not have sufficient English skills to follow a hearing conducted in English and that it would bear all costs associated with such simultaneous interpretation.

The Division invited the European Union and the third participants to comment on Russia's request. The European Union and Australia opposed Russia's request, while Japan, Norway, and the United States had no objection to Russia providing English-to-Russian interpretation at its own expense. Brazil considered that such a request should be granted only in exceptional circumstances, and took no position on whether such circumstances were present in this case.

In its Procedural Ruling, the Division noted that Russia's request related to simultaneous English-to-Russian interpretation and that Russia did not request, and the Division did not address in its Ruling, Russian-to-English interpretation. The Division authorized Russia to include in its delegation at the oral hearing interpreters for the purpose of simultaneous interpretation from English to Russian and determined that, in the interest of orderly procedure in the conduct of this appeal, the interpretation facilities in the designated hearing room would be used for that purpose.

In *US – Tax Incentives*, the United States proposed additional procedures to protect BCI during the oral hearing and requesting public observation of the opening statements at the hearing. The European Union expressed its support for the United States' request, but noted that it should be for the Appellate Body to decide whether or not sufficient time remained to organize public observation of the opening statements. Australia also supported the United States' request. Brazil expressed its concern regarding the timeliness of the request and what measures might be needed to comply with the request. China submitted that the United States' request to exclude non-BCI-Approved Persons of the third participants from the question-and-answer session would significantly constrain the ability of third participants to engage fully in the oral hearing.

The Division hearing the appeal issued a Procedural Ruling indicating that, Third Participant BCI-Approved Persons were invited to attend the session of the oral hearing in which BCI may be discussed. The Division considered that this was sufficient to allow the third participants to be represented properly at the oral hearing. Regarding the United States' request concerning public observation of the opening statements at the oral hearing, the Division expressed its strong concern regarding the timeliness of that request. While deciding, by majority, to grant exceptionally the United States' request regarding public observation, as supported by the European Union, the Division also underscored the importance for participants wishing to request public observation of all or part of oral hearings in disputes to make such requests in a timely

fashion, taking into account the due process rights of other participants and third participants and the burden on WTO Secretariat resources. The Division thus adopted in its Procedural Ruling additional procedures on the conduct of the oral hearing, including procedures pertaining to public observation of the opening statements of Member delegations that had agreed to have their statements made public.[37]

5.6 Reasons for the extension of the time-period for the circulation of Appellate Body reports

The 90-day time-period stipulated in Article 17.5 of the DSU for the circulation of reports was exceeded in all the appellate proceedings in respect of which Appellate Body reports were circulated in 2017. For each appellate proceeding, the Appellate Body communicated to the DSB Chairman the reasons why it was not possible to circulate the Appellate Body report within the 90-day period.

These reasons included the substantial workload of the Appellate Body, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, the demands that these concurrent appeals place on the WTO Secretariat's translation services, and a shortage of staff in the Appellate Body Secretariat. In *US – Anti-Dumping Methodologies (China)*, there were additional constraints owing to the number and complexity of the issues raised in that and concurrent appellate proceedings. In *Russia – Pigs*, the Division also referred to the fact that the Appellate Body was at the time composed of five, rather than the full complement of seven, Appellate Body Members.

In *US – Tax Incentives*, the Appellate Body notified the Chair of the DSB that it would not be able to circulate its Report in this appeal within the 30-day or 60-day period set out in Article 4.9 of the SCM Agreement. This was due to a number of factors, including the time needed for adopting and complying with additional procedures to protect BCI, the consequent extensions of the deadlines for filing submissions, overlapping issues identified by the participants in parallel proceedings, as well as the substantial workload faced by the Appellate Body, the overlap in the composition of the Divisions hearing several concurrent appeals, and the shortage of staff in the Appellate Body Secretariat.

5.7 Correction of clerical errors

In *EU – Fatty Alcohols (Indonesia),* Indonesia requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct clerical errors in its Notice of Appeal. The Appellate Body Division hearing the appeal provided the European Union and the third participants with an opportunity to comment in writing on Indonesia's request. Having received no objections to Indonesia's request, the Division authorized Indonesia to correct the clerical errors in its Notice of Appeal.

[37] Similar Procedural Rulings regarding public observation of the opening statements of Member delegations that had agreed to have their statements made public were adopted for the oral hearings in another appeal pending in 2017: *EC – and certain member States – Large Civil Aircraft (Article 21.5 – US)*.

6 ARBITRATIONS UNDER ARTICLE 21.3(c) OF THE DSU

The DSU does not specify who shall serve as an arbitrator under Article 21.3(c) of the DSU to determine the reasonable period of time for the implementation by a WTO Member of the recommendations and rulings adopted by the DSB in dispute settlement cases. The parties to the arbitration select the arbitrator by agreement or, if they cannot agree on an arbitrator, the Director-General of the WTO appoints the arbitrator. In all but three arbitration proceedings, all those who have served as arbitrators pursuant to Article 21.3(c) have been current or former Appellate Body Members.[38] In carrying out arbitrations under Article 21.3(c), Appellate Body Members act in an individual capacity.

6.1 *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/RPT

On 26 September 2016, the DSB adopted the Appellate Body Report and the Panel Report in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*. This dispute concerned Korea's challenge of certain methodologies used by the United States in anti-dumping investigations and administrative reviews, as well as certain anti-dumping and countervailing measures imposed by the United States on imports of large residential washers from Korea.

Specifically, Korea challenged "as such" certain aspects of the Differential Pricing Methodology (DPM) used by the USDOC to assess the existence of "targeted" dumping (a pattern of export prices that differ significantly among different purchasers, regions, or time periods), and thus to determine whether to apply the exceptional W-T comparison methodology in calculating the dumping margin. Korea also challenged "as such" certain aspects of the methodologies used to calculate the margin of dumping when applying the W-T methodology (including the USDOC's use of "zeroing" under the W-T comparison methodology). In respect of the USDOC *Washers* anti-dumping investigation, Korea challenged "as applied" the USDOC's determination to apply the W-T methodology on the basis of: (i) its identification of a pattern of export prices which differ significantly among different purchasers, regions, or time periods; and (ii) its explanation as to why such differences could not be taken into account by the methodologies that are normally to be used to calculate the dumping margin. Korea also challenged "as applied" the USDOC's calculation of the margin of dumping in the *Washers* anti-dumping investigation. With regard to the United States' countervailing measures, Korea challenged the USDOC's determinations that two tax credit programmes were specific. Korea also challenged the manner in which the USDOC calculated the *ad valorem* subsidy rate for Samsung Electronics Co., Ltd under those programmes.

In respect of these claims, the Panel and the Appellate Body found: (i) certain aspects of the USDOC's anti-dumping methodologies (including the DPM and use of the W-T methodology) to be inconsistent "as such" with Articles 2.4, 2.4.2, and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994; (ii) certain actions by the USDOC in the *Washers* anti-dumping investigation to be inconsistent "as applied" with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement; and (iii) certain actions by the USDOC in the *Washers* countervailing duty investigation to be inconsistent "as applied" with Articles 2.1(c) and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

At the meeting of the DSB held on 26 October 2016, the United States informed the DSB of its intention to implement the DSB's recommendations and rulings in this dispute, and stated that it would need a reasonable period of time in which to do so. Consultations on the reasonable period of time for implementation pursuant to Article 21.3(b) of the DSU did not result in an agreement. Korea therefore requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. Korea and the United States were unable to

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

agree on an arbitrator. Korea therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. After consulting with the parties, the Director-General appointed Ms Claudia Orozco as the Arbitrator on 12 January 2017. Ms Orozco accepted this appointment on 16 January 2017.

The United States submitted that 21 months would be a reasonable period of time to implement the DSB's recommendations and rulings in this dispute. According to the United States, implementation would require three separate proceedings. The United States explained that it required a proceeding pursuant to Section 123 of the Uruguay Round Agreements Act (URAA) to address the "as such" findings of inconsistency concerning the DPM and the use of the W-T methodology in investigations and assessment proceedings. A second and a third proceeding, each pursuant to Section 129 of the URAA, would be needed to address the "as applied" findings relating to the *Washers* anti-dumping investigation and the *Washers* countervailing duty investigation, respectively. In addition, the United States asserted that the Section 129 proceeding concerning the *Washers* anti-dumping investigation could not be commenced until it had partially completed the Section 123 proceeding because the Section 123 proceeding would develop the revised approaches and methodologies to be applied in the Section 129 proceeding. In this connection, the United States indicated that Section 123 is a legal instrument that generally governs changes in an agency's practice when a panel or the Appellate Body finds that practice to be WTO-inconsistent. According to the United States, Section 129 sets out the procedures for the implementation of DSB recommendations and rulings in respect of individual anti-dumping or countervailing duty proceedings.

Korea requested that the reasonable period of time be either six or eight months, depending on the precise means of implementation. Specifically, Korea questioned the time requested for preparatory work and the need to undertake a Section 123 procedure to address the "as such" findings. Korea contended that, taking into account the number and complexity of the issues involved, and the administrative procedures that the United States must undergo in order to implement revisions to its measures, the United States should reasonably be able to implement all of the DSB's recommendations and rulings through proceedings under Section 129 within six months. Even if a Section 123 proceeding were to be undertaken to implement the "as such" recommendations and rulings, Korea maintained that all three proceedings could be completed within a maximum of eight months.

As an initial matter, the Arbitrator considered the United States' proposed means of implementing the DSB's "as such" recommendations and rulings. The Arbitrator recalled the principle that an implementing Member has discretion in choosing its means of implementation as long as the means chosen is apt in form, nature, and content to bring the Member into compliance with its WTO obligations. The Arbitrator further recalled the Panel's findings that the DPM and the USDOC's methodology for applying the W-T comparison are measures that could be challenged "as such" in WTO dispute settlement, on the basis of a finding that they are rules or norms of general and prospective application. Additionally, the Arbitrator noted that the text of Section 123(g)(1) explicitly indicates that "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" the relevant steps set forth under Section 123(g) have been followed. The Arbitrator therefore considered that the United States had demonstrated that a Section 123 proceeding is an appropriate means to implement the DSB's "as such" recommendations and rulings in this dispute.

The Arbitrator then turned to the precise steps of the implementation process, by assessing separately: (i) implementation of the DSB's "as such" recommendations and rulings through a Section 123 proceeding; (ii) implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* anti-dumping investigation through a Section 129 anti-dumping proceeding; (iii) the sequencing of the Section 123 and Section 129 proceedings concerning the anti-dumping measures; and (iv) implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* countervailing duty investigation through a Section 129 proceeding.

With regard to implementation of the DSB's "as such" recommendations and rulings concerning the DPM and the W-T methodology, the Arbitrator observed that the parties agreed on the steps involved in a Section 123 proceeding. The Arbitrator further highlighted that while some steps can

be performed at the same time, other steps must, as a matter of law and by necessary implication, occur sequentially.

The first point of disagreement concerning implementation of the DSB's "as such" recommendations and rulings related to the need and the length of time that would be justified for preparatory work, including inter-agency consultations as well as the development and publication of a proposed modification. The Arbitrator considered that preparatory work, including consultations within government agencies, is a typical and legitimate aspect of "law-making" and is reflected throughout the Section 123 process. Consequently, such consultation and preparatory work should be taken into account in determining a reasonable period of time for implementation. The Arbitrator considered that the length of time required for such preparatory work is affected by the number and complexity of the issues and the number of agencies involved, and that time for such preparatory work serves the double purpose of ensuring that the resulting methodology is an appropriate means of addressing targeted dumping consistently with the Anti-Dumping Agreement and reducing the time needed to undertake subsequent steps in the implementation process.

Regarding the alleged "novelty" and "complexity" of the issues involved, the Arbitrator noted that this is the first dispute in which a panel or the Appellate Body has interpreted the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The Arbitrator stated that, in and of itself, the fact that a provision is interpreted for the first time in dispute settlement is not necessarily relevant to the determination of the reasonable period of time to come into conformity with that provision. A "new" interpretation of a provision may be relatively simple to implement depending on the nature of the obligation that it prescribes. The Arbitrator noted that the current case relates to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the right to use an exceptional methodology to calculate the margin of dumping, subject to several conditions, each requiring a number of analytical steps to fulfil the parameters of the provision. The scope of the DSB's recommendations and rulings in this dispute refers to each element of the provision, and each of these elements was fully interpreted for the first time in this dispute. Consequently, in the view of the Arbitrator, the nature of the obligations covered by the required implementation includes a number of interrelated issues with an aspect of novelty. Nevertheless, the Arbitrator considered that such novelty and complexity are limited to three elements, and for each the range of options that can be explored is limited by the parameters of what is WTO-compatible as interpreted by the Panel and the Appellate Body.

Turning to Korea's argument that the United States should have begun taking steps towards implementation earlier than it has, both parties agreed that the reasonable period of time for implementation is measured as from the date of adoption of the Panel and Appellate Body Reports. The Arbitrator observed that, by the time of the hearing in this arbitration, more than five months had elapsed since the DSB's adoption of the Panel and Appellate Body Reports. The Arbitrator further noted the United States' explanation that details could not be provided, and considered that it was therefore not possible to assess how much had been accomplished in this period. Nevertheless, the Arbitrator stated that it is important to keep in mind that, in the meantime, measures found to be WTO-inconsistent have remained in place, and that Article 21.1 of the DSU identifies prompt compliance with DSB recommendations and rulings as "essential in order to ensure effective resolution of disputes to the benefit of all Members".

For these reasons, the Arbitrator considered that a period of work that enables publication of a proposal only 12 months after adoption of the Panel and Appellate Body Reports would be unjustifiably long.

A second point of disagreement regarding implementation of the DSB's "as such" recommendations and rulings concerned Korea's claim that the timeline proposed by the United States does not make use of possible flexibilities. In this regard, the Arbitrator noted the United States' explanations that: (i) in practice, consultations with the relevant private sector advisory committees foreseen in Section 123 take place simultaneously with the public consultation process also foreseen in Section 123; and (ii) because the report to Congress foreseen in Section 123 must include "a summary of the advice obtained" from private sector advisory committees and also contains a summary of the comments from the public on the proposed rule, the report cannot be done in parallel with those steps.

The final point of disagreement regarding implementation of the DSB's "as such" recommendations and rulings concerned the length of time that must be afforded to the public to comment on the

proposed methodology and the time to be afforded to the USDOC to complete its analysis of those comments. The Arbitrator recalled the observation of previous arbitrators that there must be a balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand. In the current case, the Arbitrator highlighted that, while there is no statutorily prescribed minimum period for public comment, a shorter-than-normal period for public comment risks affecting the legitimacy of the modification. Turning to the period for consideration of the comments that may be received, the Arbitrator recalled that the number of issues covered and the options available within the parameters of the legal obligation are relatively limited. Consequently, the Arbitrator considered that five months from the end of the period for public comment to analyse the responses received seemed unjustifiably long.

Turning to the time required to implement the DSB's "as applied" recommendations and rulings concerning the *Washers* anti-dumping investigation, the United States submitted that it would require roughly nine months to complete a Section 129 anti-dumping proceeding to implement these recommendations and rulings, as from the date of publication of the proposed modification developed in the context of the Section 123 proceeding. Korea submitted that the United States would require only six months from the date of the adoption of the Panel and Appellate Body Reports to complete the Section 129 anti-dumping proceeding.

The Arbitrator noted that the parties agreed on the steps involved in a Section 129 proceeding, but disagreed on: (i) whether a Section 129 proceeding must be completed within a maximum of 180 days; (ii) whether the time needed for the Section 129 anti-dumping proceeding encompasses time for the USDOC to conduct additional fact-finding; and (iii) the time that the United States would require to address ministerial errors in the final determination.

Regarding the 180-day time period indicated in Section 129, the Arbitrator observed that the structure of Section 129 includes two consultation phases beyond the 180-day period, and that time for each of them must be taken into account. The Arbitrator therefore considered, in line with the findings of previous arbitrators on this issue, that the 180-day time period does not encompass the entirety of the Section 129 process. At the same time, the Arbitrator considered that whether fact-finding and additional steps of verification, a hearing, or even a preliminary determination would require additional time seemed an unnecessary question, since the text of Section 129 seemed to indicate that all steps necessary for a redetermination are to be completed within the 180-day period foreseen in Section 129. In this connection, the Arbitrator considered that reliance on time periods used in original investigations seemed inappropriate, because the implementing Member is required only to conduct a re-determination to implement a limited number of DSB rulings of inconsistency. Concerning the parties' disagreement over the time required to address any ministerial errors before publishing the final determination, the Arbitrator highlighted that the United States had indicated at the hearing that the process of addressing ministerial errors could be conducted concurrently with the process of consulting with Congress.

With regard to the parties' disagreement over whether the Section 123 and Section 129 proceedings in respect of the anti-dumping measures could take place simultaneously, the Arbitrator recalled that the United States had established that a Section 123 proceeding is an appropriate means of implementing the DSB's "as such" recommendations and rulings in this dispute. The Arbitrator further noted that such a proceeding entails publication of a proposed modification after several months of deliberations, and that, according to the United States, it is on the basis of the proposed modification that the "as applied" recommendations and rulings concerning the anti-dumping investigation would be implemented through the Section 129 proceeding. In the Arbitrator's view, without the proposed modification, the USDOC would effectively not have a methodology for the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement different from the ones found to be inconsistent with that provision.

The Arbitrator therefore considered that, while there is a necessary sequence between the Section 123 and Section 129 anti-dumping proceedings, there is also an overlap. The Arbitrator accepted that initiation of the Section 129 anti-dumping proceeding may need to be on hold until such time as the USDOC has published the proposed new methodology. The Arbitrator nevertheless highlighted that, under Section 129, the United States Trade Representative (USTR) is obliged to conduct consultations with the USDOC and with Congress "promptly" after circulation of a panel or Appellate Body report, and observed that such consultations could begin prior to publication of the new methodology.

Turning to implementation of the DSB's "as applied" recommendations and rulings concerning the *Washers* countervailing duty investigation, the United States indicated that implementation would take 21 months because of the time requested for implementation in respect of the anti-dumping measures. The United States also noted that implementation may require the USDOC to solicit additional information. Korea argued that, just as for the Section 129 anti-dumping proceeding, the United States only requires six months from the adoption of the Panel and Appellate Body Reports to complete a Section 129 proceeding addressing the DSB's recommendations and rulings concerning the countervailing measures. Korea also distinguished the anti-dumping redetermination from the implementation steps that would need to be taken in respect of the rulings and recommendations made regarding countervailing measures.

The parties agreed to the steps in a Section 129 proceeding that would be used by the United States in implementing the DSB's recommendations and rulings pertaining to the *Washers* countervailing duty investigation. They also concurred that the Section 129 countervailing duty redetermination would be separate and independent from the proceedings needed to implement the DSB's recommendations and rulings pertaining to the anti-dumping measures. Both parties requested determination of a single reasonable period of time for implementation in this dispute.

As a consequence of the partial sequencing of the proceedings for implementation concerning the anti-dumping measures, the Arbitrator observed that the reasonable period of time for implementation in this dispute is necessarily longer than the time required for the Section 129 countervailing duty proceeding. At the same time, the Arbitrator noted that no reason was presented to explain that implementation of the recommendations and rulings relating to the countervailing measures could not be completed before the expiration of that period. In that context, the Arbitrator considered the principle of prompt compliance contemplated in Article 21.1 of the DSU to be important.

Finally, the Arbitrator turned to two additional circumstances alleged by the United States to be relevant to the determination of the reasonable period of time in this dispute. Regarding the workload of the USDOC, the Arbitrator observed that previous arbitrators have taken the view that the workload of an implementing authority is not relevant to the determination of the reasonable period of time. The Arbitrator also noted that, in light of Article 21.1 of the DSU, it would be inappropriate for the USDOC to prioritize new or ongoing investigations over corrective action vis-à-vis measures already in force and found to be WTO-inconsistent. Concerning recent changes in the United States' administration, the Arbitrator observed that the United States had clarified at the hearing that, although it had referred to the change in administration in its written submission, this was not a factor that had been built into its proposed timetable.

In light of the foregoing considerations, the Arbitrator determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute was 15 months from the date on which the DSB adopted the Panel and Appellate Body Reports in this dispute, expiring on 26 December 2017.

7 OTHER ACTIVITIES

7.1 WTO 20th Anniversary Conferences

In 2017, the Appellate Body completed its series of conferences to celebrate the Twentieth Anniversary of the WTO and its dispute settlement mechanism. The conferences have been hosted by academic institutions and have focused on current dispute settlement issues and the Appellate Body's contribution to the settlement of disputes and other aspects of WTO law. Participants have included current and former Appellate Body members, high-ranking government representatives, officials of the WTO and other international organizations, academics, students, business leaders, and civil society representatives. The first five conferences in the series were held in 2015 and 2016: (i) 15 May 2015 in Italy; (ii) 2-6 July 2015 in China; (iii) 28 August 2015 in Korea; (iv) 2-4 December 2015 in Mexico; and (v) 28 to 29 April 2016 in the United States.

The sixth and final conference was held in New Delhi, India, from 16 to 18 February 2017. It was organized by National Law University, Delhi. Mr Ujal Singh Bhatia, Appellate Body member, and staff from the Appellate Body Secretariat were on the conference organizing committee. The conference saw the participation of a wide range of stakeholders, particularly from South Asia. The keynote address on the future prospects of the WTO and multilateral trade regime was delivered by Mr Arvind Subramanian, the Chief Economic Advisor to the Government of India. Other themes discussed during the conference included, inter alia, trade in services, trade remedies, the protection of intellectual property rights, challenges to dispute settlement, and the relationship between WTO dispute settlement and other areas of global governance. The program of the conference is provided in Annex 3.

7.2 Digital Dispute Settlement Registry

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

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

As a storage facility, the Digital Registry will provide access to information about WTO disputes, in particular, it will serve as an online repository of all panel and Appellate Body records. As a research facility, the Digital Registry will allow Members and the public to search the digital records of publicly available data of past disputes. Users will have access to a broader range of information and statistics than in the past. With the extent of the information available, WTO Members and the Secretariat, as well as the interested public, will be able to generate more in-depth and informative statistics on WTO dispute settlement activity.

In 2017, the Appellate Body continued to develop and test the DDSR application, helped train WTO delegates on its various functions, and compiled dispute information for uploading into the database.

The DDSR's electronic filing function has been tested as part of a pilot phase since July 2015. During this pilot phase, parties, third parties, and panelists volunteer to use the DDSR in parallel with the existing paper filing procedures for written submissions and other dispute correspondence. In 2017, the e-filing function of the DDSR was tested at the panel stage in several disputes, with two disputes using the Digital Registry for the official filing of all communications between the panel and the parties. Participants in three appellate proceedings tested the Digital Registry as part of an appeal pilot phase. The testing of the DDSR in the pilot

phase shall continue until the DDSR is fully launched and e-filing is considered as the official filing for all disputes.

7.3 ELSA Moot Court

In 2017, Appellate Body Secretariat staff along with colleagues from the WTO Secretariat participated as panelists in various moot court competitions. The WTO is committed to supporting the development of international trade law and WTO-related studies. One proven tool of such development is a simulation of WTO panel proceedings, in fora commonly referred to as WTO Moot Court Competitions. In such a Moot Court Competition, each participating student team represents both the complainant and the respondent in the fictional case and prepares both written and oral submissions. Oral pleadings are made before panels consisting of WTO law experts and a winning team is selected. Importantly, since 2003, the WTO has supported the annual Moot Court Competition on WTO Law organized by the European Law Students' Association (ELSA). The ELSA Moot Court Competition involves teams from universities in Africa, Asia-Pacific, Europe, Latin America, and North America.

While the WTO is firm in its commitment to support moot court competitions on international trade issues, in general, ELSA is of special interest in that it offers a global moot court competition. This competition therefore provides teams with the opportunity to interact and compete on a global stage with the best teams from the other regions. Moreover, WTO staff members participate in the ELSA Moot Court as judges and in other capacities, thereby giving students the opportunity to interact with those working directly on WTO issues. Additionally, the competition has created an avenue for interaction between WTO Member government officials, local university professors, and the participants of the competing teams. This has increased information exchange at the national level, and discourse on international trade law and other WTO-related issues.

In 2017, staff from the WTO and Appellate Body Secretariats provided support to the global ELSA Moot Court Competition through technical advice on the subject matter, sending WTO staff to participate as panelists in the various regional rounds, and hosting the Final Oral Round in Geneva, Switzerland.

ANNEX 1

SPEECH BY APPELLATE BODY CHAIR UJAL SINGH BHATIA ON 8 JUNE 2017

THE PROBLEMS OF PLENTY: CHALLENGING TIMES FOR THE WTO'S DISPUTE SETTLEMENT SYSTEM

This is the first time that the Appellate Body has organized an event to mark the release of its Annual Report. We intend to make this an annual event. The purpose for doing so is easily stated: the Appellate Body would like to go beyond the text of its reports to provide meaningful insights to all stakeholders about how it works – its experiences, its constraints, its concerns, and its many satisfactions. We believe you have a right to know how we do our job, as well as what more we need to do, in order to do it better.

In the 22 years of its existence, the Appellate Body has come a long way, from a hesitant after-thought to a mature and well-respected international tribunal. Its 146 adopted reports, along with more than 300 panel reports, constitute tens of thousands of pages of jurisprudence which is as wide in its reach as it is deep in its probing of the meaning of the covered agreements.

To give you a flavour of the diversity of issues that have come up before the Appellate Body over the last two or three years, here is an illustrative, though by no means exhaustive, list: environmental protection, renewable energy subsidies, tax evasion, money laundering, patent protection, animal welfare, food safety, consumer information, dumping, so-called non-market economies, and multilateral trade rules and RTAs.

The prestige that the Appellate Body now enjoys has a solid foundation which is based on several pillars:

- the hard work, shared values and wisdom of our predecessors in the Appellate Body;
- the unstinting work ethic and expertise of its staff;
- the assiduous fact-finding and analysis done by panel members and the staff in the respective dispute settlement divisions;
- the dedication and support of the WTO staff as a whole, especially the interpreters, translators and the document production department;
- the increasingly sophisticated submissions and pleadings of the parties who appear before us; and
- last, but by no means least, the unwavering support it enjoys from WTO Members.

(Let me add that the unwavering support of WTO Members is occasionally accompanied by criticism, and I will come back to this in a while).

The strongest pillar in this foundation is the shared commitment of all stakeholders to the belief that a rules-based multilateral trading system is a global public good that can be sustained only by a predictable, fair and prompt resolution of disputes. As the drafters of the DSU recognized, the WTO dispute settlement system is central in providing security and predictability for multilateral trade, by preserving Member's rights and obligations, and in clarifying the provisions as they exist in the covered agreements.

Indeed, the creation of the Appellate Body shows that Members recognized the importance of predictability, consistency and stability in the interpretation of their WTO rights and obligations. The rules and process governing panel and appellate proceedings show the emphasis Members placed on the promptness of dispute resolution. Including the requirement of "prompt" resolution of disputes in the WTO dispute settlement mechanism was a major feature that distinguished it from other international adjudicative systems. The special emphasis on promptitude was based on

the common understanding that, in the world of commerce, time really is money. However, it is important to recognise that, in recent years, the WTO dispute settlement system has substantially ceded ground on this distinction.

In this connection, it is pertinent to recall that the demonstrated success of the dispute settlement system in effectively, predictably and expeditiously resolving disputes is why it is often called the crown jewel of the WTO. It is by no means an exaggeration to maintain that the good health of this system is vital for orderly global exchange.

Over the last several years, the Appellate Body has repeatedly informed WTO Members that, in view of the limited resources available to it, the increasing build-up of appeals is steadily leading to significant delays in their disposal. The mismatch between Appellate Body resources and the number, size and complexity of appeals has significantly intensified this year. At present, the Appellate Body is dealing with five appeals, including the very large compliance appeal in the "*EC – Airbus*" dispute. Another five appeals are likely to be filed later this year, including, again, in two very large disputes – the "*US – Boeing*" compliance case and *Brazil – Certain Measures Concerning Taxation and Charges*. At present, the Appellate Body has been unable to fully staff all appeals pending before it. By the end of the year, if all five of the projected appeals materialise, there will be further delays of several months in fully staffing and taking up these appeals.

This problem cannot be expected to go away by itself. In view of the high number of ongoing panel proceedings and filings at the panel stage, the workload of the Appellate Body is unlikely to abate in the next few years. Further, the expected increase in the number of appeals in large and complex disputes – such as the EC – Airbus compliance dispute currently before the Appellate Body – will further exacerbate the problem of delays because such appeals require a larger legal team and added support staff than most other appeals, and these larger appeals also require a longer period of time to be 4 heard; thus, a significant portion of the Appellate Body's resources will be unavailable for other appeals for considerable periods of time.

The consequential delays in handling appeals have implications not only for the dispute settlement process of the WTO, but also for the WTO itself.

Let us bear in mind the prospective nature of WTO remedies. To the extent that delays in dispute resolution involve delays in the assertion of the rule of law, they provide an incentive to those who benefit from those delays. As the representative of Korea reminded the DSB in its meeting on 31 August 2015, WTO disputes are not about abstract disagreements: they involve real world interests. Allow me to quote an extract of the statement as recorded in the DSB minutes:

> Long delays created perverse incentives by lowering the cost of adopting and maintaining WTO-inconsistent measures. Interest groups seeking protection would pressure Members to adopt these measures, insisting rightly, that they would not be subject to review by the WTO for years. Members could therefore expect more protectionist measures, and more, not less, disputes being brought to the WTO.

These sentiments were echoed by several delegations in the same meeting.

That was in 2015. Let us cut now to 2017. In the DSB meeting on 22 May 2017, Canada made a statement on the Panel Report in DS 483 (*China –Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*). Canada noted that despite efforts by the parties to focus on the key issues in the dispute through brief submissions, the panel proceedings had taken two years to complete. It further noted that the Panel's 65 page report had taken four months to translate. Regarding the implications of delays, it further added:

> Throughout the period, Canadian cellulose pulp producers have faced additional costs and lost sales due to the imposition of anti-dumping duties. As a result, Canadian producers of cellulose pulp have seen a 79% decline in export value to China between 2013 and 2016. We hope that the prompt implementation of this ruling will lead to the recovery of our industry and will benefit Chinese consumers.

When delays in WTO dispute resolution become the norm, they cast doubt on the value of the WTO's rules-oriented system itself. An erosion of trust in this system can lead to the re-emergence

of power orientation in international trade policy. Delays compel WTO Members to look for other solutions, potentially elsewhere. And in this, it is the weaker countries that stand to lose the most.

On the issue of delays in WTO dispute resolution in general, and appellate proceedings in particular, I would like to draw your attention to three developments in 2016:

- First, the appeal rate of panel reports. While the appeal rate may fluctuate somewhat from year to year, over the previous 10 years the average was, I believe, 68%. However, I note that in 2016 the appeal rate had risen to 88%. Moreover, in recent years, most of the non-appealed panel reports were rather short, whereas the longest and most complex panel reports were almost always appealed.

- The second development is the increasing number, complexity and duration of Article 21.5 compliance proceedings. In 2016, Article 21.5 proceedings were initiated in six disputes. As you are aware, Article 21.1 of the DSU provides that "prompt compliance with the recommendations and rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all members". To this end, the increased activity in compliance proceedings is troubling.

- A third development relates to the well-known sequencing issue between Article 21.5 compliance proceedings and Article 22.6 arbitration proceedings on the level and nature of suspension of concessions or other commitments. We note that, in a number of recent cases, Article 22.6 proceedings have been directly initiated at the end of the RPT (the reasonable period of time) without a sequencing agreement between the parties. This development appears to be related to the larger issue of delays in WTO dispute resolution. Parallel proceedings under Article 21.5 and Article 22.6 involving the same dispute – in the absence of sequencing agreements – convey an impression of dysfunction. Addressing the sequencing issue is of great importance for the successful operation of the WTO dispute settlement system, in which WTO-consistency is to be determined multilaterally and which provides for the right of appellate review of panel findings of inconsistency in Article 21.5 proceedings. The situation therefore requires responsible and careful action by Members to ensure that the system continues to function well. I note that this matter came up for extensive discussion in recent DSB meetings, including, in particular, the last meeting of the DSB. It is our hope that broad agreement can be reached among Members on this important issue.

There could be multiple reasons for these recent developments, but it is hard to ignore the underlay of restlessness with the increasing delays, which seem to be pushing Members to explore other options in pursuing their disputes. We can only speculate about the medium-term consequences of these developments on the credibility and utility of the WTO dispute settlement system.

These developments emphasise the need for concerted action by WTO Members to find solutions to the capacity constraints of the system. The dispute settlement system is the product of negotiations between WTO Members and functions in their interest. In a rapidly changing global trade environment, and a sustained rise in dispute settlement activity, it is important that adaptations are made whenever necessary, so that the system can continue to respond effectively to changing situations.

This brings me to the issue of DSU reform. Negotiations in this regard have been continuing for almost two decades. Members need to consider whether some reform issues demand priority over others. The Appellate Body would be happy to provide its views on such issues, if consulted.

Needless to say, the Appellate Body itself has a role to play in improving its working procedures and internal practices. It is fully cognisant of this responsibility and constantly reviews its procedures and practices with the view to producing leaner reports more quickly, without compromising on quality.

In our consultations with Member representatives over the last few years, we have noted the high level of satisfaction among Members regarding the Appellate Body's functioning. We have also received some criticism. This criticism broadly covers three areas:

- timeframes for appellate review;
- allegations of "over reach" by the Appellate Body;
- issues relating to the "comprehensibility" of Appellate Body reports.

I would like to address each of these issues.

First, the DSU provides for a strict timeframe for appellate review. The Appellate Body gives much importance to the need to keep appellate proceedings as short as possible. However, it is obliged to address each finding and each legal interpretation appealed. In addition, the DSU explicitly provides that it is the mandate of the WTO dispute settlement system, and therefore also of the Appellate Body, to clarify the provisions of the covered agreements, with the objective of resolving the often-complex disputes between WTO Members and providing security and predictability to the multilateral trading system. WTO Members expect from the Appellate Body, and the Appellate Body has the responsibility to provide, reports of the highest quality, which, once adopted, assist the DSB in resolving disputes between Members. As the forum of last recourse, the Appellate Body cannot afford to take shortcuts.

Next, the allegations of "overreach" by the Appellate Body involve issues regarding the depth, as well as the breadth, of its analysis. We are well aware that panels and the Appellate Body cannot add to or diminish the rights or obligations provided for in the covered agreements. As is also well known, the Appellate Body's mandate requires it to address all issues raised on appeal. Moreover, the Appellate Body has to bear in mind that, while adoption by the DSB makes its rulings binding on the parties to the dispute, they also serve the purpose of providing guidance to other WTO Members, and thereby aid in avoiding future disputes. Dispute settlement practice demonstrates that WTO Members attach significance to the reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are almost always cited by parties in support of their legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed by panels and the Appellate Body.

As mentioned above, the clarifications of provisions of the covered agreements, as envisaged by Article 3.2 of the DSU, elucidate the scope and meaning of the provisions that are at issue in a dispute. They are an essential part of the mandate of the WTO dispute settlement system and the Appellate Body. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarifications contained in adopted panel and Appellate Body reports is not limited to the application of a particular provision in a specific case. As the DSU stipulates, the Appellate Body has to discharge this mandate "in accordance with the customary rules of interpretation of public international law". The Appellate Body is constantly aware of the need to ensure that each and every of its clarifications of WTO provisions meets this standard.

Finally, the issue of "comprehensibility" of its reports is something that the Appellate Body takes very seriously. Appellate Body reports cannot afford to be Brahminical treatises, intelligible to a chosen few. Their purpose is to resolve disputes, and for that they must be capable of being understood by all stakeholders. As just mentioned by my predecessor Tom Graham, the recent innovation of the "Findings and Conclusions" section in our reports should help in their demystification. But this remains a work in progress.

Overall, I would agree that, as in other dispute settlement mechanisms, there is still some scope for efficiency gains in the Appellate Body's work. There is much to be said for the virtues of relentless focus, brevity and readerfriendliness, while at the same time ensuring parties their "day in court" by addressing their arguments and due process concerns, as well as guaranteeing the accuracy, quality and depth of the legal reasoning on the often very difficult issues raised in an

appeal. My colleagues and I remain alive to these challenges and will continue to work in that direction.

The purpose of this address is not to present a litany of woes. Indeed, there is much today in the WTO's dispute settlement system that should be celebrated, not bemoaned. The system at large, including the Appellate Body, commands enormous support and respect from its users. The compliance rate with DSB rulings and recommendations remains very high. The high standard of lawyers in the Legal Affairs and Rules Divisions and the AB Secretariat is something of which we are genuinely proud. There is universal recognition that, amid the proliferation of bilateral and plurilateral trade agreements, the WTO dispute settlement system has played a crucial role in making WTO law one of the liveliest and most effective branches of public international law. The increasing use of WTO case law by other dispute settlement systems testifies to the growing influence of the WTO's dispute settlement system on international dispute settlement. Overall, there is much in the WTO's dispute settlement system that is rightly envied by other international adjudicatory systems.

But like any other man-made system, the WTO's dispute settlement system should not be taken for granted. It requires nurturing through timely interventions when problem areas emerge. The issue of delays is one such problem area which calls for broad, systemic solutions. It should be possible to find such solutions through determined action by WTO Members.

I would like to conclude by saying that the shared values and commitment to the objectives of fair, impartial and independent adjudication of disputes in the WTO among all its stakeholders are the greatest sources of the WTO's strength. The Appellate Body is proud of playing a role in this magnificent enterprise and shall continue to work to earn the confidence reposed on it.

ANNEX 2

BACKGROUND NOTE ON RULE 15 OF THE WORKING PROCEDURES FOR APPELLATE BODY REVIEW

Communication from the Appellate Body
24 November 2017

Rule 15 entered into force in 1996 as part of the Working Procedures for Appellate Review (Working Procedures), adopted by the Appellate Body on the basis of the authority conferred upon it by WTO Members in Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In accordance with that provision, in January 1996 the Appellate Body communicated draft Working Procedures to the Chair of the DSB and the Director-General. The DSB Chair gathered comments received from various WTO Members regarding this draft and conveyed them to the Appellate Body. The Appellate Body carefully considered the comments made in this consultative process by WTO Members, the Chair of the DSB, and the Director-General. The Appellate Body revised and finalized the Working Procedures in accordance with Article 17.9 and they entered into force on 15 February 1996.

Rule 15 of the Working Procedures has been applied by the Appellate Body in 16 instances since 1996; in two cases,[1] two of the three Appellate Body Members (AB Members) serving on the Division completed the disposition of the appeal pursuant to that Rule. This transitional provision has worked well for more than twenty years as it has ensured the efficient functioning of the Appellate Body whenever its composition changed. Until recently, the application of Rule 15 has never been called into question by any participant or third participant in any appeal, nor has it been criticized by any Member in the DSB when an Appellate Body report signed by an AB Member completing an appeal pursuant to Rule 15 was adopted by the DSB by negative consensus in accordance with Article 17.14 of the DSU.

Many international adjudicative bodies follow transitional rules or practices similar to Rule 15 permitting or requiring an outgoing adjudicator to complete the disposition of cases assigned prior to the expiry of the adjudicator's term of office. In addition, the statutes of some international tribunals contemplate that the term of office of an adjudicator is automatically extended until a successor is appointed. No similar rule providing for the extension of an AB Member's term of office until a successor is appointed exists in the DSU. However, decisions extending an AB Member's term of office have been taken by the DSB (for example, in 1999 when the DSB extended the terms of office of two AB Members from 11 December 1999 until 31 March 2000[2]).

Appellate Body Members, authorized pursuant to Rule 15, may complete the disposition of appeals assigned to them prior to the end of their terms of office. Such outgoing AB Members cannot be assigned to appeals filed after their term has expired. Outgoing Members do not participate in discussions and decision-making on general Appellate Body matters and the functioning of the Appellate Body after their term has expired. They are not permitted to attend exchanges of views held after their term expired except when they continue to serve on a Division under Rule 15. A new AB Member replacing an outgoing AB Member may not attend the exchange of views in an appeal where the outgoing Member continues to serve on a Division pursuant to that Rule.

Completing the work on appeals assigned before the expiry of the term of office places a significant burden on the outgoing Member. However, in order to ensure the smooth functioning of the appellate stage when the Appellate Body's composition changes, and in particular when it has not been possible to fill vacancies in a timely fashion, AB Members have stayed on, with the authorization of the Appellate Body, to complete the disposition of pending appeals under Rule 15.

[1] Appellate Body Reports, *US – Lead and Bismuth II* (2000); *US – Section 211 Appropriations Act ("Havana Club")* (2002).

[2] Mr Said El-Naggar and Mr Mitsuo Matsushita from 11 December 1999 to 31 March 2000 (Minutes of the DSB Meeting held on 27 October and 3 November 1999, WT/DSB/M/70, p. 33).

This Rule as initially conceived was intended to apply for relatively short periods of transition. Nowadays it applies more often and for more extended periods than in the past for several reasons. Essentially, the large number of appeals, and the exceptional size of some appeals stretches the time-frame for hearing and deciding those appeals, which in turn stretches the time a Division Member involved in these appeals needs to complete an appeal under Rule 15. This situation is further compounded by two other factors. When the number of vacant seats on the Appellate Body is high, the remaining AB Members are more frequently assigned to appeals by random draw. In addition, the time-periods needed for the completion of appeals, including those where Rule 15 applies, increase when the Appellate Body Secretariat is short of lawyers such that appeals cannot be staffed immediately when they are filed.

The DSB is still discussing the launch of selection processes for filling up three vacancies in the Appellate Body, including that of Mr Van den Bossche. In order to maintain the stability of the dispute settlement system, to deal with the unprecedented workload of appeals, and to preserve the rights of participants and third participants in pending appeals, the Appellate Body is left with no option but to apply Rule 15.

Regarding the application of Rule 15 with respect to the appeals that have been assigned to Mr Van den Bossche before his term of office expires on 11 December 2017, the Chair of the Appellate Body has transmitted a notification to the Chair of the DSB as provided for in that Rule.

The Appellate Body is open to suggestions from the DSB on all matters aimed at improving its functioning.

ANNEX 3

WTO@20 CONFERENCE, NEW DELHI

16-18 FEBRUARY 2017

Organized by the Appellate Body of the World Trade Organization
together with National Law University, Delhi

PROGRAM

THURSDAY, 16 FEBRUARY (VENUE: LONGCHAMP, THE TAJ MAHAL HOTEL, NEW DELHI)

1800 hrs:
Welcome reception and registration

1900 hrs:
Welcome address
Prof. (Dr.) Ranbir Singh, Vice Chancellor, National Law University, Delhi

1905 hrs:
Opening keynote: The current state and prospects of the multilateral trade regime and India's role and interests thereunder
Mr. Arvind Subramanian, Chief Economic Adviser, Government of India

1945 hrs:
Roundtable discussion: The new global politics: Is there space for trade multilateralism?

Moderator: Mr. Ujal Singh Bhatia, Chair, Appellate Body, WTO

Speakers:
1. Mr. Arvind Subramanian, Chief Economic Adviser, Government of India
2. Prof. Thomas Cottier, Emeritus Professor, World Trade Institute, Bern
3. Dr. Harsha Vardhana Singh, Executive Director, Brookings Institution India Center, New Delhi
4. Ms. Rita Teaotia, Secretary, Ministry of Commerce, Government of India
5. Prof. Gregory Shaffer, Chancellor's Professor of Law, University of California, Irvine School of Law

2100 hrs: **Dinner**

FRIDAY, 17 FEBRUARY (VENUE: NATIONAL LAW UNIVERSITY, DELHI)

0900 hrs-1030 hrs:

Panel 1 – The role of the WTO in international intellectual property governance

Moderator: Mr. A. V. Ganesan, former Member, Appellate Body, WTO

Speakers:
1. Ms. Jayashree Watal, Senior Counsellor, Intellectual Property Division, WTO
2. Prof. Yogesh Pai, Assistant Professor, National Law University, Delhi
3. Prof. Frederick Abbott, Edward Ball Eminent Scholar Professor of International Law, Florida State University, College of Law

4. Prof. Chandni Raina, Professor, Centre for WTO Studies, IIFT (tbc)

Discussant: Prof. Thomas Cottier, Emeritus Professor, World Trade Institute, Bern

1100 hrs-1230 hrs:

Panel 2 – Evolution of, and challenges posed by, trade remedy disputes at the WTO

Moderator: Mr. David Unterhalter, former Member, Appellate Body, WTO

Speakers:
1. Mr. S. Seetharaman, Principal Partner, Lakshmikumaran & Sridharan, Delhi
2. Mr. Renato Antonini, Partner, Jones Day, Brussels
3. Mr. Philippe De Baere, Partner, Van Bael & Bellis, Brussels
4. Mr. Johann Human, Director, Rules Division, WTO
5. Dr. Werner Zdouc, Director, Appellate Body Secretariat, WTO

Discussant: Prof. Mark Wu, Harvard Law School, Cambridge

1400 hrs-1530 hrs:

Panel 3 – Developing countries' participation in WTO dispute settlement

Moderator: Mr. Shree Baboo Chekitan Servansing, Member, Appellate Body, WTO

Speakers:
1. Prof. James Nedumpara, Associate Professor, Jindal Global Law School
2. Dr. Jayant Dasgupta, Executive Partner, Lakshmikumaran & Sridharan, Delhi
3. Ms. Moushami Joshi, Foreign Attorney, Pillsbury, Washington, D.C.
4. Mr. Marco Tulio Molina Tejeda, Deputy Permanent Representative of Guatemala to the WTO, Geneva

Discussant: Mr. Niall Meagher, Executive Director, ACWL, Geneva

1600 hrs-1730 hrs:

Panel 4 – The WTO and trade in services

Moderator: Prof. Jennifer Hillman, former Member, Appellate Body, WTO

Speakers:
1. Prof. Rupa Chanda, RBI Chair in Economics, Indian Institute of Management, Bangalore
2. Dr. Aaditya Mattoo, Research Manager, Trade and International Integration, Development Research Group, World Bank, Washington, D.C.
3. Mr. Hamid Mamdouh, Director, Trade in Services and Investment Division, WTO
4. Mr. Suhail Nathani, Partner, Economic Laws Practice, Mumbai
5. Ms. Anuradha RV, Partner, Clarus Law Associates

Discussant: Prof. Pierre Sauvé, Faculty, World Trade Institute, Bern

1930 hrs: Dinner for speakers and invited guests (Delhi Gymkhana Club)

SATURDAY, 18 FEBRUARY (VENUE: NATIONAL LAW UNIVERSITY, DELHI)

0900 hrs-1030 hrs:

Panel 5 – The WTO dispute settlement system and other areas of global governance

Moderator: Mr. Ricardo Ramirez Hernandez, Member, Appellate Body, WTO

Speakers:
1. Prof. Prabhash Ranjan, Assistant Professor, South Asia University, Delhi
2. Ms. Yuejiao Zhang, former Member, Appellate Body, WTO
3. Dr. Filippo Fontanelli, Lecturer, Edinburgh Law School
4. Dr. Aniruddha Rajput, Member, UN International Law Commission

Discussant: Prof. Gabrielle Marceau, GSI (Global Studies Institute), University of Geneva; Senior Counsellor, Legal Affairs Division, WTO

1100 hrs-1300 hrs:

Panel 6 – Addressing non-trade concerns at the WTO

Moderator: Prof. Peter Van den Bossche, Member, Appellate Body, WTO

Speakers:
1. Prof. Gregory Shaffer, Chancellor's Professor of Law, University of California, Irvine School of Law
2. Prof. Robert Howse, Lloyd C. Nelson Professor of International Law, New York University
3. Ms. Jan Yves Remy, International Lawyer, Sidley Austin, Washington, D.C.
4. Prof. Seung Wha Chang, former Member, Appellate Body, WTO

Discussant: Prof. Abhijit Das, Head and Professor, Centre for WTO Studies, IIFT

1330 hrs: Closing lunch

ANNEX 4

MEMBERS OF THE APPELLATE BODY
(1 JANUARY TO 31 DECEMBER 2017)

BIOGRAPHICAL NOTES

Ujal Singh Bhatia (India) (2011-2019)

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

Mr Bhatia has served in senior positions in the Government of India as well as in Orissa State in various administrative assignments that involved development administration and policy-making. His legal and adjudicatory experience spans over three decades, and has involved domestic and international legal/jurisprudence issues, as well as negotiation of bilateral, regional, and multilateral trade agreements.

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

Thomas R. Graham (United States) (2011-2019)

Tom is the former head of the international trade practice at King & Spalding, and he was the founder of the international trade practice at Skadden, Arps, Slate, Meagher & Flom. He was one of the first US lawyers to represent respondents in trade remedy cases in various countries around the world, and he was among the first to bring economists, accountants, and other non-lawyer professionals into the international trade practices of private law firms.

Prior to entering private practice, Tom served as Deputy General Counsel in the Office of the US Trade Representative. Earlier in his career, he was a Legal Officer of the United Nations, in Geneva; and a visiting professor of law and staff member of Ford Motor Company, in Caracas, Venezuela.

Tom was the founding chairman of the American Society of International Law's Committee on International Economic Law. He served as chair of the American Bar Association's Subcommittee on Exports. He has been a visiting professor at the University of North Carolina Law School and an adjunct professor at the Georgetown Law Center. 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 has been a Guest Scholar at the Brookings Institution and a Senior Associate at the Carnegie Endowment for International Peace. He also is the co-author, with his daughter, of *Getting Open: The Unknown Story of Bill Garrett and the Integration of College Basketball* (Simon & Schuster, Atria Books, 2006; Indiana University, paperback, 2008).

Tom received his undergraduate degree from Indiana University, and his JD from Harvard Law School.

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

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

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

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

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

Hyun Chong Kim (Korea) (2016-2017[*])

Mr Kim received his bachelor's, master's, and JD degrees from Columbia University in New York. He served as Trade Minister for Korea from 2004 to 2007, during which time Korea negotiated free trade agreements with more than 40 countries, including Korea's biggest trading partners. As minister, Mr Kim was appointed Facilitator for the services negotiations at the WTO's December 2005 Hong Kong Ministerial Conference and helped Korea host the November 2005 Asia-Pacific Economic Cooperation (APEC) Leaders' Summit in Busan. He served as Korea's Ambassador to the United Nations from 2007 to 2008 and was elected Vice President of the UN Economic and Social Council in 2008, where he worked towards achievement of the Millennium Development Goals.

Between 1999 and 2003, Mr Kim was a senior lawyer in the WTO's Appellate Body Secretariat and Legal Affairs Division, where he worked on cases related to IPR, services, TRIMs, safeguards, and subsidies/countervailing measures, among others. More recently, Mr Kim oversaw patent and anti-trust litigation with a major Korean corporation and is currently a professor at Hankuk University of Foreign Studies in Seoul, where he focuses on trade law and trade policies.

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

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

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

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

[*] Mr Hyun Chong Kim resigned from the Appellate Body, effective 1 August 2017.

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

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

Peter Van den Bossche (Belgium) (2009-2017)

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

Mr Van den Bossche holds a Doctorate in Law from the European University Institute in Florence, an LLM from the University of Michigan Law School, and a Licence en Droit *magna cum laude* from the University of Antwerp. From 1990 to 1992, he served as a référendaire of Advocate General W. van Gerven at the European Court of Justice in Luxembourg. From 1997 to 2001, Mr Van den Bossche was Counsellor and subsequently Acting Director of the WTO Appellate Body Secretariat. In 2001, he returned to academia and from 2002 to 2009 frequently acted as a consultant to international organisations and developing countries on issues of international economic law. He also served on the faculty of the Université libre de Bruxelles, Brussels, Belgium (2002-2009); the China-EU School of Law, China University of Political Science and Law, Beijing, China (2008-2014); the Trade Policy Training Centre in Africa (trapca), Arusha, Tanzania (2008 and 2013); the Foreign Trade University, Hanoi & Ho Chi Minh City, Vietnam (2009 and 2011); the Universidad San Francisco de Quito, Ecuador (2013); and the Law School of Koç University, Istanbul, Turkey (2013).

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

Hong Zhao (China) (2016-2020)

Ms Zhao received her bachelor's and master's degrees and a phD in Law from the Law School of Peking University in China. She currently serves as Vice President of the Chinese Academy of International Trade and Economic Cooperation. Ms Zhao is also a guest Professor at several universities including the Universities of Peking, Fudan, and International Business and Economics. Previously she served as Minister Counsellor in charge of legal affairs at China's mission to the WTO, during which time she served as Chair of the WTO's Committee on Trade-Related Investment Measures (TRIMs). Ms Zhao then served as Commissioner for Trade Negotiations at the Chinese Ministry of Commerce's Department for WTO Affairs, where she participated in a number of important negotiations on international trade, including the Trade Facilitation Agreement negotiations, and negotiations on expansion of the Information Technology Agreement.

Domestically, Ms Zhao helped formulate many important Chinese legislative acts on economic and trade areas adopted since the 1990s and has experience in China's judiciary system, serving as Juror at the Economic Tribunal of the Second Intermediate Court of Beijing between 1999 and 2004. She has also taught and supervised law students on international economic Law, WTO law and intellectual property rights (IPR) at various universities in China.

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DIRECTOR OF THE APPELLATE BODY SECRETARIAT

Werner Zdouc

Director of the WTO Appellate Body Secretariat since 2006, Werner Zdouc obtained a law degree from the University of Graz in Austria. He then went on to earn an LLM from Michigan Law School and a PhD from the University of St Gallen in Switzerland. Dr Zdouc joined the WTO Legal Affairs Division in 1995, advised many dispute settlement panels, and conducted technical cooperation missions in many developing countries. He became legal counsellor at the Appellate Body Secretariat in 2001. In 2008-2009 he chaired the WTO Joint Advisory Committee to the Director-General. He has been a lecturer and Visiting Professor for international trade law at Vienna Economic University; the Universities of St. Gallen, Zurich, Barcelona, Seoul, and Shanghai; and the Geneva Graduate Institute. From 1987 to 1989, he worked for governmental and 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 5

FORMER APPELLATE BODY MEMBERS AND CHAIRPERSONS

I. FORMER APPELLATE BODY MEMBERS

Name	Nationality	Term(s) of office
Said El-Naggar	Egypt	1995-2000
Mitsuo Matsushita	Japan	1995-2000
Christopher Beeby	New Zealand	1995-1999 1999-2000
Claus-Dieter Ehlermann	Germany	1995-1997 1997-2001
Florentino Feliciano	Philippines	1995-1997 1997-2001
Julio Lacarte-Muró	Uruguay	1995-1997 1997-2001
James Bacchus	United States	1995-1999 1999-2003
John Lockhart	Australia	2001-2005 2005-2006
Yasuhei Taniguchi	Japan	2000-2003 2003-2007
Merit E. Janow	United States	2003-2007
Arumugamangalam Venkatachalam Ganesan	India	2000-2004 2004-2008
Georges Michel Abi-Saab	Egypt	2000-2004 2004-2008
Luiz Olavo Baptista	Brazil	2001-2005 2005-2009
Giorgio Sacerdoti	Italy	2001-2005 2005-2009
Jennifer Hillman	United States	2007-2011
Lilia Bautista	Philippines	2007-2011
Shotaro Oshima	Japan	2008-2012
David Unterhalter	South Africa	2006-2009 2009-2013
Yuejiao Zhang	China	2008-2012 2012-2016
Seung Wha Chang	Korea, Republic of	2012-2016
Hyun Chong Kim	Korea, Republic of	2016-2017*

* Mr Hyun Chong Kim resigned from the Appellate Body, effective 1 August 2017.

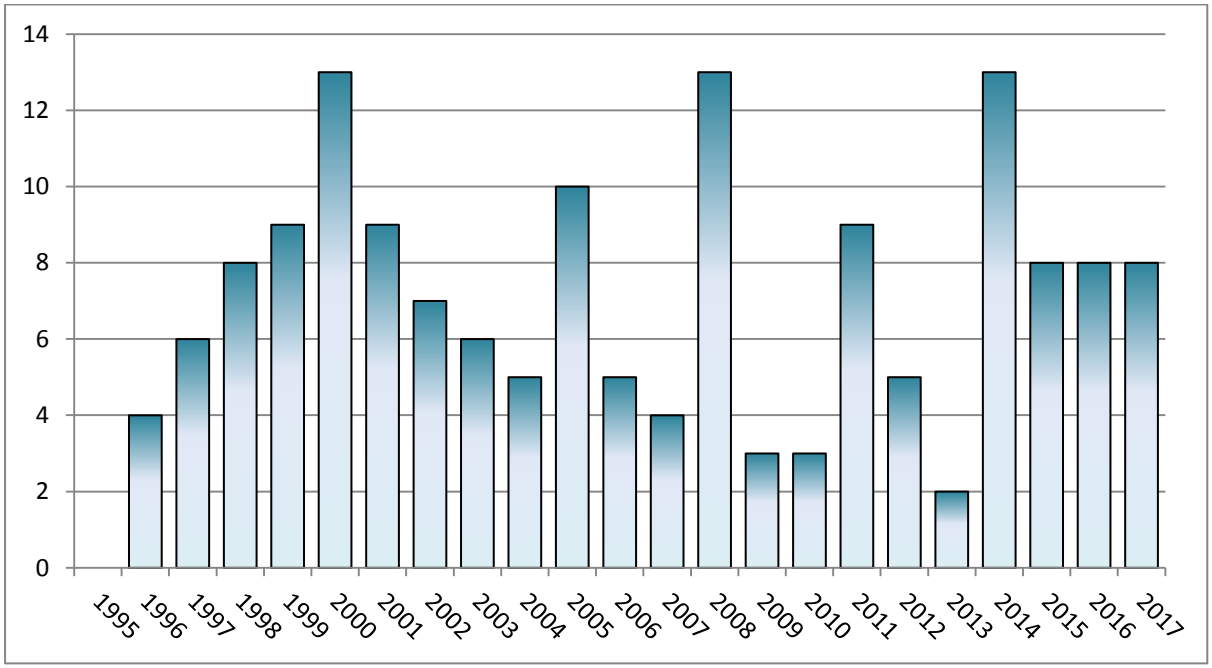
II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

Name	Nationality	Term(s) as Chairperson
Julio Lacarte-Muró	Uruguay	7 February 1996- 6 February 1997 7 February 1997- 6 February 1998
Christopher Beeby	New Zealand	7 February 1998- 6 February 1999
Said El-Naggar	Egypt	7 February 1999- 6 February 2000
Florentino Feliciano	Philippines	7 February 2000- 6 February 2001
Claus-Dieter Ehlermann	Germany	7 February 2001- 10 December 2001
James Bacchus	United States	15 December 2001- 14 December 2002 15 December 2002- 10 December 2003
Georges Abi-Saab	Egypt	13 December 2003- 12 December 2004
Yasuhei Taniguchi	Japan	17 December 2004- 16 December 2005
Arumugamangalam Venkatachalam Ganesan	India	17 December 2005- 16 December 2006
Giorgio Sacerdoti	Italy	17 December 2006- 16 December 2007
Luiz Olavo Baptista	Brazil	17 December 2007- 16 December 2008
David Unterhalter	South Africa	18 December 2008- 11 December 2009 12 December 2009- 16 December 2010
Lilia Bautista	Philippines	17 December 2010- 14 June 2011
Jennifer Hillman	United States	15 June 2011- 10 December 2011
Yuejiao Zhang	China	11 December 2011- 31 May 2012 1 June 2012- 31 December 2012
Ricardo Ramírez Hernández	Mexico	1 January 2013- 31 December 2013 1 January 2014- 31 December 2014
Peter Van den Bossche	Belgium	1 January 2015- 31 December 2015
Thomas Graham	United States	1 January 2016- 31 December 2016
Ujal Singh Bhatia	India	1 January 2017- 31 December 2017

ANNEX 6

APPEALS FILED: 1995-2017[1]

TOTAL NUMBER OF APPEALS: 1995-2017



APPEALS FILED: 1995-2017

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

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

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
2010	3	3	0
2011	9	9	0
2012	5	5	0
2013	2	2	0
2014	13	11	2
2015	8[h]	6	2
2016	8	7	1
2017	8	6	2
Total	**159**	**133**	**26**

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

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

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

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

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

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

[g] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *US – Shrimp (Thailand)* and *US – Customs Bond Directive.*

[h] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* and *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*.

ANNEX 7

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF ADOPTION[a]: 1996-2017[b]

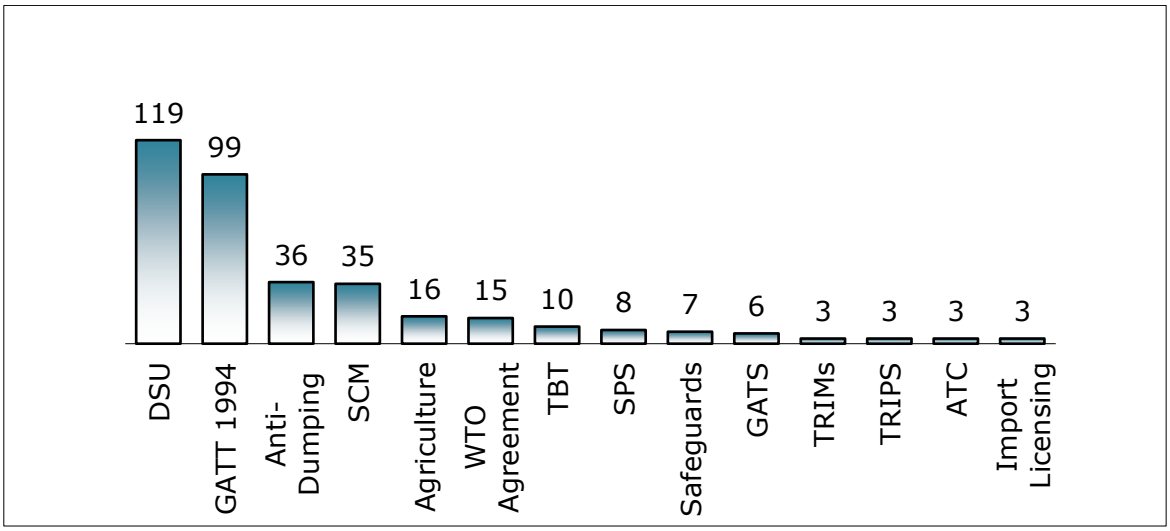
	All panel reports			Panel reports other than Article 21.5 reports[c]			Article 21.5 panel reports		
Year of adoption	**Panel reports adopted[d]**	**Panel reports appealed[e]**	**Percentage appealed[f]**	**Panel reports adopted**	**Panel reports appealed**	**Percentage appealed**	**Panel reports adopted**	**Panel reports appealed**	**Percentage appealed**
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
2006	7	6	86%	4	3	75%	3	3	100%
2007	10	5	50%	6	3	50%	4	2	50%
2008	11	9	82%	8	6	75%	3	3	100%
2009	8	6	75%	6	4	67%	2	2	100%
2010	5	2	40%	5	2	40%	0	0	–
2011	8	5	63%	8	5	63%	0	0	–
2012	18	11	61%	18	11	61%	0	0	–
2013	4	2	50%	4	2	50%	0	0	–
2014	15	13	87%	13	11	85%	2	2	100%
2015	13	8	62%	11	6	55%	2	2	100%
2016	8	7	88%	6	6	100%	2	1	50%
2017	9	8	89%	9	6	67%	0	2	100%
Total	**231**	**159**	**70%**	**198**	**133**	**68%**	**33**	**26**	**79%**

[a] The figures in this table correspond to the year in which the panel report was adopted, even in cases when the panel reports were appealed in a different year.
[b] No panel reports were adopted in 1995.
[c] 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.
[d] 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*, *EC – Export Subsidies on Sugar*, and *EC – Chicken Cuts* are also counted as single panel reports in each of those disputes.
[e] 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.
[f] Percentages are rounded to the nearest whole number.

ANNEX 8

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2017

The chart below shows the number of times specific WTO agreements have been addressed in the 150 Appellate Body reports circulated from 1996 to 2017.



WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2017[a]

Year of circulation	DSU	WTO Agmt	GATT 1994	Agri-culture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	Safe-guards	GATS	TRIPS
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	0	1	1
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	1	0	0
2000	8	1	7	2	0	0	0	0	2	0	5	2	1	1
2001	7	1	3	1	0	1	1	0	4	0	1	2	0	0
2002	8	2	4	3	0	0	1	0	1	0	3	1	1	1
2003	4	2	3	0	1	0	0	0	4	0	1	1	0	0
2004	2	0	5	0	0	0	0	0	2	0	1	0	0	0
2005	9	0	5	2	0	0	0	0	2	0	4	0	1	0
2006	5	0	3	0	0	0	0	0	3	0	2	0	0	0
2007	5	0	2	1	0	0	0	0	2	0	1	0	0	0
2008	8	1	9	1	2	0	0	0	3	0	3	0	0	0
2009	3	0	4	0	0	0	0	0	3	0	0	0	1	0
2010	1	0	0	0	1	0	0	0	0	0	0	0	0	0
2011	7	1	6	0	0	0	0	0	1	0	2	0	0	0
2012	9	0	7	0	0	0	4	0	1	0	2	0	0	0
2013	0	0	2	0	0	0	0	2	0	0	2	0	0	0
2014	6	4	7	0	0	0	2	0	0	0	3	0	0	0
2015	7	0	7	1	0	0	2	0	3	1	0	0	0	0
2016	6	1	6	0	0	0	0	1	2	0	1	0	1	0
2017	6	0	2	2	1	0	0	0	2	0	1	0	0	0
Total	**119**	**16**	**99**	**16**	**8**	**3**	**10**	**3**	**36**	**3**	**35**	**7**	**6**	**3**

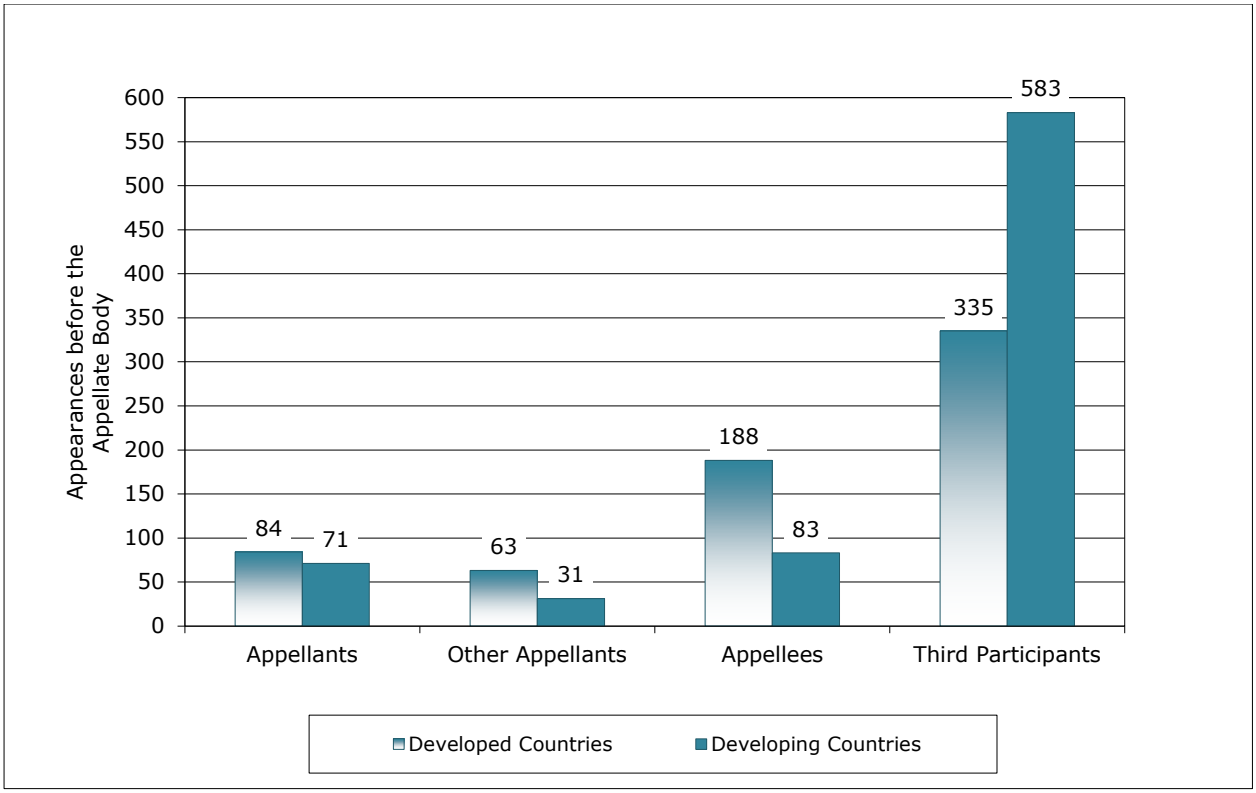
[a] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

ANNEX 9

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1996-2017

The chart below shows the ratio of developed country Members to developing country Members in terms of appearances made as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 to 2017.[1]

WTO MEMBER PARTICIPATION IN APPEALS 1996-2017



I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua & Barbuda	0	1	1	0	2
Argentina	3	5	8	22	38
Australia	2	2	6	49	59
Bahrain, Kingdom of	0	0	0	1	1
Barbados	0	0	0	1	1
Belize	0	0	0	4	4

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

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Benin	0	0	0	1	1
Bolivia, Plurinational State of	0	0	0	1	1
Brazil	5	7	12	42	66
Cameroon	0	0	0	3	3
Canada	14	10	23	36	83
Chad	0	0	0	2	2
Chile	3	0	2	12	17
China	16	5	11	54	86
Colombia	1	0	0	23	24
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	19	23
Egypt	0	0	0	2	2
El Salvador	0	0	0	6	6
European Union	22	22	51	75	170
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	2	2	13	18
Guyana	0	0	0	1	1
Honduras	0	2	2	6	10
Hong Kong, China	0	0	0	8	8
Iceland	0	0	0	2	2
India	9	2	8	47	66
Indonesia	3	1	1	5	10
Israel	0	0	0	2	2
Jamaica	0	0	0	5	5
Japan	7	6	15	71	99
Kenya	0	0	0	1	1
Korea	3	5	7	41	56
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1
Malaysia	1	0	1	1	3
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Mexico	5	6	9	36	56
Namibia	0	0	0	1	1
New Zealand	0	3	8	14	25
Nicaragua	0	0	0	4	4
Nigeria	0	0	0	1	1
Norway	2	1	3	35	41
Oman	0	0	0	4	4
Pakistan	0	0	2	3	5
Panama	1	0	2	3	6
Paraguay	0	0	0	7	7
Peru	1	1	1	7	10
Philippines	3	0	3	2	8
Poland	0	0	1	0	1
Russian Federation	1	0	1	12	14
Saint Lucia	0	0	0	4	4
Saudi Arabia, Kingdom of	0	0	0	18	18
Senegal	0	0	0	1	1
Singapore	0	0	0	2	2
South Africa	0	0	0	1	1
St Kitts & Nevis	0	0	0	1	1
St Vincent & the Grenadines	0	0	0	3	3
Suriname	0	0	0	3	3
Swaziland	0	0	0	1	1
Switzerland	0	1	1	1	3
Chinese Taipei	0	0	0	44	44
Tanzania	0	0	0	1	1
Thailand	3	2	5	23	33
Trinidad & Tobago	0	0	0	1	1
Turkey	1	0	0	20	21
Ukraine	0	0	0	1	1
United States	38	24	85	44	191
Venezuela, Bolivarian Republic of	0	0	1	6	7
Viet Nam	1	0	0	9	10
Total	**148**	**110**	**275**	**897**	**1430**

II. DETAILS BY YEAR OF CIRCULATION

1996

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

1997

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

1998

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

1999

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

2000

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

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

2001

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

2002

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

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

2003

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

2004

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

2005

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

2005 (CONT'D)

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

2006

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

2007

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

2008

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Stainless Steel (Mexico) WT/DS344/AB/R	Mexico	---	United States	Chile China European Communities Japan Thailand
US – Upland Cotton (Article 21.5 – Brazil) WT/DS267/AB/RW	United States	Brazil	Brazil United States	Argentina Australia Canada Chad China European Communities India Japan New Zealand Thailand
US – Shrimp (Thailand) WT/DS343/AB/R	Thailand	United States	United States Thailand	Brazil Chile China European Communities India Japan Korea Mexico Viet Nam
US – Customs Bond Directive WT/DS345/AB/R	India	United States	United States India	Brazil China European Communities Japan Thailand
US – Continued Suspension WT/DS320/AB/R	European Communities	United States	United States European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei
Canada – Continued Suspension WT/DS321/AB/R	European Communities	Canada	Canada European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei

2008 (CONT'D)

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

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Auto Parts (EC) WT/DS339/AB/R	China	---	European Communities	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (US) WT/DS340/AB/R	China	---	United States	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (Canada) WT/DS342/AB/R	China	---	Canada	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand

2009

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

2010

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

2011

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Anti-Dumping and Countervailing Duties (China) WT/DS379/AB/R	China	---	United States	Argentina Australia Bahrain Brazil Canada European Union India Japan Kuwait Mexico Norway Saudi Arabia Chinese Taipei Turkey
EC and certain member States – Large Civil Aircraft WT/DS316/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
Thailand – Cigarettes (Philippines) WT/DS371/AB/R	Thailand	---	Philippines	Australia China European Union India Chinese Taipei United States
EC – Fasteners (China) WT/DS397/AB/R	European Union	China	China European Union	Brazil Canada Chile Colombia India Japan Norway Chinese Taipei Thailand Turkey United States
US – Tyres (China) WT/DS399/AB/R	China	---	United States	European Union Japan Chinese Taipei Turkey Viet Nam

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Philippines – Distilled Spirits (European Union) WT/DS396/AB/R	Philippines	European Union	European Union Philippines	Australia China India Mexico Chinese Taipei Thailand
Philippines – Distilled Spirits (United States) WT/DS403/AB/R	Philippines	---	United States	Australia China Colombia India Mexico Chinese Taipei Thailand

2012

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

2012 (CONT'D)

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

2012 (CONT'D)

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

2013

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

2014

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Seal Products (Canada) WT/DS400/AB/R	Canada	European Union	Canada European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Russia United States
EC – Seal Products (Norway) WT/DS401/AB/R	Norway	European Union	Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Namibia Russia United States
US – Countervailing and Anti-Dumping Measures (China) WT/DS449/AB/R and Corr.1	China	United States	United States China	Australia Canada European Union India Japan Russia Turkey Viet Nam
China – Rare Earths (US) WT/DS431/AB/R	United States	China	United States China	Argentina Australia Brazil Canada Chinese Taipei Colombia European Union India Indonesia Korea Japan Norway Oman Peru Russia Saudi Arabia Turkey Viet Nam

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Rare Earths (EU) WT/DS432/AB/R	China	---	European Union	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia Japan Korea Norway Oman Peru Russia Saudi Arabia Turkey United States Viet Nam
China – Rare Earths (Japan) WT/DS433/AB/R	China	---	Japan	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia European Union Korea Norway Oman Peru Russia United States
US – Carbon Steel (India) WT/DS436/AB/R	India	United States	India United States	Australia Canada China European Union Saudi Arabia Turkey

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Countervailing Measures (China) WT/DS437/AB/R	China	United States	United States China	Australia Brazil Canada European Union India Japan Korea Norway Russia Saudi Arabia Turkey Viet Nam

2015

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Argentina – Import Measures (EU) WT/DS438/AB/R	Argentina	European Union	Argentina European Union	Australia Canada China Ecuador Guatemala India Israel Japan Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States
Argentina – Import Measures (US) WT/DS444/AB/R	Argentina		United States	Australia Canada China Ecuador European Union Guatemala India Israel Japan Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland
Argentina – Import Measures (Japan) WT/DS445/AB/R	Argentina	Japan	Argentina Japan	Australia Canada China Ecuador European Union Guatemala India Israel Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – COOL (Article 21.5 – Canada) WT/DS384/AB/RW	United States	Canada	Canada United States	Australia Brazil China Colombia European Union Guatemala India Japan Korea Mexico New Zealand
US – COOL (Article 21.5 – Mexico) WT/DS386/AB/RW	United States	Mexico	Mexico United States	Australia Brazil Canada China Colombia European Union Guatemala India Japan Korea New Zealand
US – Shrimp II (Viet Nam) WT/DS429/AB/R	Viet Nam	---	United States	China Ecuador European Union Japan Norway Thailand
India – Agricultural Products WT/DS430/AB/R	India	---	United States	Argentina Brazil China Colombia Ecuador European Union Guatemala Japan
Peru – Agricultural Products WT/DS457/AB/R	Peru	Guatemala	Guatemala Peru	Argentina Brazil China Colombia Ecuador El Salvador European Union Honduras India Korea United States

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – HP-SSST (Japan) WT/DS454/AB/R and Add. 1	Japan	China	China Japan	European Union India Korea Russia Saudi Arabia Turkey United States
China – HP-SSST (EU) WT/DS460/AB/R and Add. 1	China	European Union	China European Union	India Japan Korea Russia Saudi Arabia Turkey United States
US – Tuna II (Mexico) (Article 21.5 – Mexico) WT/DS381/AB/RW	United States	Mexico	Mexico United States	Australia Canada China European Union Guatemala Japan Korea New Zealand Norway Thailand

2016

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Fasteners (China) – (Article 21.5 – China) WT/DS397/AB/RW	European Union	China	China European Union	Japan United States
Argentina – Financial Services WT/DS453/AB/R	Panama	Argentina	Argentina Panama	Australia Brazil China Ecuador European Union Guatemala Honduras India Oman Saudi Arabia Singapore United States
Colombia –Textiles WT/DS461/AB/R	Colombia	---	Panama	China Ecuador El Salvador European Union Guatemala Honduras Philippines United States
US – Washing Machines WT/DS464/AB/R	United States	Korea	Korea United States	Brazil Canada China European Union India Japan Norway Saudi Arabia Thailand Turkey Viet Nam

2016 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
India – Solar Cells WT/DS456/AB/R	India	---	United States	Brazil Canada China Ecuador European Union Japan Korea Malaysia Norway Russia Saudi Arabia Chinese Taipei Turkey
EU – Biodiesel (Argentina) WT/DS473/AB/R	European Union	Argentina	Argentina European Union	Australia China Colombia Indonesia Mexico Norway Russia Saudi Arabia Turkey United States

2017

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Pigs (EU) WT/DS475/AB/R	Russia	European Union	European Union Russia	Australia Brazil China India Japan Korea Norway Chinese Taipei South Africa United States
US – Anti-Dumping Methodologies (China) WT/DS471/AB/R	China	---	United States	Brazil Canada European Union India Japan Korea Norway Russia Saudi Arabia Chinese Taipei Turkey Ukraine Viet Nam
US – Tax Incentives WT/DS487/AB/R	United States	---	European Union	Australia Brazil Canada China Japan Korea Russia
EU – Fatty Alcohols (Indonesia) WT/DS442/AB/R	Indonesia	European Union	European Union Indonesia	Korea United States
Indonesia – Import Licensing Regimes WT/DS477/AB/R	Indonesia	---	New Zealand United States	Argentina Australia Brazil Canada China European Union Japan Korea Norway Paraguay Singapore Chinese Taipei

2017 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Indonesia – Import Licensing Regimes WT/DS478/AB/R	Indonesia	---	New Zealand United States	Argentina Australia Brazil Canada China European Union Japan Korea Norway Paraguay Singapore Chinese Taipei