



WORLD TRADE  
ORGANIZATION

# WTO Analytical Index: **Supplement Covering New Developments in WTO Law and Practice**

**October 2011 – June 2015**

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## **SCOPE AND COVERAGE OF THIS SUPPLEMENT**

The Third Edition of the *WTO Analytical Index: Guide to WTO Law and Practice* is updated to 30 September 2011. This *Supplement* covers developments in WTO law and practice over the period 1 October 2011 to 4 June 2015.

**DISCLAIMER**

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

## FOREWORD

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

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

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

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

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

Valerie Hughes  
Director  
Legal Affairs Division  
World Trade Organization

## EDITORIAL CONVENTIONS

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

- Where there are multiple cases addressing a provision, they are presented in chronological order.
- Dispute settlement reports, awards and decisions are referred to by their standard short titles.
- Extracts are introduced by short explanatory sentences, generally setting out the context for the particular extract.
- Extracts are generally kept to a minimum, given that the full text of all materials cited in this work can be accessed on-line through the WTO website.
- Original footnotes within extracts are generally omitted.
- No emphasis is added to any of the extracts. Thus, wherever there is any emphasis in an extract, it is found in the original.
- Within quoted material, ellipses (" ... ") are used to indicate where text within a sentence, a paragraph or larger section has been omitted. Ellipses are not used at the beginning or ending of passages reproduced in quotations. Square brackets [ ] are used to indicate required editorial changes, which have been kept to a minimum.

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## I. NEW DISPUTE SETTLEMENT REPORTS, AWARDS, AND DECISIONS

### A. TABLE OF CASES COVERED IN THIS SUPPLEMENT

1. The Third Edition of the *WTO Analytical Index: Guide to WTO Law and Practice* is updated to 30 September 2011. This *Supplement* contains summaries and selected extracts of key findings from 41 decisions circulated between 1 October 2011 and 4 June 2015, including 22 panel reports, 17 Appellate Body reports, and 2 arbitration awards:

Type	Short Title	DS No.	Circulated	Subject
Appellate Body Report	<i>India – Agricultural Products</i>	430	2015.06.04	SPS
Appellate Body Reports	<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	384, 386	2015.05.18	TBT / GATT
Panel Report	<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	381	2015.04.15	TBT / GATT
Appellate Body Report	<i>US – Shrimp II (Viet Nam)</i>	429	2015.04.07	AD
Panel Report	<i>China – HP-SSST (Japan)</i>	454, 460	2015.02.13	AD
Appellate Body Reports	<i>Argentina – Import Measures</i>	438, 444, 445	2015.01.15	GATT
Appellate Body Report	<i>US – Countervailing Measures (China)</i>	437	2014.12.18	SCM
Appellate Body Report	<i>US – Carbon Steel (India)</i>	436	2014.12.08	SCM
Panel Report	<i>Peru – Agricultural Products</i>	457	2014.11.27	Agriculture / GATT
Panel Report	<i>US – Shrimp II (Viet Nam)</i>	429	2014.11.17	AD
Panel Reports	<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	384, 386	2014.10.20	DSU
Panel Report	<i>India – Agricultural Products</i>	430	2014.10.14	SPS
Panel Reports	<i>Argentina – Import Measures</i>	438, 444, 445	2014.08.22	GATT
Appellate Body Reports	<i>China – Rare Earths</i>	431, 432, 433	2014.08.07	GATT / Accession Protocol
Panel Report	<i>US – Carbon Steel (India)</i>	436	2014.07.14	SCM
Panel Report	<i>US – Countervailing Measures (China)</i>	437	2014.07.14	SCM
Appellate Body Report	<i>US – Countervailing and Anti-Dumping Measures (China)</i>	449	2014.07.07	GATT
Panel Report	<i>China – Autos (US)</i>	440	2014.05.23	AD / SCM

Appellate Body Reports	<i>EC – Seal Products</i>	400, 401	2014.05.22	TBT / GATT
Panel Reports	<i>China – Rare Earths</i>	431, 432, 433	2014.03.26	GATT / Accession Protocol
Panel Report	<i>US – Countervailing and Anti-Dumping Measures (China)</i>	449	2014.03.27	GATT / SCM
Panel Reports	<i>EC – Seal Products</i>	400, 401	2013.11.25	TBT / GATT
Panel Report	<i>China – Broiler Products</i>	427	2013.08.02	AD / SCM
Appellate Body Reports	<i>Canada – Renewable Energy / Feed-In Tariff Program</i>	412, 426	2013.05.06	SCM / GATT / TRIMs
Award of the Arbitrator	<i>China – GOES (Article 21.3(c))</i>	414	2013.05.03	DSU
Panel Report	<i>China – X-Ray Equipment</i>	425	2013.02.26	AD
Panel Reports	<i>Canada – Renewable Energy / Feed-In Tariff Program</i>	412, 426	2012.12.19	SCM / GATT / TRIMs
Award of the Arbitrator	<i>US – COOL (Article 21.3(c))</i>	384, 386	2012.12.04	DSU
Appellate Body Report	<i>China – GOES</i>	414	2012.10.18	SCM / AD
Panel Report	<i>China – Electronic Payment Services</i>	413	2012.07.16	GATS
Panel Report	<i>US – Shrimp and Sawblades</i>	422	2012.06.08	AD
Appellate Body Reports	<i>US – COOL</i>	384, 386	2012.06.29	TBT
Panel Report	<i>China – GOES</i>	414	2012.06.15	SCM / AD
Appellate Body Report	<i>US – Tuna II (Mexico)</i>	381	2012.05.16	TBT
Appellate Body Report	<i>US – Clove Cigarettes</i>	406	2012.04.04	TBT
Appellate Body Report	<i>US – Large Civil Aircraft (2nd complaint)</i>	353	2012.03.12	SCM
Panel Reports	<i>Dominican Republic – Safeguard Measures</i>	415, 416, 417, 418	2012.01.31	Safeguards / GATT
Appellate Body Reports	<i>China – Raw Materials</i>	394, 395, 398	2012.01.30	GATT / Accession Protocol
Appellate Body Reports	<i>Philippines – Distilled Spirits</i>	396, 403	2011.12.21	GATT
Panel Reports	<i>US – COOL</i>	384, 386	2011.11.18	TBT / GATT
Panel Report	<i>EU – Footwear (China)</i>	405	2011.10.28	AD / GATT / Accession Protocol

**B. WTO AGREEMENT****1. Article IX: Decision-Making**

(a) Article IX:2 (multilateral interpretations)

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

**2. Article XII: Accession**

(a) Article XII:1 (general)

3. In *China – Rare Earths*, the Panel followed the Appellate Body's prior ruling, in *China – Raw Materials*, that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT.<sup>2</sup> However, the Panel did agree with China that the so-called "trading rights" commitments in Paragraphs 83 and 84 of China's Working Party Report are subject to the general exceptions in Article XX of the GATT.<sup>3</sup> China appealed certain elements of the Panel's reasoning regarding the relationship between Paragraph 11.3 of the Accession Protocol and Article XX of the GATT 1994, and in particular the Panel's rejection of China's argument that, by virtue of Article XII:1 of the WTO Agreement (and Paragraph 1.2 of China's Accession Protocol), Paragraph 11.3 and certain other provisions relating to trade in goods in China's Accession Protocol have been made an integral part of the GATT 1994, and are therefore subject to the general exceptions in Article XX of the GATT. The Appellate Body, like the Panel, did not consider that Article XII:1 of the WTO Agreement (and/or Paragraph 1.2 of China's Accession Protocol) made Paragraph 11.3 of China's Accession Protocol an integral part of the GATT 1994, and did not consider that Article XII:1 offered any specific guidance on whether the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT.<sup>4</sup>

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<sup>1</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

<sup>2</sup> Panel Reports, *China – Rare Earths*, paras. 7.49-7.138.

<sup>3</sup> Panel Reports, *China – Rare Earths*, paras. 1.1016-7.1033.

<sup>4</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.22-5.34.



## C. GATT 1994

### 1. Article I: General Most-Favoured Nation Treatment

#### (a) Article I:1 (general obligation)

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

5. In *Dominican Republic – Safeguards*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX of the GATT 1994 or the Agreement on Safeguards.<sup>6</sup> The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures resulted in a suspension of obligations incurred by the Dominican Republic under Article I:1 of the GATT 1994.<sup>7</sup>

6. In *US – Tuna II (Mexico)*, the Panel, having found no violation of Article 2.1 of the TBT Agreement, exercised judicial economy in respect of the complainant's claim under Article I:1 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 and Article I:1 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claim under Article I:1.<sup>8</sup>

7. In *EC – Seal Products*, the Panel found that the indigenous communities and marine resource management exceptions to the EU ban on seal products were inconsistent with Article I:1 of the GATT.<sup>9</sup> The Panel found that in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affected the conditions of competition on the market of Canadian and Norwegian origin as compared to seal products of Greenlandic origin. Specifically, the Panel found that while the vast majority of seal products from Canada and Norway did not meet the requirements of the indigenous communities exception for placing on the market under the EU Seal Regime, virtually all of Greenlandic seal products were likely to qualify under that exception. The Appellate Body upheld the Panel's finding that, in the context of a claim under Article I:1 or III:4 of the GATT, as opposed to a claim under Article 2.1 of the TBT Agreement, it was not necessary to conduct an additional analysis of whether such detrimental treatment stemmed exclusively from a "legitimate regulatory distinction".<sup>10</sup>

8. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that the eligibility criteria, certification requirements, and tracking and verification requirements in the amended tuna measure

<sup>5</sup> Panel Report, *EU – Footwear (China)*, paras. 7.98-7.106.

<sup>6</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.

<sup>7</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.61-7.73.

<sup>8</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.

<sup>9</sup> Panel Reports, *EC – Seal Products*, paras. 7.592-7.600.

<sup>10</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.84-5.96, and 5.97-5.130.

accorded less favourable treatment to Mexican tuna and tuna products than that accorded to like products originating in certain other countries, in violation of Article I:1 of the GATT 1994.<sup>11</sup>

## 2. Article II: Schedules of Concessions

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

9. In *Dominican Republic – Safeguards*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX of the GATT 1994 or the Agreement on Safeguards.<sup>12</sup> The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures resulted in a suspension of obligations incurred by the Dominican Republic under Article II:1(b) of the GATT 1994.<sup>13</sup>

10. In *Peru – Agricultural Products*, the Panel found that the additional duties arising from its price range system measure constitute "other duties or charges ... imposed on or in connection with the importation" within the meaning of the second sentence of Article II:1(b) of the GATT 1994, and that in applying measures which constitute "other duties or charges", without having recorded them in its Schedule of Concessions, Peru's actions were inconsistent with the second sentence of Article II:1(b) of the GATT 1994.<sup>14</sup>

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

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

11. In *Philippines – Distilled Spirits*, the Appellate Body examined certain findings by the Panel concerning an excise tax on distilled spirits, whereby a low flat tax was applied by the Philippines to spirits made from certain designated raw materials, while significantly higher tax rates were applied to spirits made from non-designated materials. The Appellate Body upheld the Panel's finding that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994.<sup>15</sup> The Appellate Body upheld the Panel's finding that each type of imported distilled spirit at issue (brandy, rum, vodka, whisky, and tequila) made from non-designated raw materials was "like" the same type of distilled spirit made from designated raw materials. However, the Appellate Body reversed the Panel's finding that *all* imported distilled spirits made from non-designated raw materials were, irrespective of their type, "like" *all* domestic distilled spirits made from designated raw materials, within the meaning of Article III:2, first sentence, of the GATT 1994. In the course of its analysis, the Appellate Body considered the interpretation and application of Article III:2, first sentence, with regard to products' physical characteristics, consumer tastes and habits, tariff classification, and regulatory regimes of other Members.

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

12. In *Philippines – Distilled Spirits*, the Appellate Body upheld the Panel's finding (made in the context of the co-complaint by the United States) that the measure at issue was inconsistent with Article III:2, second sentence, of the GATT 1994.<sup>16</sup> The Appellate Body upheld the Panel's finding that all of the imported and domestic distilled spirits at issue were "directly competitive or

<sup>11</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.404-7.468.

<sup>12</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.

<sup>13</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.74-7.88.

<sup>14</sup> Panel Report, *Peru – Agricultural Products*, paras. 7.402-7.467.

<sup>15</sup> Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 112-174.

<sup>16</sup> Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 194-260.

substitutable" within the meaning of Article III:2, second sentence. The Appellate Body also upheld the Panel's finding that dissimilar taxation of imported distilled spirits, and of directly competitive or substitutable domestic distilled spirits, was applied "so as to afford protection" to Philippine production of distilled spirits.

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

13. In *US – Tuna II (Mexico)*, the Panel, having found no violation of Article 2.1 of the TBT Agreement, exercised judicial economy in respect of the complainant's claim under Article III:4 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 and Article III:4 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claim under Article III:4.<sup>17</sup>

14. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel concluded that compliance with the "Minimum Required Domestic Content Level" involved the "purchase or use" of products from a domestic source, within the meaning of Paragraph 1(a) of the Illustrative List, and that such compliance "is necessary" for electricity generators using solar PV and wind power technologies to participate in the FIT Programme, and thereby "obtain an advantage" within the meaning of Paragraph 1 of the Illustrative List. Having found that the challenged measures were TRIMs falling within the scope of Paragraph 1(a) of the Illustrative List, they were inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

15. In *EC – Seal Products*, the Panel found that the marine resource management exception to the EU ban on seal products was inconsistent with Article III:4 of the GATT.<sup>18</sup> Specifically, the Panel found that while the vast majority of seal products from Canada and Norway did not meet the requirements of the marine resource management exception, virtually all domestic seal products were likely to qualify under that exception. The Appellate Body upheld the Panel's finding that in the context of a claim under Article I:1 or III:4 of the GATT, as opposed to a claim under Article 2.1 of the TBT Agreement, it was not necessary to conduct an additional analysis of whether such detrimental treatment stemmed exclusively from a "legitimate regulatory distinction".

16. In *Argentina – Import Measures*, the Appellate Body upheld the Panel's finding that one of the measures at issue, with respect to its local content requirement, was inconsistent with Article III:4 of the GATT 1994.<sup>19</sup>

17. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel concluded that the amended COOL measure had a detrimental impact on the competitive opportunities of imported livestock and, thus, accords less favourable treatment than that accorded to like domestic livestock, within the meaning of Article III:4 of the GATT 1994.<sup>20</sup> On appeal, the Appellate Body found that the Panel did not err by not attributing contextual relevance to Article IX of the GATT 1994 in its interpretation of Article III:4 of the GATT 1994.<sup>21</sup>

18. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that the eligibility criteria, certification requirements, and tracking and verification requirements in the amended tuna measure

<sup>17</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.

<sup>18</sup> Panel Reports, *EC – Seal Products*, paras. 7.604-7.609.

<sup>19</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.271-6.296; Appellate Body Reports, *Argentina – Import Measures*, para. 5.205.

<sup>20</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.617-7.642.

<sup>21</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.341-5.359.

accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States, in violation of Article III:4 of the GATT 1994.<sup>22</sup>

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

19. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body provided a detailed analysis of the scope of the derogation in Article III:8(a) of the GATT 1994, and ultimately found that the measure at issue did not fall within the scope of the derogation in Article III:8(a) of the GATT 1994.<sup>23</sup>

#### 4. Article VI: Anti-Dumping and Countervailing Duties

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

20. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article VI:1 of the GATT 1994 with respect to: (i) the analogue country selection procedure, and the selection of Brazil as the analogue country in the original investigation<sup>24</sup>; (ii) the PCN system used and the adjustment for leather quality made by the Commission in the original investigation<sup>25</sup>; or (iii) the procedures for, and selection of, a sample of the domestic industry for purposes of examining injury in the original investigation.<sup>26</sup>

21. In *China – GOES*, the Panel exercised judicial economy over a claim that China acted inconsistently with Article VI:2 of the GATT 1994 with respect to the amount of the anti-dumping duty levied by MOFCOM on the "all other" unknown exporters, having found inconsistencies with both substantive and procedural provisions of the Anti-Dumping Agreement.<sup>27</sup>

22. In *US – Shrimp II (Viet Nam)*, the Panel found that Viet Nam failed to establish that the simple zeroing methodology as used by the USDOC in administrative reviews is a measure of general and prospective application which can be challenged "as such", and therefore found that Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement or Article VI:2 of the GATT 1994.<sup>28</sup> However, the Panel found that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in certain administrative reviews under the *Shrimp* anti-dumping order.<sup>29</sup>

- (b) Article VI:3 (countervailing duties)

23. In *China – Broiler Products*, the United States claimed that MOFCOM acted inconsistently with Articles 19.4 of the SCM Agreement and VI:3 of the GATT 1994 because it improperly calculated the amount of per unit subsidization in the subject imports. In particular, the United States claimed that MOFCOM improperly allocated subsidies received for the production of *all* chicken products *only* to the production of subject products. The Panel upheld the claims. It concluded MOFCOM had not explained how its subsidy calculation ensured that it only countervailed those subsidies bestowed on the production of subject products even though US interested parties had raised

<sup>22</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.469-7.504.

<sup>23</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.54-5.85.

<sup>24</sup> Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.

<sup>25</sup> Panel Report, *EU – Footwear (China)*, paras. 7.276-7.287.

<sup>26</sup> Panel Report, *EU – Footwear (China)*, paras. 7.353-7.391.

<sup>27</sup> Panel Report, *China – GOES*, paras. 7.431-7.432.

<sup>28</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.29-7.56.

<sup>29</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.74-7.81.

doubts as to whether the data relied upon by MOFCOM pertained to all of their production, or only to their production of subject products.<sup>30</sup>

## 5. Article VIII: Fees and Formalities connected with Importation and Exportation

### (a) Relationship to Article XI:1

24. In *Argentina – Import Measures*, the Appellate Body upheld the Panel's finding that the measures constituted a "restriction" on the importation of goods and were thus inconsistent with Article XI:1 of the GATT 1994.<sup>31</sup> In the course of its analysis, the Appellate Body considered several issues relating to the interpretation of discrete elements of Article XI:1 of the GATT 1994, including whether and under what circumstances measures that qualify as "formalities" or "requirements" under GATT Article VIII may constitute "restrictions" under Article XI:1.

## 6. Article X: Publication and Administration of Trade Regulations

### (a) Article X:1 (prompt publication)

25. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:1 of the GATT.<sup>32</sup> At issue was PL 112-99, as US law enacted on 13 March 2012 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from nonmarket economy (NME) countries to all US CVD investigations initiated on or after 20 November 2006. The United States had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. China claimed that PL 112-99 violated Article X:1 because it had not been "published promptly" in relation to the date that it was "made effective", as required by Article X:1. The Panel concluded that for the purposes of Article X:1, PL 112-99 was "made effective" on 13 March 2012, and not on 20 November 2006 as argued by China. Accordingly, the Panel found no violation of Article X:1.

### (b) Article X:2 (enforcement prior to publication)

26. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:2 of the GATT.<sup>33</sup> At issue was PL 112-99, as US law enacted on 13 March 2012 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from nonmarket economy (NME) countries to all US CVD investigations initiated on or after 20 November 2006. The United States Department of Commerce (USDOC) had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. The Panel concluded that PL 112-99 was not a measure "effecting an advance" or "imposing a new or more burdensome requirement" within the meaning of Article X:2, and therefore rejected China's claim. The Appellate Body reversed the Panel's interpretation of Article X:2, but was ultimately unable to complete the analysis of whether PL 112-99 was a measure "effecting an advance" or "imposing a new or more burdensome requirement" within the meaning of Article X:2.<sup>34</sup> The Appellate Body considered that the Panel erred in identifying the USDOC's practice of applying

<sup>30</sup> Panel Report, *China – Broiler Products*, paras. 7.255-7.266.

<sup>31</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.243-6.265; 6.425-6.479; Appellate Body Reports, *Argentina – Import Measures*, paras. 5.214-5.288.

<sup>32</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.16-7.89.

<sup>33</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.90-7.241.

<sup>34</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.53-4.183.

countervailing duties to imports from China as an NME country between 2006 and 2012 as the relevant baseline of comparison to determine whether PL 112-99 effected an "advance" in the rate of duty or imposed a "new or more burdensome requirement". The Appellate Body concluded that instead of proceeding from the agency practice and then addressing the issue of whether that practice was lawful or not, the Panel should have focused on ascertaining the meaning of the prior published US CVD law, in order to determine whether the 2012 law increased duties or imposed new or more burdensome requirements in relation to that pre-existing US law. The Appellate Body was unable to complete the analysis and arrive at a conclusion as to whether PL 112-99 changed pre-existing US CVD law and/or effected an "advance" in a rate of duty or imposed a "new or more burdensome" requirement or restriction on imports within the meaning of Article X:2.

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

27. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which required that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement and Article I:1 of the GATT 1994. Like the panel in *EC – Fasteners (China)*, the Panel then exercised judicial economy with respect to a claim that Article 9(5) was administered in a manner inconsistent with Article X:3(a) of the GATT 1994.<sup>35</sup>

28. In *US – COOL*, the Panel found, based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, that the Vilsack letter was not "appropriate", and thus did not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a) of the GATT 1994. However, the Panel rejected Mexico's claim that shifts in the USDA guidance on the labelling requirements under the COOL measure violated Article X:3(a).<sup>36</sup>

(d) Article X:3(b) (judicial review)

29. In *US – Countervailing and Anti-Dumping Measures (China)*, the Panel rejected China's claim that the measure at issue violated Article X:3(b) of the GATT.<sup>37</sup> At issue was PL 112-99, as US law enacted on 13 March 2012 that expressly provided for the applicability of US countervailing duty (CVD) law to imports from nonmarket economy (NME) countries to all US CVD investigations initiated on or after 20 November 2006. The United States had been applying US CVD law to imports from China since 2006. In 2012, a US court decided that US CVD law was not applicable to imports from China and other countries that the United States treated as NMEs under its trade remedy laws. PL 112-99 was enacted before that court decision became final. The Panel found that the United States had not acted inconsistently with Article X:3(b), on the grounds that the obligation that administrative agencies implement and be governed by decisions of the tribunals maintained to review their administrative action relating to customs matters does not prohibit a Member from taking legislative action in the nature of PL 112-99.

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<sup>35</sup> Panel Report, *EU – Footwear (China)*, para. 7.10.

<sup>36</sup> Panel Reports, *US – COOL*, paras. 7.809-7.887.

<sup>37</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.242-7.297.

## 7. Article XI: General Elimination of Quantitative Restrictions

### (a) Article XI:1 (general obligation)

30. The Panel in *China – Rare Earths* found that the export quotas at issue were restrictions within the meaning of Article XI:1 of the GATT 1994.<sup>38</sup>

31. In *EC – Seal Products*, the Panel rejected a claim that each of the exceptions to the EU ban on seal products (as distinguished from the ban as such) individually imposed quantitative restrictions on imports of seal products inconsistently with Article XI:1 of the GATT.<sup>39</sup>

32. In *Argentina – Import Measures*, the Appellate Body upheld the Panel's finding that the measures constituted a "restriction" on the importation of goods and were thus inconsistent with Article XI:1 of the GATT 1994.<sup>40</sup> In the course of its analysis, the Appellate Body considered several issues relating to the interpretation of discrete elements of Article XI:1 of the GATT 1994, including whether and under what circumstances measures that qualify as "formalities" or "requirements" under GATT Article VIII may constitute "restrictions" under Article XI:1.

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

33. In *China – Raw Materials*, the Appellate Body upheld the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage".<sup>41</sup> The Appellate Body found that an export prohibition or restriction applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions to bridge a passing need. The Appellate Body agreed with the Panel that such a restriction must be of a limited duration and not indefinite. Moreover, the Appellate Body found that the term "critical shortages" refers to those deficiencies in quantity that are crucial and of decisive importance, or that reach a vitally important or decisive stage. On the basis of these findings, the Appellate Body upheld the Panel's conclusion that China did not demonstrate that its export quota on refractory-grade bauxite was "temporarily applied" to either prevent or relieve a "critical shortage".

## 8. Article XIX: Emergency Action on Imports of Particular Products

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

34. In *Dominican Republic – Safeguard Measures*, the Panel rejected the Dominican Republic's argument that because the challenged measures did not exceed its bound tariff rate, they were not safeguard measures, and were therefore not subject to the disciplines in Article XIX:1(a) of the GATT 1994 or the Agreement on Safeguards.<sup>42</sup> The Panel found that they were safeguard measures subject to Article XIX of the GATT 1994 and the Safeguards Agreement because, among other things, the impugned measures: (i) resulted in a suspension of obligations incurred by the Dominican Republic under Articles I:1 and II:1(a) of the GATT 1994; (ii) were taken by the Dominican Republic with the objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports; (iii) were the result of a procedure based, *inter alia*, on the provisions and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards; and (iv) were notified by the Dominican Republic as safeguard measures to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on

<sup>38</sup> Panel Reports, *China – Rare Earths*, para. 7.200.

<sup>39</sup> Panel Reports, *EC – Seal Products*, paras. 7.657-7.663.

<sup>40</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.243-6.265; 6.425-6.479; Appellate Body Reports, *Argentina – Import Measures*, paras. 5.214-5.288.

<sup>41</sup> Appellate Body Reports, *China – Raw Materials*, paras. 308-344.

<sup>42</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.50-7.91.

Safeguards. The Panel found the following violations of Article XIX:1(a): (i) the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994<sup>43</sup>; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that was inconsistent with Article 4.1(c) of the Agreement on Safeguards<sup>44</sup>; (iii) the determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry<sup>45</sup>; and (iv) the imposition of a safeguard measure on the basis of a determination of the existence of "serious injury" that is inconsistent with Article 4.1(a) of the Agreement on Safeguards.<sup>46</sup>

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

35. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article XIX:2 of the GATT 1994 by failing to properly notify the definitive safeguard measure.<sup>47</sup> The Panel also rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article XIX:2 by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.<sup>48</sup>

## 9. Article XX: General Exceptions

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

36. In *China – Raw Materials*, the Appellate Body found that the Panel did not err in finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to the obligation in Paragraph 11.3 of China's Accession Protocol.<sup>49</sup> The Appellate Body therefore upheld the Panel's conclusion that China could not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994, and the Panel's conclusion that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994.

37. In *China – Rare Earths*, the Panel followed the Appellate Body's prior ruling in *China – Raw Materials* and found that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT.<sup>50</sup> However, the Panel did agree with China that the so called "trading rights" commitments in Paragraphs 83 and 84 of China's Working Party Report are subject to the general exceptions in Article XX of the GATT.<sup>51</sup> China did not ask the Appellate Body to reverse the Panel's finding that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3 of China's Accession Protocol.<sup>52</sup> However, China appealed certain elements of the Panel's reasoning regarding the relationship between Paragraph 11.3 of the Accession Protocol and Article XX of the GATT 1994, and in particular the Panel's rejection of China's argument that, by virtue of Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol, Paragraph 11.3 and certain other provisions relating to trade in goods in China's Accession Protocol have been made an integral part of the GATT 1994, and are therefore subject to the general

<sup>43</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

<sup>44</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.

<sup>45</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.

<sup>46</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

<sup>47</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.415-7.438.

<sup>48</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.

<sup>49</sup> Appellate Body Reports, *China – Raw Materials*, paras. 270-307.

<sup>50</sup> Panel Reports, *China – Rare Earths*, paras. 7.49-7.138.

<sup>51</sup> Panel Reports, *China – Rare Earths*, paras. 1.1016-7.1033.

<sup>52</sup> Appellate Body Reports, *China – Rare Earths*, para. 2.27.



exceptions in Article XX of the GATT. The Appellate Body, like the Panel, did not consider that Article XII:1 of the WTO Agreement and/or Paragraph 1.2 of China's Accession Protocol made Paragraph 11.3 of China's Accession Protocol an integral part of the GATT 1994, and did not consider that these provisions offered any specific guidance on whether the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT.<sup>53</sup>

(b) Chapeau of Article XX

38. In *EC – Seal Products*, the Panel found that although the EU ban on seal products was "necessary to protect public morals" within the meaning of Article XX(a) of the GATT, the indigenous communities and marine resource management exceptions to the EU ban failed to meet the requirements under the chapeau of Article XX.<sup>54</sup> The Appellate Body reached the same conclusion.<sup>55</sup> The Appellate Body identified several features of the EU Seal Regime that indicated that the regime was applied in a manner that constitutes a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, in particular with respect to the indigenous communities (IC) exception. The Appellate Body considered that the European Union had not shown that the manner in which the EU Seal Regime treats seal products derived from IC versus "commercial" hunts could be reconciled with the objective of addressing EU public moral concerns regarding seal welfare; in particular, the Appellate Body found that the European Union had not established why it could not do anything further to ensure that the welfare of seals was addressed in the context of hunts conducted by Inuit and other indigenous communities, given that such hunts can cause the very pain and suffering for seals that the EU public was concerned about. The Appellate Body also found that, due to considerable ambiguity in certain criteria of the IC exception, and the broad discretion that the recognized bodies consequently enjoyed in applying them, seal products derived from what should have in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC exception. The Appellate Body was also not persuaded that the European Union had made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it had done with respect to the Greenlandic Inuit.

39. The Panel in *China – Rare Earths*, having found that none of the measures fell within the scope of the exceptions in Article XX, further found that none of the measures were applied in accordance with the requirements of the chapeau of Article XX.<sup>56</sup> In its chapeau analysis, the Panel first determined whether there was discrimination and/or a disguised restriction on international trade; it then determined whether such discrimination or disguised restriction was based on or explained by a conservation rationale in the light of China's reliance on Article XX(g); finally, the Panel considered whether WTO-consistent alternative measures existed. China did not appeal the Panel's findings that China had not established that its export quotas meet the requirements of the chapeau of Article XX of the GATT 1994.

40. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that all three aspects of the amended tuna measure challenged by Mexico were provisionally justified under paragraph (g) of Article XX, and proceeded to examine their consistency with the requirements of the chapeau of Article XX.<sup>57</sup> The Panel found that the eligibility criteria in the amended tuna were applied in a manner that meets the requirements of the chapeau; however, the Panel found that the different certification requirements and tracking and verification requirements in the amended tuna measure were applied in a manner that did not.

<sup>53</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.18-5.74.

<sup>54</sup> Panel Reports, *EC – Seal Products*, paras. 7.644-7.651.

<sup>55</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.291-5.339.

<sup>56</sup> Panel Reports, *China – Rare Earths*, paras. 7.188-7.193, 7.338-7.361, 7.616-7.680, 7.822-7.845, and 7.945-7.970.

<sup>57</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.546-7.613.

## (c) Article XX(a) (public morals)

41. In *EC – Seal Products*, the Panel found that the EU ban on seal products was "necessary to protect public morals" within the meaning of Article XX(a) of the GATT (but that the indigenous communities and marine resource management exceptions to the EU ban failed to meet the requirements under the chapeau of Article XX).<sup>58</sup> The Appellate Body upheld the Panel's finding that the EU Seal Regime was "necessary to protect public morals" within the meaning of Article XX(a).<sup>59</sup> The Appellate Body noted that, while the Panel identified the "principal objective" of the EU Seal Regime as being "to address public concerns on seal welfare", the Panel proceeded to find that the interests of Inuit and other indigenous communities had been "accommodated" in the measure. The Appellate Body did not find fault with the Panel's analysis that the EU Seal Regime was a measure taken to protect public morals within the meaning of Article XX(a) of the GATT 1994, and that the EU Seal Regime makes a contribution to its objective. The Appellate Body also did not take issue with the Panel's finding that the alternative measure proposed by Canada and Norway, which entailed a certification regime that conditioned market access for seal products on compliance with animal welfare standards, was beset by difficulties in addressing EU public moral concerns regarding seal welfare and therefore not "reasonably available" to the European Union.

## (d) Article XX(b) (human, animal or plant life or health)

42. In *EC – Seal Products*, the Panel found that the EU ban on seal products was "necessary to protect public morals" within the meaning of Article XX(a) of the GATT. Noting its finding that the objective of the measure was to address EU public moral concerns on seal welfare as opposed to the protection of seal welfare as such, and that the European Union had submitted limited arguments under Article XX(b) of the GATT, the Panel found that the European Union failed to make a prima facie case for its defence under Article XX(b).<sup>60</sup>

43. In *China – Rare Earths*, China did not dispute that it had applied export taxes inconsistently with the obligation in Paragraph 11.3 of its Accession Protocol, but argued that those export taxes were justified under Article XX(b) of the GATT. The Panel found that Article XX exceptions were not available to justify a breach of Paragraph 11.3 of China's Accession Protocol, but proceeded to address China's defence under Article XX(b) on an *arguendo* basis. The Panel found that China had not demonstrated that its export duties on the products at issue were justified under Article XX(b) of the GATT 1994 as measures necessary to protect human, animal or plant life or health, nor that they were applied in accordance with the requirements of the chapeau of Article XX.<sup>61</sup>

44. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that all three aspects of the amended tuna measure challenged by Mexico were provisionally justified under paragraph (g) of Article XX, and was therefore of the view that it need not decide whether the amended tuna measure was justified under Article XX(b).<sup>62</sup>

## (e) Article XX(g) (exhaustible natural resources)

45. In *China – Raw Materials*, China did not ask the Appellate Body to reverse the Panel's overall finding that the measures at issue were not justified under Article XX(g) of the GATT 1994, but did appeal one element of the Panel's interpretation of Article XX(g). The Appellate Body agreed with China and found that the Panel erred in its interpretation of the terms "made effective in conjunction

<sup>58</sup> Panel Reports, *EC – Seal Products*, paras. 7.630-7.639.

<sup>59</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.168-5.290.

<sup>60</sup> Panel Reports, *EC – Seal Products*, para. 7.640.

<sup>61</sup> Panel Reports, *China – Rare Earths*, paras. 7.139-7.194.

<sup>62</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.542-7.545.

with" in the context of Article XX(g).<sup>63</sup> Contrary to the Panel's findings, the Appellate Body saw nothing in the text of Article XX(g) to suggest that, in addition to being "made effective in conjunction with restrictions on domestic production or consumption", a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel had found.

46. In *China – Rare Earths*, the Panel found that China failed to demonstrate that its export quotas and measures relating to the administration thereof were justified under Article XX(g) of the GATT 1994, and/or that they were applied in accordance with the requirements of the chapeau of Article XX.<sup>64</sup> China, without seeking reversal of the Panel's final conclusion, appealed limited aspects of the Panel's interpretation and application of Article XX(g) of the GATT 1994, in connection with its findings that the export quotas at issue were not measures "relating to" the conservation of exhaustible natural resources, and were not "made effective in conjunction with" restrictions on domestic production or consumption. With respect to the "relating to" requirement, the Appellate Body found that the Panel did not err in its reasoning regarding the signals sent to foreign and domestic consumers by China's export quotas on rare earths and tungsten, or in rejecting China's argument that, by virtue of these signalling functions, China's export quotas on rare earths and tungsten "relate to" conservation. With respect to the "made effective in conjunction with" requirement, the Appellate Body found that the Panel erred to the extent that it suggested that "even-handedness" is a separate requirement that must be fulfilled in addition to the requirements expressly provided for in Article XX(g), and to the extent that it suggested that Article XX(g) requires the burden of conservation to be evenly distributed, for instance in the case of export restrictions, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. However, the Appellate Body also considered that any such error did not taint the remaining elements of the Panel's interpretation of the second clause of subparagraph (g). The Appellate Body also rejected multiple allegations by China that the Panel failed to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter. Accordingly, the Appellate Body upheld the Panel's findings that China's export quotas on rare earths, tungsten, and molybdenum were not justified under Article XX(g) of the GATT 1994.<sup>65</sup>

47. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that the amended tuna measure was provisionally justified under Article XX(g) of the GATT 1994.<sup>66</sup> In this regard, the Panel found that the features of the amended tuna measure that give rise to violations of Articles I and III of the GATT 1994 were nevertheless provisionally justified under subparagraph (g) of Article XX of the GATT 1994, as they clearly "relate to" the goal of conserving dolphins, and were also made effective in conjunction with restrictions on domestic production of tuna products.

## 10. Article XXIII: Nullification or Impairment

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

48. In *US – COOL*, the Panel did not consider it necessary to rule on a non-violation claim under Article XXIII:1(b) of the GATT 1994, having already reached findings of violation under Articles 2.1 and 2.2 of the TBT Agreement, and Article X:3(a) of the GATT 1994.<sup>67</sup>

49. In *EC – Seal Products*, the Panel refrained from examining the complainants' non-violation claim under Article XXIII:1(b) of the GATT, as a consequence of having already found that the measure at issue violated certain obligations in the TBT Agreement and the GATT.<sup>68</sup> The Panel

<sup>63</sup> Appellate Body Reports, *China – Raw Materials*, paras. 353-361.

<sup>64</sup> Panel Reports, *China – Rare Earths*, paras. 7.236-7.970, and 7.1034-7.1046.

<sup>65</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.75-5.252.

<sup>66</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.510-7.541.

<sup>67</sup> Panel Reports, *US – COOL*, paras. 7.900-7.907.

<sup>68</sup> Panel Reports, *EC – Seal Products*, paras. 7.677-7.683.

reasoned that compliance by the European Union with the findings of violations under Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement would remove the basis of the complainants' non-violation claims of nullification or impairment.

50. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel exercised judicial economy with regard to the non-violation claims under Article XXIII:1(b) of the GATT 1994 raised by Canada and Mexico, but nonetheless made alternative and conditional findings under Article XXIII:1(b) in the event that its findings of violation were overturned on appeal.<sup>69</sup>

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<sup>69</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.664-7.716.

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**D. AGREEMENT ON AGRICULTURE****1. Article 4: Market Access**

## (a) Article 4.2 (measures other than ordinary customs duties)

51. In *Peru – Agricultural Products*, the Panel found that the duties arising from its price range system measure constituted variable import levies or, at the least, shared sufficient characteristics with variable import levies to be considered a border measure similar to a variable import levy, within the meaning of footnote 1 to the Agreement on Agriculture; however, they did not constitute minimum import prices, and did not share sufficient characteristics with minimum import prices to be considered a border measure similar to a minimum import price, within the meaning of footnote 1 to the Agreement on Agriculture. The Panel found that by maintaining measures which constitute a variable import levy or, at the least, are border measures similar to a variable import levy, and are thus measures of the kind which have been required to be converted into ordinary customs duties, Peru was acting inconsistently with Article 4.2 of the Agreement on Agriculture.<sup>70</sup>

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<sup>70</sup> Panel Report, *Peru – Agricultural Products*, paras. 7.269-7.372.

## E. TBT AGREEMENT

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

#### (a) Article 2.1 (non-discrimination)

52. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the TBT Agreement.<sup>71</sup> The Appellate Body began by interpreting the concept of "like products" in Article 2.1, disagreeing with the Panel that "like products" in Article 2.1 of the TBT Agreement should be interpreted based on the regulatory purpose of the technical regulation at issue. Rather, the Appellate Body considered that the determination of whether products are "like", within the meaning of Article 2.1 of the TBT Agreement, is a determination about the competitive relationship between the products, based on an analysis of the traditional "likeness" criteria considered under Article III:4 of the GATT 1994, namely, physical characteristics, end-uses, consumer tastes and habits, and tariff classification. However, based on this interpretation of the concept of "like products", the Appellate Body nonetheless agreed with the Panel that clove cigarettes and menthol cigarettes are "like products" within the meaning of Article 2.1 of the TBT Agreement. The Appellate Body found that the Panel did not err in its approach to the product scope, or the temporal scope, of its analysis of "less favourable treatment". The Appellate Body found that the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflected discrimination against the group of like products imported from Indonesia.

53. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the US "dolphin-safe" labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement, and found instead that the US measure was inconsistent with Article 2.1.<sup>72</sup> The Appellate Body concluded that the Panel erred in its interpretation of the terms "treatment no less favourable". The Appellate Body reasoned, first, that by excluding most Mexican tuna products from access to the "dolphin-safe" label while granting access to most US tuna products and tuna products from other countries, the measure modified the conditions of competition in the US market to the detriment of Mexican tuna products. Next, the Appellate Body scrutinized whether, in the light of the factual findings made by the Panel and undisputed facts on the record, the detrimental impact from the measure stemmed exclusively from a legitimate regulatory distinction. The Appellate Body found that the measure at issue was not even-handed in the manner in which it addressed the risks to dolphins arising from different fishing techniques in different areas of the ocean.

54. In *US – COOL*, the Appellate Body upheld the Panel's finding that the COOL measure violated Article 2.1 of the TBT Agreement by according "less favourable treatment" to imported Canadian cattle and hogs than to like domestic cattle and hogs.<sup>73</sup> The Appellate Body agreed with the Panel that the COOL measure had a detrimental impact on imported livestock because its recordkeeping and verification requirements created an incentive for processors to use exclusively domestic livestock, and a disincentive against using like imported livestock. The Appellate Body found, however, that the Panel's analysis was incomplete because the Panel did not go on to consider whether this *de facto* detrimental impact stemmed exclusively from a legitimate regulatory distinction, in which case it would not violate Article 2.1. In its own analysis, the Appellate Body found that the COOL measure lacked even-handedness because its recordkeeping and verification requirements imposed a disproportionate burden on upstream producers and processors of livestock as compared to

<sup>71</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 104-233.

<sup>72</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 200-300.

<sup>73</sup> Appellate Body Reports, *US – COOL*, paras. 254-350.

the information conveyed to consumers through the mandatory labelling requirements for meat sold at the retail level.

55. In *EC – Seal Products*, the Panel found that the indigenous communities (IC) and marine resource management (MRM) exceptions to the EU ban on seal products were inconsistent with Article 2.1 of the TBT Agreement.<sup>74</sup> The Panel found that the IC exception had a detrimental impact on seal products imported from Canada, as it allowed virtually all seal products from Greenland to enter the EU market, while excluding the vast majority of seal products from Canada; similarly, the Panel found that the MRM exception had a detrimental impact on seal products from Canada, in that all of the EU's domestic seal products were eligible under the MRM exception, while virtually all Canadian seal products were not. The Panel then examined whether the detrimental impact caused by the IC and MRM exceptions stemmed exclusively from "legitimate regulatory distinctions", by considering: (1) whether the distinction was rationally connected to the objective of the EU Seal Regime; (2) if not, whether there was any cause or rationale that could justify the distinction despite the lack of a rational connection to the objective; and (3) whether the distinction was designed or applied in a manner that lacked even-handedness or constituted arbitrary or unjustifiable discrimination. The Panel ultimately concluded that the detrimental impact did not stem exclusively from a legitimate regulatory distinction. The Appellate Body reversed the Panel's threshold finding that the EU Seal Regime constituted a "technical regulation" subject to the disciplines of the TBT Agreement, and therefore declared moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.<sup>75</sup> The Appellate Body upheld the Panel's finding, made in the course of its analysis of claims under Articles I:1 and III:4 of the GATT, that in the context of a claim under those provisions, as opposed to a claim under Article 2.1 of the TBT Agreement, it was not necessary to conduct an additional analysis of whether such detrimental treatment stemmed exclusively from a "legitimate regulatory distinction".<sup>76</sup>

56. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body upheld the Panel's finding that the amended COOL measure violated Article 2.1 of the TBT Agreement because it accorded Canadian and Mexican livestock treatment less favourable than that accorded to like domestic livestock.<sup>77</sup> The Appellate Body upheld the Panel's finding that the amended COOL measure increased the recordkeeping burden entailed by the original COOL measure, its findings regarding the potential for labelling inaccuracy, and its findings regarding the exemptions prescribed by the amended COOL measure.

57. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that certain aspects of the measure were inconsistent with Article 2.1 of the TBT Agreement.<sup>78</sup> The Panel concluded that the eligibility criteria in the amended tuna measure did not accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, and were thus consistent with Article 2.1 of the TBT Agreement. However, the Panel found that the different certification requirements and tracking and verification requirements in the amended tuna measure did accord less favourable treatment to Mexican tuna and tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement.

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

58. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that Mexico had demonstrated that the US "dolphin-safe" labelling provisions were more trade-restrictive than

<sup>74</sup> Panel Reports, *EC – Seal Products*, paras. 7.126-7.353.

<sup>75</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.70.

<sup>76</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.84-5.96, and 5.97-5.130.

<sup>77</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.1-5.191.

<sup>78</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.68-7.402.

necessary to fulfil the United States' legitimate objectives, and therefore inconsistent with Article 2.2.<sup>79</sup> The Appellate Body reasoned that the Panel had conducted a flawed analysis and comparison between the challenged measure and the alternative measure proposed by Mexico, and found that the latter would not make an equivalent contribution to the United States' objectives, as compared with the challenged measure, in all ocean areas. On this basis, the Appellate Body reversed the Panel's finding that the measure was inconsistent with Article 2.2. The Appellate Body addressed Mexico's other appeal and rejected Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective, and Mexico's claim that the Panel erred in proceeding to examine whether there was a less trade-restrictive alternative measure after it had found that the measure at issue could, at best, only partially fulfil the United States' objectives.

59. In *US – COOL*, the Appellate Body reversed the Panel's finding that the COOL measure violated Article 2.2 of the TBT Agreement because it did not fulfil its legitimate objective of providing consumers with information on origin, but was unable to complete the legal analysis and determine whether the COOL measure was more trade-restrictive than necessary to meet its objective.<sup>80</sup> The Appellate Body disagreed that a measure could be consistent with Article 2.2 only if it fulfilled its objective completely or exceeded some minimum level of fulfilment, and considered that the Panel seemed to have ignored its own findings, which demonstrated that the COOL measure did contribute, at least to some extent, to achieving its objective.

60. In *EC – Seal Products*, the Panel found the EU ban on seal products was not inconsistent with Article 2.2 of the TBT Agreement.<sup>81</sup> The Panel first addressed the objective pursued by the measure, which it determined to be addressing the EU public moral concerns on seal welfare. The Panel then concluded that this was a "legitimate objective". The Panel found that the EU Seal Regime made a contribution to the fulfilment of its objective, notwithstanding the ban's exceptions for indigenous communities and marine resource management. Finally, the Panel examined the complainants' proposed alternative measure (consisting of animal welfare criteria with certification and labelling requirements) in light of the animal welfare risks of seal hunting and the challenges of monitoring and certification; the Panel concluded that the proposed alternative had not been shown to be reasonably available or to make an equivalent or greater contribution to the fulfilment of the objective as the EU Seal Regime. The Appellate Body reversed the Panel's threshold finding that the EU Seal Regime constituted a "technical regulation" subject to the disciplines of the TBT Agreement, and therefore declared moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.<sup>82</sup>

61. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body reversed the compliance Panel's finding<sup>83</sup> that the complainants did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement.<sup>84</sup> The Appellate Body engaged in a detailed analysis of several interpretative issues relating to Article 2.2, including the sequence and order of the elements of the "necessity" analysis under Article 2.2, the analysis of a measure's contribution to its objective, the interpretation and application of the phrase "taking account of the risks non-fulfilment would create", and the consideration of alternative measures.

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<sup>79</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 301-342.

<sup>80</sup> Appellate Body Reports, *US – COOL*, paras. 351-491.

<sup>81</sup> Panel Reports, *EC – Seal Products*, paras. 7.354-7.505.

<sup>82</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.70.

<sup>83</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.286-7.7.616.

<sup>84</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.192-5.340.



## (c) Article 2.4 (international standards)

62. In *US – Tuna II (Mexico)*, the Appellate Body upheld the Panel's finding that the measure at issue was not inconsistent with Article 2.4 of the TBT Agreement, but modified the Panel's interpretation of that provision.<sup>85</sup> The Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>86</sup> In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement, the definition of "international body or system" in Annex 1.4 to the TBT Agreement, as well as the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). The Appellate Body also relied on the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement, which it considered a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. The Appellate Body concluded that the Panel erred in finding that the AIDCP, to which new parties can accede only by invitation, is "open to the relevant body of every country and is therefore an international standardizing organization" for purposes of Article 2.4 of the TBT Agreement.

63. In *US – COOL*, the Panel found that Mexico failed to establish that the COOL measure violated Article 2.4 of the TBT Agreement.<sup>87</sup> Specifically, after assuming *arguendo* that CODEX-STAN 1-1985 was a "relevant international standard" within the meaning of Article 2.4, the Panel found that this standard would be an ineffective and inappropriate means for the fulfilment of the specific objective pursued by the United States through the COOL measure, as it considered that CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered.

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

64. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement; the Appellate Body found that Article 2.12, when interpreted in the context of paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, normally requires a minimum of six months between the publication and the entry into force of a technical regulation.<sup>88</sup>

65. The Arbitrator in *US – COOL (Article 21.3(c))* rejected the argument that an additional six-month period was required for the United States to comply with Article 2.12 of the TBT Agreement.<sup>89</sup> The Arbitrator agreed that other WTO obligations, as well as other non-WTO international obligations, may have to be taken into account in the determination of the reasonable period of time under Article 21.3(c) of the DSU. However, the Arbitrator found that in this case, Article 2.12 of the TBT Agreement did not justify extending the reasonable period of time by six months. Taking into account the interpretative clarification provided by Paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the TBT Agreement establishes a rule that "normally" producers in exporting Members require a period of not less than six months to adapt their products or production methods to the

<sup>85</sup> Panel Report, *US – COOL*, paras. 7.721-7.737; Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

<sup>86</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

<sup>87</sup> Panel Reports, *US – COOL*, paras. 7.721-7.737.

<sup>88</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 237-297.

<sup>89</sup> Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 101-121.

requirements of an importing Member's technical regulation. The Arbitrator noted, however, that the "normal" period of six months may be reduced in situations where producers need less time or even no time at all to adapt to the technical regulation - which Canada and Mexico contended was the case here. Similarly, the six-month period may be reduced when it would be ineffective to fulfil the legitimate objectives pursued by the technical regulation, and one of the objectives of the measure in question was prompt compliance.

## **2. Article 5: Procedures for Assessment of Conformity**

### (a) Article 5.1.2 (unnecessary obstacles to trade)

66. In *EC – Seal Products*, the Panel found that the European Union acted inconsistently with Article 5.1.2 of the TBT Agreement.<sup>90</sup> The Panel considered that Article 5.1.2 permits a system of third-party accreditation as part of a conformity assessment procedure, and therefore did not consider that the third-party accreditation system under the EU Seal Regime per se violated Article 5.1.2. However, the Panel found that the particular facts and circumstances in this case established that the conformity assessment procedure was not capable of allowing trade in conforming products to occur on the date of the measure's entry into force and, for that reason, had the effect of creating unnecessary obstacles to international trade inconsistently with the first sentence of Article 5.1.2. The Panel rejected the complainants' claim that the EU Seal Regime procedure was more strict, or applied more strictly, than was necessary to give adequate confidence of conformity with the applicable technical regulations within the meaning of the second sentence of Article 5.1.2. The Appellate Body reversed the Panel's threshold finding that the EU Seal Regime constituted a "technical regulation" subject to the disciplines of the TBT Agreement, and therefore declared moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.<sup>91</sup>

### (b) Article 5.2.1 (as expeditiously as possible)

67. In *EC – Seal Products*, the Panel rejected a claim that the European Union had acted inconsistently with Article 5.2.1 of the TBT Agreement.<sup>92</sup> The Panel found that, in spite of its concern regarding the time taken with respect to the certain applications, it had not been demonstrated that the conformity assessment procedure was not undertaken and completed as expeditiously as possible within the meaning of Article 5.2.1 of the TBT Agreement. The Appellate Body reversed the Panel's threshold finding that the EU Seal Regime constituted a "technical regulation" subject to the disciplines of the TBT Agreement, and therefore declared moot and of no legal effect the Panel's findings under Articles 2.1, 2.2, 5.1.2, and 5.2.1 of the TBT Agreement.<sup>93</sup>

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

68. In *US – COOL*, the Panel rejected Mexico's claim under Article 12.3 of the TBT Agreement.<sup>94</sup> After defining the operative obligation in Article 12.3 and clarifying the allocation of the burden of proof for a claim under Article 12.3, the Panel examined the meaning of "take account of" and, based on the evidence before it, found that the United States did consider Mexico's special development, financial and trade needs in an active and meaningful way. Having rejected the claim under Article 12.3, the Panel rejected a consequential claim under Article 12.1.

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<sup>90</sup> Panel Reports, *EC – Seal Products*, paras. 7.511-7.547.

<sup>91</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.70.

<sup>92</sup> Panel Reports, *EC – Seal Products*, paras. 7.548-7.580.

<sup>93</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.70.

<sup>94</sup> Panel Reports, *US – COOL*, paras. 7.737-7.804.

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

(a) Terms defined in ISO/IEC Guide 2

69. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") was a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>95</sup> In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement).<sup>96</sup>

(b) Annex 1.1: "technical regulation"

70. In *US – COOL*, the Panel examined: (i) the US statutory provisions and implementing regulations setting out the United States' mandatory country of origin labelling regime for beef and pork ("COOL measure"); as well as (ii) a letter issued by the US Secretary of Agriculture Vilsack on the implementation of the COOL measure. The Panel found that the COOL measure was a technical regulation within the meaning of Annex 1.1 to the TBT Agreement. The Panel found that the Vilsack letter was not a technical regulation within the meaning of Annex 1.1, on the grounds that compliance with this letter was not mandatory.<sup>97</sup>

71. In *US – Tuna II (Mexico)*, the Appellate Body found that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.<sup>98</sup> The Appellate Body found that a determination of whether a particular measure constitutes a technical regulation within the meaning of Annex 1.1 must be made in the light of the features of the measure and the circumstances of the case. The Appellate Body found it relevant that the challenged measure was composed of legislative and regulatory acts of the US federal authorities and includes administrative provisions; that the measure set out a single and legally mandated definition of a "dolphin-safe" tuna product, and disallowed the use of other labels on tuna products that use the terms "dolphin-safe", dolphins, porpoises and marine mammals and that did not satisfy this definition; and that in doing so, the US measure prescribed in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement was made.

72. In *EC – Seal Products*, the Appellate Body reversed the Panel's finding that the EU ban on seal products and its exceptions constituted a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.<sup>99</sup> Specifically, the Appellate Body reversed the Panel's finding that the EU Seal Regime laid down "product characteristics" within the meaning of Annex 1.1. The Appellate Body explained that the Panel should have examined the design and operation of the measure while seeking to identify its "integral and essential" aspects before reaching a final conclusion as to the legal characterization of the measure as a whole. The Appellate Body found in this regard that the measure was not concerned with banning the placing on the EU market of seal products as such; instead, it established the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product was derived. That being the main feature of the EU Seal Regime, the Appellate Body considered that the measure, taken as a whole, did not "lay down product characteristics". Given that the Panel and the participants had not sufficiently explored the question of whether the EU Seal Regime lays down "related processes and production methods" within the meaning of Annex 1.1, the Appellate Body did not find it

<sup>95</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

<sup>96</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 354.

<sup>97</sup> Panel Reports, *US – COOL*, paras. 7.146-7.217.

<sup>98</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 178-199.

appropriate to complete the analysis and resolve this question. The Appellate Body noted in this regard that drawing the line between processes and production methods that fall within the scope of the TBT Agreement, and those that do not, raises important systemic issues.

73. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel saw no reason to disagree with the parties that the amended COOL measure was a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.<sup>100</sup>

74. Likewise, in *US – Tuna II (Mexico) (Article 21.5 – Mexico)* the Panel saw no reason to disagree with the parties that the amended measure was a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.<sup>101</sup>

(c) Annex 1.2: "standard"

75. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>102</sup> In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement.

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

76. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>103</sup> In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied, *inter alia*, on the definition of "international body or system" in Annex 1.4 to the TBT Agreement.

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<sup>99</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.1-5.70.

<sup>100</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.52-7.56.

<sup>101</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.71.

<sup>102</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

<sup>103</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

## F. SPS AGREEMENT

### 1. Article 2: Basic Rights and Obligations

#### (a) Article 2.2 (necessity and scientific principles)

77. In *India – Agricultural Products*, the Panel found, in the light of its findings of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement, that India's avian influenza measures were also inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence.<sup>104</sup> The Panel, having found that India's avian influenza measures are inconsistent with Article 5.6 of the SPS Agreement, found that those measures were also consequentially inconsistent with Article 2.2 of the SPS Agreement because they were applied beyond the extent necessary to protect human and animal life or health.<sup>105</sup> The Appellate Body found that by failing to consider whether the presumption of inconsistency with Article 2.2 that flowed from its finding that India's avian influenza measures were inconsistent with Articles 5.1 and 5.2 was rebutted by the arguments and evidence presented by India, the Panel erred in its application of Article 2.2.<sup>106</sup> The Appellate Body was unable to complete the legal analysis and assess the consistency of India's avian influenza measures with Article 2.2.<sup>107</sup>

#### (b) Article 2.3 (arbitrary or unjustifiable discrimination / disguised restriction)

78. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminated between Members where identical or similar conditions prevailed. The Panel found that India's measures were also inconsistent with Article 2.3, second sentence, of the SPS Agreement because they were applied in a manner which constitutes a disguised restriction on international trade.<sup>108</sup> India appealed the Panel's findings under Article 2.3 of the SPS Agreement, but its appeal concerned the Panel's assessment of the facts, and was not directed at the Panel's interpretation or application of Article 2.3.<sup>109</sup>

### 2. Article 3: Harmonization

#### (a) Article 3.1 (requirement to base on international standards)

79. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Article 3.1 of the SPS Agreement because they were not "based on" the relevant international standard, the Terrestrial Code, and, in particular, Chapter 10.4 thereof.<sup>110</sup>

#### (b) Article 3.2 (presumption of consistency)

80. In *India – Agricultural Products*, the Panel found that India's avian influenza measures did not "conform to" the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.2 of the SPS Agreement.<sup>111</sup>

<sup>104</sup> Panel Report, *India – Agricultural Products*, paras. 7.281-7.283, 7.328-7.332.

<sup>105</sup> Panel Report, *India – Agricultural Products*, paras. 7.598-7.617.

<sup>106</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.11-5.40.

<sup>107</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.47-5.52.

<sup>108</sup> Panel Report, *India – Agricultural Products*, paras. 7.335-7.347, 7.385-7.479.

<sup>109</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.246.

<sup>110</sup> Panel Report, *India – Agricultural Products*, paras. 7.192-7.274.

<sup>111</sup> Panel Report, *India – Agricultural Products*, paras. 7.202-7.203, 7.275.

### 3. Article 5: Risk Assessment

(a) Article 5.1 (requirement to base on risk assessment)

81. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Article 5.1 of the SPS Agreement because they were not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations.<sup>112</sup>

(b) Article 5.2 (factors to be taken into account)

82. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Article 5.2 of the SPS Agreement because they were not based on a risk assessment that takes into account the factors set forth in Article 5.2.<sup>113</sup>

(c) Article 5.6 (not more trade-restrictive than necessary)

83. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Article 5.6 of the SPS Agreement because they were significantly more trade-restrictive than required to achieve India's ALOP, with respect to the products covered by Chapter 10.4 of the Terrestrial Code.<sup>114</sup> The Appellate Body found upheld the Panel's finding that India's avian influenza measures were inconsistent with Article 5.6 of the SPS Agreement.<sup>115</sup> The Appellate Body found that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection, and that the Panel did not fail to identify the alternative measures with precision.

### 4. Article 6: Adaptation to Regional Conditions

84. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were inconsistent with Articles 6.1 and 6.2 of the SPS Agreement.<sup>116</sup> The Panel found that the measures were inconsistent with Article 6.2, first sentence, because they failed to recognize the concepts of disease-free areas and areas of low disease prevalence. Consequentially, the Panel found that India's measures were also inconsistent with Article 6.2, second sentence, because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence rendered impossible a determination of such areas based on the factors enumerated in Article 6.2, second sentence. The Panel, having found that India's avian influenza measures failed to recognize the concepts of disease-free areas and areas of low disease prevalence and were therefore inconsistent with Article 6.2, found that those measures were inconsistent with Article 6.1, first sentence, because they were therefore not adapted to the SPS characteristics of the areas from which products originate and to which they are destined. Having found that the measures were inconsistent with Article 6.1, first sentence, the Panel found that those measures were also inconsistent with Article 6.1, second sentence, because India had not taken into account factors including those specified in Article 6.1, second sentence. On appeal, the Appellate Body rejected India's proposed interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement, and explained that while it had some difficulties with certain statements made by the Panel with regard to the relationship between paragraphs 1 and 3 of Article 6, overall, it did not consider that they amounted to a reversible error.<sup>117</sup>

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<sup>112</sup> Panel Report, *India – Agricultural Products*, paras. 7.281-7.283, 7.309-7.318.

<sup>113</sup> Panel Report, *India – Agricultural Products*, paras. 7.281-7.283, 7.319.

<sup>114</sup> Panel Report, *India – Agricultural Products*, paras. 7.514-7.597.

<sup>115</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.188-5.243.

<sup>116</sup> Panel Report, *India – Agricultural Products*, paras. 7.642-7.715.

<sup>117</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.112-5.186.

## 5. Article 7: Transparency

85. In *India – Agricultural Products*, the Panel, having found that India acted inconsistently with Annex B(2) and Annex B(5)(a), (b) and (d), found that India also acted inconsistently with Article 7 of the SPS Agreement.<sup>118</sup>

## 6. Article 11: Consultations and Dispute Settlement

(a) Article 11.2 (advice of experts)

86. In *India – Agricultural Products*, the Appellate Body rejected India's argument that Article 11.2 of the SPS Agreement and Article 13.2 of the DSU limit the permissible scope of a panel's consultation with an international organization to scientific and technical issues, and that the Panel erred in consulting with the OIE not only concerning the evidence submitted by the parties, but also regarding the interpretation of the OIE Code. The Appellate Body found that while the language of Article 11.2 indicates that experts should be consulted in disputes involving scientific or technical issues, neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU mandate that the advice sought be confined to such issues.<sup>119</sup>

## 7. Annex A: Definitions

87. Annex A(1) (definition of SPS measure)

88. In *India – Agricultural Products*, the Panel found that India's avian influenza measures were SPS measures falling within the definition in Annex A(1) of the SPS Agreement.<sup>120</sup>

## 8. Annex B: Transparency of SPS Regulations

89. In *India – Agricultural Products*, the Panel found that India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of the SPS measure and its entry into force.<sup>121</sup> The Panel found that India could not rely upon Annex B(6) of the SPS Agreement to justify omitting steps enumerated in Annex B(5) of the SPS Agreement, because the condition prescribed in the chapeau of Annex B(6) was not satisfied with respect to the SPS measure at the time of its proposal.<sup>122</sup> The Panel found that the conditions specified in the chapeau of Annex B(5) were satisfied, and proceeded to examine whether India acted inconsistently with Annex B(5)(a) through (d).<sup>123</sup> The Panel found that India acted inconsistently with Annex B(5)(a) because it failed to publish a notice "at an early stage" about the "proposed" SPS measure<sup>124</sup>; that India acted inconsistently with Annex B(5)(b) because it failed to notify other Members through the WTO Secretariat, "at an early stage", of the "proposed" SPS measure<sup>125</sup>; that the United States failed to make a *prima facie* case of violation of Annex B(5)(c) by India<sup>126</sup>; and that India acted inconsistently with Annex B(5)(d) of the SPS Agreement because it did not allow "reasonable time" for other Members to make comments on the "proposed" SPS measure.<sup>127</sup>

<sup>118</sup> Panel Report, *India – Agricultural Products*, para. 7.797.

<sup>119</sup> Appellate Body Report, Report, *India – Agricultural Products*, paras. 5.82-5.89.

<sup>120</sup> Panel Report, *India – Agricultural Products*, paras. 7.132-7.154.

<sup>121</sup> Panel Report, *India – Agricultural Products*, paras. 7.749-7.759.

<sup>122</sup> Panel Report, *India – Agricultural Products*, paras. 7.760-7.765.

<sup>123</sup> Panel Report, *India – Agricultural Products*, paras. 7.769-7.782.

<sup>124</sup> Panel Report, *India – Agricultural Products*, paras. 7.783-7.784.

<sup>125</sup> Panel Report, *India – Agricultural Products*, paras. 7.785-7.790.

<sup>126</sup> Panel Report, *India – Agricultural Products*, paras. 7.791-7.792.

<sup>127</sup> Panel Report, *India – Agricultural Products*, paras. 7.793-7.796.

**G. TRIMS AGREEMENT****1. Article 1: Coverage**

90. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the FIT Programme and the FIT and microFIT Contracts, to the extent they envisaged and imposed a "Minimum Required Domestic Content Level", constituted "investment measures related to trade in goods" within the meaning of Article 1 of the TRIMs Agreement.<sup>128</sup>

**2. Article 2: National Treatment and Quantitative Restrictions**

91. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel concluded that compliance with the "Minimum Required Domestic Content Level" involved the "purchase or use" of products from a domestic source within the meaning of Paragraph 1(a) of the Illustrative List, and that such compliance was necessary for electricity generators to participate in the FIT Programme, and thereby "obtain an advantage", within the meaning of Paragraph 1 of the Illustrative List. The Panel was therefore satisfied that the challenged TRIMs fell within the scope of Paragraph 1(a) of the Illustrative List, and that in the light of Article 2.2 and the chapeau to Paragraph 1(a) of the Illustrative List, they were inconsistent with Article III:4 of the GATT 1994, and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.<sup>129</sup> The Appellate Body upheld the Panel's finding that Article III:8(a) of the GATT 1994 is applicable to measures falling within the scope of Articles 2.1 and 2.2 of the TRIMs Agreement and the Illustrative List annexed thereto.<sup>130</sup> The Appellate Body also agreed with the Panel's finding, albeit for different reasons, that the measure at issue did not fall within the scope of the derogation in Article III:8(a) of the GATT 1994.<sup>131</sup>

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<sup>128</sup> Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.108-7.112.

<sup>129</sup> Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.155-7.166.

<sup>130</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.19-5.33.

<sup>131</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.54-5.85.



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## H. ANTI-DUMPING AGREEMENT

### 1. Article 2: Determination of Dumping

#### (a) Article 2.1 (definition of dumping)

92. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement with respect to the analogue country selection procedure, or with the selection of Brazil as the analogue country in the original investigation.<sup>132</sup>

#### (b) Article 2.2 (constructed normal value)

##### (i) Article 2.2.1.1

93. In *China – Broiler Products*, the Panel found that China acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in its determination of the US respondents' costs of production for the purposes of constructing their normal value.<sup>133</sup> The Panel found that China did not demonstrate that the Chinese investigating authority had properly rejected the respondents' normal books and records, as there was no explanation on the record of its reasons for doing so. The Panel also found that MOFCOM's own allocation methodology was inconsistent with Article 2.2.1.1 because MOFCOM allocated all processing costs equally across all products, even though processing costs differed by product types. The Panel found that this meant that MOFCOM had allocated to a product costs that were not actually associated with its production and sale. Finally, the Panel found that MOFCOM allocated the costs of producing certain products (blood and feathers) to the other products produced by the particular respondent, and thereby again allocated costs to a product that were not actually associated with its production and sale.

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

94. In *EU – Footwear (China)*, the Panel found that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement with respect to the determination of the amounts for SG&A and profit for one producer-exporter in the original investigation.<sup>134</sup>

95. In *China – HP-SSST (Japan)*, the Panel found that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.<sup>135</sup>

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<sup>132</sup> Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.

<sup>133</sup> Panel Report, *China – Broiler Products*, paras. 7.108-7.198.

<sup>134</sup> Panel Report, *EU – Footwear (China)*, paras. 7.295-7.301.

<sup>135</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.64-7.67.

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

(i) *General*

96. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Articles 2.1 and 2.4 of the Anti-Dumping Agreement with respect to the analogue country selection procedure, or in its selection of Brazil as the analogue country in the original investigation.<sup>136</sup> The Panel found that the European Union did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement with respect to the PCN system used and the adjustment for leather quality made by the Commission in the original investigation.<sup>137</sup>

97. In *China – HP-SSST (Japan)*, the Panel found that China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to address a request for an adjustment to ensure a fair comparison between the export price and the normal value for certain products.<sup>138</sup>

98. Article 2.4.2 (comparison methods)

99. In *US – Shrimp and Sawblades*, the Panel upheld China's claim concerning the USDOC's use of zeroing in the calculation of dumping margins for individually examined exporters/producers. The Panel found that the "zeroing" methodology used by the USDOC in calculating the margins of dumping in the anti-dumping investigations at issue was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.<sup>139</sup> The Panel examined USDOC's calculation of the "separate rate" that was applied on imports from exporters/producers not selected for individual examination, and found that USDOC had relied upon dumping margins, calculated with zeroing, in calculating the "separate rate". However, the Panel considered that Article 2.4.2 of the Anti-Dumping Agreement did not provide the proper legal basis for a finding of inconsistency with respect to the separate rate.<sup>140</sup>

(d) Article 2.6 (definition of like products)

100. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 2.6 of the Anti-Dumping Agreement in its determination of the scope of the product under consideration.<sup>141</sup>

## **2. Article 3: Determination of Injury**

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

101. Panels have addressed claims under Article 3.1 of the Anti-Dumping Agreement in a number of disputes, mostly in conjunction with one or more other paragraphs of Article 3.

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

102. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 of the Anti-Dumping Agreement as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.<sup>142</sup>

<sup>136</sup> Panel Report, *EU – Footwear (China)*, paras. 7.253-7.266.

<sup>137</sup> Panel Report, *EU – Footwear (China)*, paras. 7.276-7.287.

<sup>138</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.76-7.86.

<sup>139</sup> Panel Report, *US – Shrimp and Sawblades*, paras. 7.12-7.32.

<sup>140</sup> Panel Report, *US – Shrimp and Sawblades*, paras. 7.33-7.39.

<sup>141</sup> Panel Report, *EU – Footwear (China)*, paras. 7.308-7.315.

<sup>142</sup> Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.

103. In *China – GOES*, the Panel found that China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement in relation to MOFCOM's analysis of the price effects of subject imports.<sup>143</sup> On appeal, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 3.2.<sup>144</sup> Like the Panel, the Appellate Body rejected China's interpretation that Article 3.2 merely requires an investigating authority to consider the existence of price depression or suppression, and does not require the consideration of any link between subject imports and these price effects.<sup>145</sup> With regard to the Panel's application of the legal standard under Article 3.2, read together with Article 3.1, the Appellate Body found that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression.<sup>146</sup>

104. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, on the basis that China did not conduct an objective examination based on positive evidence of the effect of the dumped imports on prices in the domestic market for like products. In particular, the Panel found that China failed to ensure that the prices it was comparing as a part of its price effects analysis were actually comparable, and that China's price undercutting and price suppression analyses were not based on an objective examination of positive evidence.<sup>147</sup>

105. In *China – Broiler Products*, the United States claimed that MOFCOM's price effects findings were inconsistent with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement because, when performing a comparison of domestic and import prices for purposes of determining injury, MOFCOM inflated the extent of price undercutting by: (i) comparing prices for transactions at different levels of trade; and (ii) comparing transactions with a different product mix (the United States argued that US imports were composed of low-value chicken parts, while Chinese domestic producers sold all chicken parts). The Panel upheld the United States' argument concerning differences in product mix and rejected its argument concerning level of trade. In addition, the Panel upheld claims by the United States that MOFCOM's findings of price suppression were inconsistent with the same provisions, because they were based on the WTO-inconsistent findings of price undercutting.<sup>148</sup>

106. In *China – Autos (US)*, the Panel found that China acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and Articles 15.1 and 15.2 of the SCM Agreement, as a result of MOFCOM's price effects analysis and consequent finding of price depression in its final determination.<sup>149</sup>

107. In *China – HP-SSST (Japan)*, the Panel found that MOFCOM failed to properly account for differences in quantities when comparing the price of certain subject imports with the domestic price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>150</sup> The Panel rejected a claim that MOFCOM failed to consider whether certain subject imports had any price undercutting effect on domestic like products.<sup>151</sup> The Panel also rejected a claim that MOFCOM

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<sup>143</sup> Panel Report, *China – GOES*, paras. 7.511-7.554.

<sup>144</sup> Appellate Body Report, *China – GOES*, paras. 116-232.

<sup>145</sup> Appellate Body Report, *China – GOES*, paras. 116-169.

<sup>146</sup> Appellate Body Report, *China – GOES*, paras. 170-232.

<sup>147</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.30-7.97.

<sup>148</sup> Panel Report, *China – Broiler Products*, paras. 7.473-7.494, and 7.502-7.513.

<sup>149</sup> Panel Report, *China – Autos (US)*, paras. 7.254-7.296.

<sup>150</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.111-7.115.

<sup>151</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.121-7.130.

improperly extended its findings of price undercutting in respect of other subject imports to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>152</sup>

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

108. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 3.3 of the Anti-Dumping Agreement with respect to its determination to undertake a cumulative assessment in the original investigation.<sup>153</sup>

(d) Article 3.4 (relevant injury factors)

109. In *EU – Footwear (China)*, the Panel found that China failed to demonstrate that the European Union violated Article 3.4 of the Anti-Dumping Agreement in its evaluation of all relevant economic factors and indices having a bearing on the state of the industry in the context of the original investigation the expiry review.<sup>154</sup>

110. In *China – X-Ray Equipment*, the European Union presented a number of different arguments to support its claim that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Panel found that the European Union had not established that MOFCOM failed to rely upon positive evidence. However, the Panel concluded that China acted inconsistently with Articles 3.1 and 3.4 because MOFCOM failed to consider all relevant economic factors, in particular, the "magnitude of the margin of dumping". Furthermore, MOFCOM's examination of the state of the industry, including the trends in individual injury factors, lacked objectivity and was not always reasoned and adequate. Finally, the Panel exercised judicial economy regarding whether MOFCOM acted inconsistently with Article 3.4 by failing to take into account the differences between high-energy and low-energy scanners.<sup>155</sup>

111. In *China – HP-SSST (Japan)*, the Panel rejected a claim that MOFCOM failed to undertake a segmented analysis, and failed to properly weigh the positive and negative injury factors, when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>156</sup> However, the Panel did find that MOFCOM failed to properly evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>157</sup>

(e) Article 3.5 (causation)

112. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 3.5 of the Anti-Dumping Agreement with respect to the causation determination in the original investigation and the expiry review.<sup>158</sup>

113. In *China – GOES*, the Panel found that China acted inconsistently with Article 3.5 of the Anti-Dumping Agreement with respect to MOFCOM's causation analysis.<sup>159</sup>

114. In *China – X-Ray Equipment*, the Panel concluded that MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement due to a failure to take into consideration the differences in the products under consideration in the price effects analysis, and due to a failure to

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<sup>152</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.136-7.143.

<sup>153</sup> Panel Report, *EU – Footwear (China)*, paras. 7.400-7.405.

<sup>154</sup> Panel Report, *EU – Footwear (China)*, paras. 7.412-7.463.

<sup>155</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.141-7.217.

<sup>156</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.152-7.155, 7.166-7.169.

<sup>157</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.159-7.163.

<sup>158</sup> Panel Report, *EU – Footwear (China)*, paras. 7.481-7.541.

<sup>159</sup> Panel Report, *China – GOES*, paras. 7.617-7.638.

provide a reasoned and adequate explanation regarding how the prices of the dumped imports caused price suppression in the domestic industry, particularly in 2008. The Panel exercised judicial economy with respect to MOFCOM's analysis of the effect of the volume of subject imports. Finally, the Panel concluded that MOFCOM failed to consider certain "known factors", and failed to consider evidence relating to other factors that it did explicitly consider, in its non-attribution analysis.<sup>160</sup>

115. In *China – Autos (US)*, the Panel found that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and Articles 15.1 and 15.5 of the SCM Agreement, as a result of MOFCOM's causation determination in the two investigations at issue.<sup>161</sup>

116. In *China – HP-SSST (Japan)*, the Panel found that MOFCOM improperly relied on the market share of subject imports, and its flawed price effects and impact analyses, in finding a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>162</sup> The Panel also found that MOFCOM failed to ensure that injury to the domestic industry caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>163</sup>

### 3. Article 4: Definition of Domestic Industry

117. In *China – Broiler Products*, the United States claimed that MOFCOM improperly defined the domestic industry for two reasons. First, because MOFCOM did not seek to define the domestic industry as the "domestic producers as a whole" before settling on those producers representing a "major proportion" of total domestic production. Second, according to the United States, MOFCOM's process for defining the domestic industry involved a self-selection process whereby those companies that supported the Petition would be more likely to be included in the domestic industry definition, thus introducing a "material risk of distortion" into the injury analysis. The Panel concluded that there was no obligation in Article 4.1 of the Anti-Dumping Agreement, or Article 16.1 of the SCM Agreement, to first attempt to define the "domestic industry" as the domestic producers as a whole before an investigating authority can define the domestic industry as those producers representing a "major proportion" of total domestic production. The Panel also concluded that the United States had not adduced evidence that MOFCOM's process for defining the domestic industry involved a self-selection process that introduced a material risk of distortion into the injury analysis. Therefore, the Panel found no inconsistency with these provisions.<sup>164</sup>

118. In *China – Autos (US)*, the Panel rejected the US claim that MOFCOM's definition of the domestic industry was distorted and failed to include producers accounting for a major proportion of total domestic production of the domestic like product, inconsistently with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.<sup>165</sup> The Panel therefore also rejected the US claim that China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement by basing its injury determination in the investigations at issue on a wrongly defined domestic industry.

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<sup>160</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.237-7.300.

<sup>161</sup> Panel Report, *China – Autos (US)*, paras. 7.320-7.363.

<sup>162</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.180-7.188, 7.191-7.192.

<sup>163</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.200-7.204.

<sup>164</sup> Panel Report, *China – Broiler Products*, paras. 7.407-7.438.

<sup>165</sup> Panel Report, *China – Autos (US)*, paras. 7.205-7.231.

#### 4. Article 6: Evidence

(a) Article 6.1 (evidence from interested parties)

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

119. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 6.1.1 of the Anti-Dumping Agreement by giving interested parties only 15 days to submit certain information, because the forms at issue were not "questionnaires" within the meaning of Article 6.1.1.<sup>166</sup> The Panel rejected China's related claim under Paragraph 15(a)(i) of China's Accession Protocol.<sup>167</sup>

(ii) *Article 6.1.2 (making evidence available promptly)*

120. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union violated Article 6.1.2 of the Anti-Dumping Agreement by not making certain evidence available promptly to other interested parties.<sup>168</sup> The Panel concluded that the wording of the provision does not support the conclusion that information must be made available immediately, and that the obligation to make evidence available promptly must be understood in the context of the proceeding in question.

(b) Article 6.2 (right to defend interests)

121. In *China – X-Ray Equipment*, the Panel exercised judicial economy over the European Union's claims under Article 6.2 of the Anti-Dumping Agreement, as a consequence of having already upheld many of the EU claims under Articles 6.5.1 and 6.9 of the Anti-Dumping Agreement.<sup>169</sup>

122. In *China – Broiler Products*, the Panel found a violation of Article 6.2 of the Anti-Dumping Agreement.<sup>170</sup> The United States claimed that despite a specific request from the US Government, MOFCOM did not provide an opportunity for interested parties with adverse interests to meet and present their views. China argued that MOFCOM had contacted the Chinese interested parties, with interests adverse to the United States, and that those parties had declined to attend the proposed meeting with the US Government. The Panel upheld the claim as it found that no evidence on the record supported China's assertion that MOFCOM had contacted these Chinese interested parties, and MOFCOM had taken no other action to organize a meeting between the US Government and these parties.

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

123. In *EU – Footwear (China)*, the Panel rejected China's claims that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement by failing to provide timely opportunities for interested parties to see non-confidential information that was relevant to the presentation of their cases, and that was used by the Commission in the expiry review and original investigation at issue.<sup>171</sup>

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<sup>166</sup> Panel Report, *EU – Footwear (China)*, paras. 7.547-7.554.

<sup>167</sup> Panel Report, *EU – Footwear (China)*, paras. 7.555-7.560.

<sup>168</sup> Panel Report, *EU – Footwear (China)*, paras. 7.572-7.588.

<sup>169</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.372-7.374, 7.427-7.429.

<sup>170</sup> Panel Report, *China – Broiler Products*, paras. 7.20-7.25.

<sup>171</sup> Panel Report, *EU – Footwear (China)*, paras. 7.601-7.660.

124. In *China – X-Ray Equipment*, the Panel exercised judicial economy over the European Union's claims under Article 6.4 of the Anti-Dumping Agreement, having already upheld many of the EU claims under Articles 6.5.1 and 6.9 of the Anti-Dumping Agreement.<sup>172</sup>

125. In *China – HP-SSST (Japan)*, the Panel rejected a claim made under Article 6.4 of the Anti-Dumping Agreement made in connection with MOFCOM's disclosure of the essential facts relating to the determination of the "all others" rates.<sup>173</sup>

(d) Article 6.5 (confidential information)

126. In *EU – Footwear (China)*, the Panel addressed a series of claims that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in both the expiry review and the original investigation by wrongly treating certain information as confidential; with Article 6.5.1 of the Anti-Dumping Agreement in both the expiry review and the original investigation by failing, with respect to some of the information at issue that was treated as confidential, to require adequate non-confidential summaries thereof, or an explanation as to why such summarization was not possible; and with Article 6.5.2 of the Anti-Dumping Agreement by failing to disregard certain information because confidential treatment of that information was not warranted. The Panel found certain EU acts or omissions were inconsistent with Article 6.5 and 6.5.1 while others were not, and rejected the claims under Article 6.5.2.<sup>174</sup>

127. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.<sup>175</sup>

128. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement on the basis that China did not require interested parties providing confidential information to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.<sup>176</sup> The Panel also found that China acted inconsistently with Article 6.5.1 on the basis that China did not require an interested party to explain why certain information submitted in confidence could not be summarized.<sup>177</sup>

129. In *China – Broiler Products*, the United States claimed that MOFCOM did not require non-confidential summaries of the confidential information redacted from the public version of the petition, thus hampering US interested parties' ability to defend their interests. The Panel accepted *arguendo* China's argument that the non-confidential version of the petition, which merely redacted the confidential information without replacing it, contained non-confidential summaries of the information redacted, and found that these "summaries" did not satisfy the requirement in Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement to provide a reasonable understanding of the information submitted in confidence.<sup>178</sup>

130. In *China – Autos (US)*, the Panel examined whether the non-confidential summaries of data concerning 12 injury factors were adequate.<sup>179</sup> The Panel concluded that the non-confidential summaries of confidential information concerning some of the injury factors did permit a reasonable

<sup>172</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.372-7.374, 7.427-7.429.

<sup>173</sup> Panel Report, *China – HP-SSST (Japan)*, para. 7.262.

<sup>174</sup> Panel Report, *EU – Footwear (China)*, paras. 7.667-7.808.

<sup>175</sup> Panel Report, *China – GOES*, paras. 7.187-7.225.

<sup>176</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.328-7.364.

<sup>177</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.365-7.371.

<sup>178</sup> Panel Report, *China – Broiler Products*, paras. 7.49-7.65.

<sup>179</sup> Panel Report, *China – Autos (US)*, paras. 7.24-7.54.

understanding of the substance of the confidential information at issue, and thus were consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement. However, the Panel concluded that the non-confidential summaries of confidential information concerning certain other injury factors did not permit a reasonable understanding of the substance of the confidential information at issue, and thus were not consistent with Article 6.5.1 and Article 12.4.1.

131. In *China – HP-SSST (Japan)*, the Panel found that MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement.<sup>180</sup> The Panel also found that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require the petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible.<sup>181</sup>

(e) Article 6.7 and Annex I (on-site verifications)

132. In *China – HP-SSST (Japan)*, the Panel found that China acted inconsistently with Article 6.7 and Annex I(7) of the Anti-Dumping Agreement by rejecting a request for rectification solely on the basis that it was not provided prior to verification.<sup>182</sup>

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

133. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Article 6.8 of the Anti-Dumping Agreement for not being even handed and applying "facts available" to domestic producers whose injury questionnaire responses contained errors.<sup>183</sup>

134. In *China – GOES*, the Panel found that China acted inconsistently with Article 6.8 and Annex II:1 of the Anti-Dumping Agreement in using "facts available" to calculate the dumping margins for unknown exporters, on the grounds that the preconditions for the application of facts available were not met.<sup>184</sup>

135. In *China – Broiler Products*, the United States claimed that China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement when it used "facts available" to determine the anti-dumping and countervailing duty rates for unknown US producers/exporters, i.e. producers/exporters who failed to register with MOFCOM to participate in the investigation. The Panel concluded that facts available can be used to determine the anti-dumping duty rates of unknown producers/exporters and that MOFCOM's publication of a notice on the internet requesting registration and certain information, and informing of the consequences of not doing so, fulfilled the requirements of Articles 6.8 and 12.7 for resorting to "facts available". However, the Panel concluded that the facts relied upon were "adverse" to the interests of the unknown producers, contrary to the two provisions, and as a result, the Panel upheld the United States' claim.<sup>185</sup>

136. In *China – Autos (US)*, the Panel found that China acted inconsistently with its obligations under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement in the use of facts available in the determination of the residual AD/CVD duty

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<sup>180</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.290-7.303.

<sup>181</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.304-7.327.

<sup>182</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.98-7.101.

<sup>183</sup> Panel Report, *EU – Footwear (China)*, paras. 7.815-7.821.

<sup>184</sup> Panel Report, *China – GOES*, paras. 7.383-7.394.

<sup>185</sup> Panel Report, *China – Broiler Products*, paras. 7.298-7.313, and 7.354-7.360.



rates in the automobiles investigation.<sup>186</sup> The Panel found that a request for information concerning the identity, volume and value of exporters of the product is not a sufficiently specific request for information to justify the determination of a dumping margin on the basis of facts available for unknown or non-existent exporters.

137. In *US – Shrimp II (Viet Nam)*, the Panel found that Viet Nam failed to establish that the rate applied to the Viet Nam-wide entity in certain administrative reviews was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.<sup>187</sup>

138. In *China – HP-SSST (Japan)*, the Panel rejected a claim that China acted inconsistently with Article 6.8 and Annex II(3) and II(6) to the Anti-Dumping Agreement by applying facts available in respect of certain information that SMST sought to rectify at verification.<sup>188</sup> The Panel also rejected a claim that China's reliance on facts available to calculate the dumping margin for all European Union companies other than SMST and Tubacex, and all Japanese companies other than SMI and Kobe, was inconsistent with Article 6.8 and Annex II(1) to the Anti-Dumping Agreement.<sup>189</sup>

(g) Article 6.9 (disclosure of essential facts)

139. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to provide sufficient time for comment following issuance of the "Additional Final Disclosure Document" in the original investigation.<sup>190</sup>

140. In *China – GOES*, the Panel found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform interested parties of the "essential facts" under consideration in calculating the all others dumping margin.<sup>191</sup> The Panel also found that China's failure to disclose the "essential facts" underlying MOFCOM's finding of "low" subject import prices was inconsistent with Article 6.9.<sup>192</sup> The Panel further found that China acted inconsistently with Article 6.9 in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation analysis.<sup>193</sup> On appeal, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 6.9.<sup>194</sup> The Appellate Body agreed with the Panel that MOFCOM failed to disclose in its preliminary determination, and its final injury disclosure document, all the "essential facts" relating to the "low price" of subject imports on which it relied for its price effects finding. The Appellate Body found that MOFCOM was required to disclose, under Article 6.9, the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

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

<sup>186</sup> Panel Report, *China – Autos (US)*, paras. 7.121-7.140, and 7.170-7.175..

<sup>187</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.230-7.236.

<sup>188</sup> Panel Report, *China – HP-SSST (Japan)*, para. 7.102.

<sup>189</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.213-7.224.

<sup>190</sup> Panel Report, *EU – Footwear (China)*, paras. 7.826-7.834.

<sup>191</sup> Panel Report, *China – GOES*, paras. 7.404-7.412.

<sup>192</sup> Panel Report, *China – GOES*, paras. 7.567-7.575.

<sup>193</sup> Panel Report, *China – GOES*, paras. 7.639-7.660.

<sup>194</sup> Appellate Body Report, *China – GOES*, paras. 233-251.

adjustment to export price was made; (ii) the calculations of Smiths' margin of dumping; and (iii) the facts forming the basis of the decision to apply facts available in relation to the residual duty rate.<sup>195</sup>

142. In *China – Broiler Products*, the Panel upheld several claims by the United States under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.<sup>196</sup> The United States argued that MOFCOM was obligated to disclose the essential facts leading up to the calculation of normal value, export price, and the dumping margins. The United States contended that this requires an investigating authority to disclose the actual data used and the calculations performed. The Panel upheld the United States' claims, but did not accept the United States' argument that Article 6.9 required the disclosure of the actual data used and calculations performed (e.g. printouts of computer programmes used to calculate the dumping margins).

143. In *China – Autos (US)*, the Panel found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose essential facts to US respondents prior to making its final determination in the AD investigation at issue.<sup>197</sup> However, the Panel rejected a separate US claim that MOFCOM acted inconsistently with the disclosure obligation under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in connection with the determination of the residual AD/CVD duty rates at issue.<sup>198</sup>

144. In *China – HP-SSST (Japan)*, the Panel addressed a series of claims, under Article 6.9 of the Anti-Dumping Agreement, that MOFCOM failed to disclose the "essential facts" in connection with the methodology used to calculate margins of dumping and the data underlying the determination of certain dumping margins; import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination; and certain essential facts regarding the "all others" rates.<sup>199</sup>

(h) Article 6.10 (individual margin)

145. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Article 6.10 of the Anti-Dumping Agreement.<sup>200</sup>

146. The Panel in *EU – Footwear (China)* found that the European Union did not act inconsistently with Article 6.10.2 of the Anti-Dumping Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, or Paragraphs 151(e) and (f) of China's Accession Working Party Report, with respect to the examination of the non-sampled cooperating Chinese exporting producers' MET applications in the original investigation.<sup>201</sup> The Panel also rejected China's claims that the European Union acted inconsistently with Article 6.10.2 of the Anti-Dumping Agreement in selecting the sample for the dumping determination in the original investigation<sup>202</sup>, and in the procedures for and selection of a sample of the domestic industry for purposes of examining injury in the original investigation.<sup>203</sup>

147. In *US – Shrimp II (Viet Nam)*, the Panel found that the practice or policy whereby, in NME proceedings, the USDOC presumed that all producers/exporters in the NME country belong to a

<sup>195</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.398-7.426.

<sup>196</sup> Panel Report, *China – Broiler Products*, paras. 7.85-7.107, 7.314-7.323, and 7.361-7.363.

<sup>197</sup> Panel Report, *China – Autos (US)*, paras. 7.69-7.86.

<sup>198</sup> Panel Report, *China – Autos (US)*, paras. 7.141-7.150, 7.176-7.178.

<sup>199</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.233-7.262.

<sup>200</sup> Panel Report, *EU – Footwear (China)*, paras. 7.82-7.89.

<sup>201</sup> Panel Report, *EU – Footwear (China)*, paras. 7.178-7.205.

<sup>202</sup> Panel Report, *EU – Footwear (China)*, paras. 7.211-7.226.

<sup>203</sup> Panel Report, *EU – Footwear (China)*, paras. 7.353-7.391.

single, NME-wide entity, and assigns a single rate to these producers/exporters, is "as such" inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>204</sup> In addition, the Panel found that the United States acted inconsistently with Articles 6.10 and 9.2 as a result of the application by the USDOC, in certain administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide entity, and assignment of a single rate to that entity.<sup>205</sup>

## 5. Article 7: Provisional Measures

### (a) Article 7.4 (not exceeding four months)

148. In *China – HP-SSST (Japan)*, the Panel found that China's application of provisional measures for a period exceeding four months was inconsistent with Article 7.4 of the Anti-Dumping Agreement.<sup>206</sup>

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

### (a) Article 9.1 (lesser duty principle)

149. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 of the Anti-Dumping Agreement as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.<sup>207</sup>

### (b) Article 9.2 (appropriate amount)

150. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Article 9.2 of the Anti-Dumping Agreement.<sup>208</sup>

151. In *EU – Footwear (China)*, the Panel rejected China's claim that the European Union acted inconsistently with Articles 3.1, 3.2, 9.1, and 9.2 of the Anti-Dumping Agreement as a result of establishing the level of "lesser duty" on imports from China at a rate higher than the rate of "lesser duty" established for imports from Viet Nam.<sup>209</sup>

152. In *US – Shrimp II (Viet Nam)*, the Panel found that the practice or policy whereby, in NME proceedings, the USDOC presumed that all producers/exporters in the NME country belong to a single, NME-wide entity, and assigns a single rate to these producers/exporters, is "as such" inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>210</sup> In addition, the Panel found that the United States acted inconsistently with Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in certain administrative reviews under the *Shrimp* anti-dumping order, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide, entity and assignment of a single rate to that entity.<sup>211</sup>

<sup>204</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.143-7.193.

<sup>205</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.203-7.208.

<sup>206</sup> Panel Report, *China – HP-SSST (Japan)*, para. 7.334.

<sup>207</sup> Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.

<sup>208</sup> Panel Report, *EU – Footwear (China)*, paras. 7.90-7.92.

<sup>209</sup> Panel Report, *EU – Footwear (China)*, paras. 7.920-9-933.

<sup>210</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.143-7.193.

<sup>211</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.203-7.208.

153. In *US – Shrimp II (Viet Nam)*, the Appellate Body upheld the Panel's finding that Viet Nam failed to establish that Section 129(c)(1) of the URAA precludes implementation, with respect to prior unliquidated entries, of DSB recommendations and rulings, and therefore that Viet Nam had not established that Section 129(c)(1) is "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1 and 18.1 of the Anti-Dumping Agreement.<sup>212</sup>

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

154. In *EU – Footwear (China)*, the Panel found, for the same reasons and as set out in more detail by the panel in *EC – Fasteners (China)*, that Article 9(5) of the Basic AD Regulation, which requires that a country-wide duty be imposed on producers/exporters in investigations involving NMEs unless they satisfy the conditions for individual treatment in that provision, was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.<sup>213</sup> Like the panel in *EC – Fasteners (China)*, the Panel then exercised judicial economy with respect to the related claims under Articles 9.3 and 9.4 of the Anti-Dumping Agreement.<sup>214</sup> In *US – Shrimp II (Viet Nam)*, the Panel found that Viet Nam failed to establish that the simple zeroing methodology as used by the USDOC in administrative reviews is a measure of general and prospective application which can be challenged "as such", and therefore found that Viet Nam had not established that the USDOC's simple zeroing methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement or Article VI:2 of the GATT 1994.<sup>215</sup> However, the Panel found that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in certain administrative reviews under the *Shrimp* anti-dumping order.<sup>216</sup>

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

155. In *US – Shrimp II (Viet Nam)*, the Panel found that Viet Nam failed to establish the existence of a measure with respect to the manner in which the USDOC determines the NME-wide entity rate, in particular concerning the use of facts available, and therefore found that Viet Nam had not established that the alleged measure is "as such" inconsistent with Articles 6.8 and 9.4, and Annex II, of the Anti-Dumping Agreement.<sup>217</sup> The Panel found that the United States acted inconsistently with Article 9.4 of the Anti-Dumping Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in certain administrative reviews under the *Shrimp* anti-dumping order.<sup>218</sup>

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

(a) Article 11.2 (request for administrative review)

156. In *US – Shrimp II (Viet Nam)*, the Panel found that the United States acted inconsistently with Article 11.2 of the Anti-Dumping Agreement in certain administrative reviews as a result of its treatment of requests for revocation made by certain Vietnamese producers/exporters.<sup>219</sup>

<sup>212</sup> Appellate Body Report, *US – Shrimp II (Viet Nam)*, paras. 4.1-4.51.

<sup>213</sup> Panel Report, *EU – Footwear (China)*, paras. 7.82-7.92.

<sup>214</sup> Panel Report, *EU – Footwear (China)*, para. 7.93.

<sup>215</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.29-7.56.

<sup>216</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.74-7.81.

<sup>217</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.194.

<sup>218</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.215-7.223.

<sup>219</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.355-7.396.

## (b) Article 11.3 (expiry/sunset reviews)

157. In *EU – Footwear (China)*, the Panel rejected China's claims under Article 11.3 of the Anti-Dumping Agreement with respect to the analogue country selection procedure, the selection of Brazil as the analogue country in the expiry review, the PCN system used by the Commission in the expiry review, the procedure for sample selection and the selection of the sample for the injury determination in the expiry review, and the finding of likelihood of continuation or recurrence of injury in the expiry review.<sup>220</sup>

158. In *US – Shrimp II (Viet Nam)*, the Panel found that the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review.<sup>221</sup>

**8. Article 12: Public Notice and Explanation of Determinations**

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

159. In *EU – Footwear (China)*, the Panel found that the European Union did not act inconsistently with Article 12.2.2 of the Anti-Dumping Agreement in connection with the information and explanations provided in respect of specific issues in the original investigation and expiry review.<sup>222</sup>

160. In *China – GOES*, the Panel found that China did not act inconsistently with Article 12.2.2 of the Anti-Dumping Agreement by not including in a public notice or separate report the data and calculations used to determine the respondent companies' final dumping margins, on the grounds that Article 12.2.2 contains no obligation to do so.<sup>223</sup> The Panel found that China did act inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in relation to deficiencies in the public notice and explanation of its determination of the "all others" dumping margin.<sup>224</sup> The Panel found that China acted inconsistently with Article 12.2.2 by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.<sup>225</sup> The Panel further found that China acted inconsistently with Article 12.2.2 in relation to the public notice and explanation of its causation analysis with respect to non-subject imports.<sup>226</sup> In *China – GOES*, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 12.2.2 because MOFCOM failed to disclose in its final determination all relevant information on the matters of fact relating to the "low price" of subject imports on which it relied for its price effects finding.<sup>227</sup> The Appellate Body found that MOFCOM was required to disclose under Article 12.2.2 the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

161. In *China – X-Ray Equipment*, the Panel concluded that China acted inconsistently with the first sentence of Article 12.2.2 of the Anti-Dumping Agreement, on the basis that MOFCOM's public notice was deficient in failing to provide relevant information regarding: (i) its price effects analysis; and (ii) the factual basis for the determination of the residual rate. However, the Panel found that the European Union failed to establish that China acted inconsistently with the first sentence of Article

<sup>220</sup> Panel Report, *EU – Footwear (China)*, paras. 7.153-7.158, 7.163-7.165, 7.266, 7.287, 7.329-7.340, 7.391, 7.432, 7.493-7.494, and 7.517.

<sup>221</sup> Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.300-7.320.

<sup>222</sup> Panel Report, *EU – Footwear (China)*, paras. 7.842-7.898.

<sup>223</sup> Panel Report, *China – GOES*, paras. 7.330-7.339.

<sup>224</sup> Panel Report, *China – GOES*, paras. 7.419-7.426.

<sup>225</sup> Panel Report, *China – GOES*, paras. 7.587-7.592.

<sup>226</sup> Panel Report, *China – GOES*, paras. 7.669-7.675.

<sup>227</sup> Appellate Body Report, *China – GOES*, paras. 252-267.

12.2.2 by failing to include in the public notice: (i) the calculations and underlying data for Smiths' margin of dumping; and (ii) the calculation of the residual duty rate.<sup>228</sup> The Panel also found that China acted inconsistently with the second sentence of Article 12.2.2 of the Anti-Dumping Agreement, on the basis that MOFCOM's public notice was deficient in failing to explain why MOFCOM rejected Smiths' arguments regarding the treatment of domestic sales to affiliated distributors. However, the Panel found that the European Union failed to establish that China acted inconsistently with the second sentence of Article 12.2.2 in connection with: (i) Smiths' arguments on the credibility of certain injury data; and (ii) additional arguments allegedly made by Smiths concerning MOFCOM's injury and causation analysis.<sup>229</sup>

162. In *China – Broiler Products*, the Panel addressed a series of claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement.<sup>230</sup>

163. In *China – Autos (US)*, the Panel rejected a US claim that MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement in connection with the imposition of the residual AD/CVD duty rates at issue.<sup>231</sup> The Panel considered that whether or not the IA should have resolved a particular issue of fact or law differently, or whether it failed to address a necessary issue, is a matter that arises under the relevant substantive provisions of the Agreement governing determinations, and not under these provisions.

164. In *China – HP-SSST (Japan)*, the Panel addressed a series of claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement pertaining to information concerning MOFCOM's injury determination, and MOFCOM's determination of the all others rates.<sup>232</sup>

## 9. Article 17: Consultation and Dispute Settlement

(a) Article 17.6 (standard of review)

165. In *EU – Footwear (China)*, the Panel found that Article 17.6(i) of the Anti-Dumping Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping investigations that could be the subject of a finding of violation, and therefore dismissed all of China's claims of violation of that provision.<sup>233</sup>

166. In *US – Shrimp II (Viet Nam)*, the Panel observed that Article 17.6 of the Anti-Dumping Agreement does not, in itself, impose obligations upon investigating authorities, and insofar as Viet Nam was making an independent claim of violation under this provision, rejected that claim.<sup>234</sup>

<sup>228</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.456-7.470.

<sup>229</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.471-7.491.

<sup>230</sup> Panel Report, *China – Broiler Products*, paras. 7.324-7.331, 7.364-7.367, 7.526-7.532, 7.601-7.607.

<sup>231</sup> Panel Report, *China – Autos (US)*, paras. 7.151-7.158, 7.179-7.181.

<sup>232</sup> Panel Report, *China – HP-SSST (Japan)*, paras. 7.270-7.281.

<sup>233</sup> Panel Report, *EU – Footwear (China)*, paras. 7.35-7.44.

<sup>234</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.302.

## I. SCM AGREEMENT

### 1. Article 1: Definition of Subsidy

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

167. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that all of the entities involved were "public bodies" within the meaning of Article 1.1(a) of the SCM Agreement.<sup>235</sup> The Panel found that the OPA and the IESO are agents of the Government of Ontario and noted that there is no dispute between the parties that they are a "public bod[ies]" for the purpose of Article 1.1(a)(1). The Panel found that Hydro One is an agent of the Government of Ontario, thereby being a provincial government organization to which the government has assigned or delegated authority and responsibility, or which otherwise has statutory authority and responsibility to perform a public function or service.

168. In *US – Countervailing Measures (China)*, the Panel found that USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by finding that certain state-owned enterprises were "public bodies", and that USDOC's policy of presuming that a majority government-owned entity is a public body is inconsistent, as such, with Article 1.1(a)(1) of the SCM Agreement.<sup>236</sup>

169. In *US – Carbon Steel (India)*, the Appellate Body reversed the Panel's interpretation of "public body" in Article 1.1(a)(1) of the SCM Agreement, and, upon completing the legal analysis, found that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1).<sup>237</sup>

#### (b) "financial contribution"

##### (i) "direct transfer of funds" (Art. 1.1(a)(1)(i))

170. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the payments and access to facilities, equipment, and employees provided to Boeing pursuant to the NASA procurement contracts and DOD assistance instruments at issue involved a "direct transfers of funds" and the "provision of goods or services", and were therefore financial contributions covered by Article 1.1(a)(1)(i) and Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>238</sup> The Appellate Body declared moot and of no legal effect the Panel's finding that transactions properly characterized as "purchases of services" are excluded from the scope of Article 1.1(a)(1) of the SCM Agreement.

171. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Appellate Body, having upheld the Panel's finding that the measures at issue are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement, rejected Japan's argument that the measures should also be characterized as a "direct transfer of funds" or "potential direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.<sup>239</sup>

172. In *US – Carbon Steel (India)*, India argued that loans provided by the Managing Committee of the Steel Development Fund did not constitute a "direct transfer of funds". India argued that, because of the private status of the entity that actually disbursed the funds (the JPC), and the private

<sup>235</sup> Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.234, 7.235, 7.239, and fn 464 thereto.

<sup>236</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.60-7.75, and 7.92-7.128.

<sup>237</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.1-4.55.

<sup>238</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 550-625.

<sup>239</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 5.131.

source or ownership of the relevant funds (neither owned by nor sourced from the government), SDF loans were private transfers falling outside the scope of the SCM Agreement. The Panel rejected India's claim.<sup>240</sup> On appeal, the Appellate Body rejected India's claim that the USDOC's determination that the SDF Managing Committee provided direct transfers of funds was inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.<sup>241</sup>

(ii) "government revenue otherwise due is foregone" (Art 1.1(a)(1)(ii))

173. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body upheld the Panel's finding that the reduction in the Washington State B&O tax rate applicable to commercial aircraft and component manufacturers constituted the foregoing of revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.<sup>242</sup>

(iii) "provides goods or services ... or purchases goods" (Art. 1.1(a)(1)(iii))

174. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the payments and access to facilities, equipment, and employees provided to Boeing pursuant to the NASA procurement contracts and DOD assistance instruments at issue involved a "direct transfers of funds" and the "provision of goods or services", and are therefore financial contributions covered by Article 1.1(a)(1)(i) and Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>243</sup> The Appellate Body declared moot and of no legal effect the Panel's finding that transactions properly characterized as "purchases of services" are excluded from the scope of Article 1.1(a)(1) of the SCM Agreement.

175. The Panel in *Canada – Renewable Energy / Feed-In Tariff Program* determined that the measures amounted to government "purchases of goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>244</sup> On appeal, the Appellate Body upheld the Panel's finding that the FIT Programme and related FIT and microFIT Contracts are government "purchases [of] goods" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>245</sup>

176. In *US – Carbon Steel (India)*, the Panel rejected India's claim that the USDOC's determination that the Government of India provided goods through the grant of mining rights for iron ore and coal was inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>246</sup> The Panel rejected India's argument that because of the uncertainties involved in mining operations, and because of the amount of work required by the mining entity to extract the iron ore and coal once the lease has been granted, the grant of the mining lease by the GOI was too remote from the extracted minerals to be treated as the "provision" of a good within the meaning of Article 1.1(a)(1)(iii). The Appellate Body rejected India's claim that the USDOC's determination that the GOI provided goods through the grant of mining rights for iron ore and coal was inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>247</sup>

<sup>240</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.290-7.297.

<sup>241</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.82-4.103.

<sup>242</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 801-831.

<sup>243</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 550-625.

<sup>244</sup> Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.194-7.249.

<sup>245</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.122-5.128.

<sup>246</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.233-7.241.

<sup>247</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.60-4.75.



(iv) "entrusts or directs a private body"

177. In *US – Countervailing Measures (China)*, the Panel found that USDOC acted inconsistently with Article 11.3 of the SCM Agreement by initiating a countervailing duty investigation based on an allegation and evidence that a financial contribution existed by virtue of an export restraint.<sup>248</sup> In that context, the Panel interpreted Article 1.1(a)(1)(iv) of the SCM Agreement.

(c) "income or price support" (Art. 1.1(a)(2))

178. In *China – GOES*, the Panel found that certain export restrictions did not constitute "price support" within the meaning of Article 1.1(a)(2) of the SCM Agreement. The Panel did so in the context of finding a violation of Article 11.3 of the SCM Agreement, on the grounds that, for certain of the measures at issue in the CVD investigation at issue, the application to initiate the CVD investigation contained insufficient evidence of the existence of a financial contribution within the meaning of Article 1.1(a)(1), or of income or price support within the meaning of Article 1.1(a)(2).<sup>249</sup>

179. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel declined to make a finding on whether the measures at issue constituted "income or price support" under Article 1.1(a)(2) of the SCM Agreement, after finding that they constituted a "financial contribution" within the meaning of Article 1.1(a)(1). The Appellate Body rejected Japan's claim that, in so doing, the Panel exercised false judicial economy and acted inconsistently with Article 11 of the DSU; the Appellate Body declined to make a finding on whether the measures at issue might be characterized as "income or price support" under Article 1.1(a)(2) of the SCM Agreement.<sup>250</sup>

(d) "benefit" (Art. 1.1(b))

180. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body upheld, albeit for different reasons, the Panel's findings that the payments and access to facilities, equipment, and employees provided under the NASA procurement contracts and USDOD assistance instruments at issue conferred a benefit on Boeing within the meaning of Article 1.1(b) of the SCM Agreement.<sup>251</sup>

181. The Panel in *Canada – Renewable Energy / Feed-In Tariff Program* concluded that the complainants failed to demonstrate that the financial contribution conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, given the inappropriateness of the benchmark used by the complainants.<sup>252</sup> The Appellate Body reversed the Panel's finding that the complainants failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement; however, the Appellate Body was unable to complete the analysis as to whether the challenged measures confer a benefit within the meaning of Article 1.1(b).<sup>253</sup>

<sup>248</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.380-7.407.

<sup>249</sup> Panel Report, *China – GOES*, paras. 7.79-7.93.

<sup>250</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.133-5.139.

<sup>251</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 626-666.

<sup>252</sup> Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 7.270-7.327.

<sup>253</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.140-5.246.

## 2. Article 2: Specificity

182. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the allocation of patent rights under NASA/DOD contracts was not specific within the meaning of Article 2.1(a) of the SCM Agreement.<sup>254</sup> The Appellate Body began its analysis by setting forth its reservations about the Panel's use of an *arguendo* approach with respect to the existence of a subsidy under Article 1; it then upheld the Panel's finding that the allocation of patent rights under contracts and agreements between NASA/USDOD and Boeing was not explicitly limited to certain enterprises within the meaning of Article 2.1(a) of the SCM Agreement. Having found that the Panel erred by failing to separately examine the European Communities' argument that such allocation was de facto specific under Article 2.1(c) of the SCM Agreement, the Appellate Body proceeded to find that it was not. The Appellate Body also upheld the Panel's finding that a different subsidy, the Washington State B&O tax rate reduction, was specific within the meaning of Article 2.1(a) of the SCM Agreement.<sup>255</sup> The Appellate Body upheld, albeit for different reasons, the Panel's finding that the subsidies provided by the City of Wichita through the issuance of Industrial Revenue Bonds subsidies provided to Boeing and Spirit were specific within the meaning of Article 2.1(c) of the SCM Agreement.<sup>256</sup>

183. In *US – Carbon Steel (India)*, the Appellate Body reviewed several findings by the Panel relating to de facto specificity under Article 2.1(c) of the SCM Agreement.<sup>257</sup> The Appellate Body upheld the Panel's finding that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme. The Appellate Body rejected India's argument that specificity must be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities. The Appellate Body also rejected India's argument that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a subset of this industry.

184. In *US – Countervailing Measures (China)*, the Appellate Body reviewed several findings by the Panel relating to de facto specificity under Article 2.1(c) of the SCM Agreement.<sup>258</sup> The Appellate Body agreed with the Panel that it may be permissible for an investigating authority to proceed directly to a specificity analysis under Article 2.1(c), and that an application of the principles set out in subparagraphs (a) and (b) is not always required before an analysis can be conducted under subparagraph (c). The Appellate Body reversed the Panel's finding that China had not established that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by failing to identify a "subsidy programme", but was unable to complete the legal analysis in this regard. The Appellate Body also reversed the Panel's finding that China had not established that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by failing to identify a "granting authority", but was unable to complete the legal analysis in this regard.

## 3. Article 6: Serious Prejudice

185. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body upheld the Panel's overall conclusion that the aeronautic R&D subsidies and tax subsidies at issue caused serious prejudice to the interests of the European Communities within the meaning of Articles 5(c), 6.3(b) and 6.3(c) of the SCM Agreement. In its examination of whether the specific subsidies provided to Boeing caused serious prejudice to the interests of the European Communities within the meaning of Article 5(c) and 6.3 of the SCM Agreement, the Appellate Body first considered the "technology effects" of the aeronautics R&D subsidies with respect to the 200-300 seat LCA market, and then considered the

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<sup>254</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 724-800.

<sup>255</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 832-858.

<sup>256</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 859-889.

<sup>257</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.354-4.398.

<sup>258</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.108-4.173.

"price effects" of certain tax and other subsidies with respect to the 100-200 seat and 300-400 seat LCA markets. With respect to the "technology effects" of the aeronautics R&D subsidies, the Appellate Body upheld the Panel's finding of significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, reversed the Panel's finding that the effect of the aeronautics R&D subsidies was a threat of displacement and impedance of EC exports in third-country markets within the meaning of Article 6.3(b) of the SCM Agreement, and upheld the Panel's finding that the effect of the aeronautics R&D subsidies was significant price suppression within the meaning of Article 6.3(c).<sup>259</sup> With respect to the "price effects" of certain tax and other subsidies at issue, the Appellate Body concluded that the Panel did not provide a proper legal basis for its generalized findings that the FSC/ETI subsidies and the B&O tax rate reductions caused significant price suppression, significant lost sales, and displacement and impedance in the 100-200 seat and 300-400 seat LCA markets, and therefore serious prejudice to the interests of the European Communities, within the meaning of Articles 5(c) and 6.3(b) and 6.3(c) of the SCM Agreement. In completing the analysis, the Appellate Body found that, in two sales campaigns, the FSC/ETI subsidies and the Washington State B&O tax rate reduction caused, through their effects on Boeing's prices, significant lost sales to Airbus within the meaning of Article 6.3(c) of the SCM Agreement.<sup>260</sup> Moreover, the Appellate Body: (i) found that the Panel erred in failing to consider whether the price effects of the B&O tax rate reductions complement and supplement the technology effects of the aeronautics R&D subsidies in causing significant lost sales and significant price suppression, and a threat of displacement and impedance, in the 200-300 seat LCA market; (ii) reversed the Panel's finding that the remaining subsidies had not been shown to have affected Boeing's prices in a manner giving rise to serious prejudice with respect to the 100-200 seat and 300-400 seat LCA markets; and (iii) in completing the analysis, found that the effects of the City of Wichita IRBs complemented and supplemented the price effects of the FSC/ETI subsidies and the State of Washington B&O tax rate reduction, thereby causing serious prejudice, in the form of significant lost sales, within the meaning of Articles 5(c) and 6.3(c) of the SCM Agreement, in the 100-200 seat LCA market.<sup>261</sup>

#### 4. Article 11: Initiation and Subsequent Investigation

##### (a) Article 11.3 (obligation to review evidence)

186. In *China – GOES*, the Panel found that China acted inconsistently with Article 11.3 of the SCM Agreement, on the basis that MOFCOM initiated countervailing duty investigations into each of the 11 programmes challenged before the Panel by the United States, without "sufficient evidence" to justify this. The Panel reached its conclusions by reference to the requirements for "sufficient evidence" set forth in Article 11.2 of the SCM Agreement, but did not consider it necessary to make a separate finding under this provision.<sup>262</sup>

187. In *US – Countervailing Measures (China)*, the Panel found that China failed to establish that the USDOC acted inconsistently with Article 11.3 of the SCM Agreement by initiating the challenged investigations without sufficient evidence that financial contributions were provided by "public bodies" and that the subsidies were "specific".<sup>263</sup> The Panel did however find that USDOC acted inconsistently with Article 11.3 by initiating a countervailing duty investigation based on an allegation and evidence that a financial contribution existed by virtue of an export restraint.<sup>264</sup>

<sup>259</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 923-1127.

<sup>260</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1146-1274.

<sup>261</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1275-1349.

<sup>262</sup> Panel Report, *China – GOES*, paras. 7.48-7.148.

<sup>263</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.143-7.155, 7.275-7.283, and

<sup>264</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.380-7.407.

## 5. Article 12: Evidence

### (a) Article 12.4 (confidentiality)

188. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement, on the basis that MOFCOM did not require the applicants to furnish non-confidential summaries in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.<sup>265</sup>

189. In *China – Broiler Products*, the United States claimed that MOFCOM did not require non-confidential summaries of the confidential information redacted from the public version of the petition, thus hampering US interested parties' ability to defend their interests. The Panel accepted *arguendo* China's argument that the non-confidential version of the petition, which merely redacted the confidential information without replacing it, contained non-confidential summaries of the information redacted, and upheld the United States' claim and found that these "summaries" did not satisfy the requirement in Articles 6.5.1 of the Anti-Dumping Agreement and 12.4.1 of the SCM Agreement to provide a reasonable understanding of the information submitted in confidence.<sup>266</sup>

190. In *China – Autos (US)*, the Panel examined whether the non-confidential summaries of data concerning 12 injury factors were adequate.<sup>267</sup> The Panel concluded that the non-confidential summaries of confidential information concerning some of the injury factors did permit a reasonable understanding of the substance of the confidential information at issue, and thus were consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement. However, the Panel concluded that the non-confidential summaries of confidential information concerning certain other injury factors did not permit a reasonable understanding of the substance of the confidential information at issue, and thus were not consistent with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement.

### (b) Article 12.5 (authorities to satisfy themselves as to accuracy)

191. In *US – Carbon Steel (India)*, the Panel found that the USDOC did not have a sufficient basis to properly determine the existence of the Captive Mining of Iron Ore Programme, and therefore upheld India's claim that the USDOC failed to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5 of the SCM Agreement.<sup>268</sup>

### (c) Article 12.7 (use of facts available)

192. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.7 of the SCM Agreement in connection with MOFCOM's use of a 100% utilization rate in calculating the subsidy rates for the two known respondents under certain procurement programmes.<sup>269</sup> The Panel found that China also acted inconsistently with Article 12.7 in applying 'facts available' to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation.<sup>270</sup> The Panel further found that China applied facts available in a manner inconsistent with Article 12.7 of the SCM Agreement by including programmes

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<sup>265</sup> Panel Report, *China – GOES*, paras. 7.187-7.225.

<sup>266</sup> Panel Report, *China – Broiler Products*, paras. 7.49-7.65.

<sup>267</sup> Panel Report, *China – Autos (US)*, paras. 7.24-7.54.

<sup>268</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.205-7.217.

<sup>269</sup> Panel Report, *China – GOES*, paras. 7.266-7.311.

<sup>270</sup> Panel Report, *China – GOES*, paras. 7.446-7.448.

found by MOFCOM not to confer countervailable subsidies in the calculation of the 'all others' subsidy rate.<sup>271</sup>

193. In *China – Broiler Products*, the United States claimed that China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement and 12.7 of the SCM Agreement when it used "facts available" to determine the anti-dumping and countervailing duty rates for unknown US producers/exporters, i.e. producers/exporters who failed to register with MOFCOM to participate in the investigation. The Panel concluded that facts available can be used to determine the anti-dumping duty rates of unknown producers/exporters and that MOFCOM's publication of a notice on the internet requesting registration and certain information, and informing of the consequences of not doing so, fulfilled the requirements of Articles 6.8 and 12.7 for resorting to "facts available". However, the Panel concluded that the facts relied upon were "adverse" to the interests of the unknown producers, contrary to the two provisions and upheld the United States' claim.<sup>272</sup>

194. In *China – Autos (US)*, the Panel found that China acted inconsistently with its obligations under Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement in the use of facts available in the determination of the residual AD/CVD duty rates in the automobiles investigation.<sup>273</sup> The Panel found that a request for information concerning the identity, volume and value of exporters of the product is not a sufficiently specific request for information to justify the determination of a dumping margin on the basis of facts available for unknown or non-existent exporters.

195. In *US – Carbon Steel (India)*, the Appellate Body reviewed several findings by the Panel regarding the use of "facts available" under Article 12.7 of the SCM Agreement.<sup>274</sup> The Appellate Body found that Article 12.7 requires an investigating authority to use facts available that reasonably replace the missing necessary information with a view to arriving at an accurate determination, and that this also includes an evaluation of available evidence. The Appellate Body upheld the Panel's finding that India failed to establish a *prima facie* case that Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations are inconsistent as such with Article 12.7 of the SCM Agreement.

196. In *US – Countervailing Measures (China)*, the Panel found that China had not established that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by not relying on facts available on the record in 42 instances.<sup>275</sup> The Appellate Body upheld China's claim that the Panel failed to sufficiently examine each of the 42 instances of the USDOC's use of "adverse" facts available in order to determine whether the USDOC had disclosed how its conclusions were supported by facts on the record.<sup>276</sup> The Appellate Body was unable to complete the analysis in this regard. The scope of China's appeal was limited to the Panel's "cursory analysis" of the evidence, not its interpretation of Article 12.7 of the SCM Agreement or the standard of review applied by the Panel.

(d) Article 12.8 (disclosure of essential facts)

197. In *China – GOES*, the Panel found that China acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose certain essential facts underlying its decision to apply an "all others" subsidy rate.<sup>277</sup> The Panel also found that China's failure to disclose the "essential facts"

<sup>271</sup> Panel Report, *China – GOES*, paras. 7.449-7.452.

<sup>272</sup> Panel Report, *China – Broiler Products*, paras. 7.298-7.313, and 7.354-7.360.

<sup>273</sup> Panel Report, *China – Autos (US)*, paras. 7.121-7.140, and 7.170-7.175..

<sup>274</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.399-4.509.

<sup>275</sup> Panel Report, *US – Countervailing Measures (China)*, paras. 7.307-7.325.

<sup>276</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.174-4.209.

<sup>277</sup> Panel Report, *China – GOES*, paras. 7.461-7.466.

underlying MOFCOM's finding of "low" subject import prices was inconsistent with Article 12.8.<sup>278</sup> The Panel found that China acted inconsistently with Article 12.8 in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation analysis.<sup>279</sup> On appeal, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 12.8.<sup>280</sup> The Appellate Body agreed with the Panel that MOFCOM failed to disclose in its preliminary determination and its final injury disclosure document all the "essential facts" relating to the "low price" of subject imports on which it relied for its price effects finding. The Appellate Body found that MOFCOM was required to disclose, under Article 12.8, the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

198. In *China – Broiler Products*, the Panel upheld claims by the United States under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement.<sup>281</sup>

199. In *China – Autos (US)*, the Panel rejected a separate US claim that MOFCOM acted inconsistently with the disclosure obligation under Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement in connection with the determination of the residual AD/CVD duty rates at issue.<sup>282</sup>

## 6. Article 14: Calculation of the Amount of the Subsidy in Terms of the Benefit to the Recipient

### (a) Article 14(b) (loans)

200. In *US – Carbon Steel (India)*, the Panel rejected India's claim that USDOC acted inconsistently with Article 14(b) in determining that loans provided by the Managing Committee of the Steel Development Fund conferred a benefit.<sup>283</sup> The Panel considered that the US benefit methodology was transparent and adequately explained within the meaning of the chapeau of Article 14, that an investigating authority is entitled to rely on constructed interest rate proxies where actual comparable commercial loan rates are not available, and that investigating authorities are not required to take account of the costs incurred by recipients in participating in the scheme under which the loans are provided.

### (b) Article 14(d) (provision of goods or services)

201. In *US – Carbon Steel (India)*, the Appellate Body addressed a series of issues relating to Article 14(d) of the SCM Agreement.<sup>284</sup> The Appellate Body rejected India's claims that the US benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it fails to require investigating authorities to assess the adequacy of remuneration from the perspective of the government provider before assessing whether a benefit has been conferred on the recipient; that the US benchmarking mechanism is inconsistent "as such" with Article 14(d) of the SCM Agreement because it excludes the use of government prices as benchmarks; that the use of "world market prices" as Tier II benchmarks provided for in Section 351.511(a)(2)(ii) of the US Regulations was inconsistent "as such" with Article 14(d) of the SCM Agreement; and that the mandatory use of "as delivered" benchmarks provided for in Section 351.511(a)(2)(iv) of the US Regulations is inconsistent "as such" with Article 14(d) of the SCM Agreement. The Appellate Body also addressed a series of "as applied" claims under Article 14(d) of the SCM Agreement in relation to the USDOC's

<sup>278</sup> Panel Report, *China – GOES*, paras. 7.567-7.575.

<sup>279</sup> Panel Report, *China – GOES*, paras. 7.639-7.660.

<sup>280</sup> Appellate Body Report, *China – GOES*, paras. 233-251.

<sup>281</sup> Panel Report, *China – Broiler Products*, paras. 7.85-7.107, 7.314-7.323, and 7.361-7.363.

<sup>282</sup> Panel Report, *China – Autos (US)*, paras. 7.141-7.150, 7.176-7.178.

<sup>283</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.307-7.313.

<sup>284</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.104-4.353.

determinations of benefit in the countervailing duty investigation concerning: (i) the provision of iron ore by the NMDC; and (ii) the provision of captive mining rights for iron ore and coal by the GOI. The Appellate Body found that USDOC's exclusion of the NMDC's export prices in determining a Tier II benchmark was inconsistent with Article 14(d) and the chapeau of Article 14 of the SCM Agreement; that the USDOC's construction of government prices for iron ore and coal was not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and was unable to complete the analysis of whether USDOC erred in finding that loans provided under the SDF conferred a benefit within the meaning of Articles 1.1(b) and 14(b) of the SCM Agreement.

202. In *US – Countervailing Measures (China)*, the Appellate Body addressed benefit benchmark issues under Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>285</sup> The Appellate Body reversed the Panel's finding upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted. The Appellate Body reversed the Panel's finding that China had failed to establish that the USDOC acted inconsistently with Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations at issue. The Appellate Body completed the legal analysis and found that the USDOC acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations and, consequently, with Article 10 and Article 32.1 of the SCM Agreement.

## 7. Article 15: Determination of Injury

### (a) General

203. In *US – Carbon Steel (India)*, the Panel examined a claim under Article 15.3 of the SCM Agreement with respect to a provision of US law requiring, in certain situations, a single injury assessment for both subsidized imports and dumped imports when there are simultaneous countervailing and anti-dumping investigations of the same product from different countries.<sup>286</sup> The Panel found that Article 15.3 of the SCM Agreement prohibits the "cross-cumulation" of the effects of subsidized imports with the effects of other unfairly traded imports, namely non-subsidized, dumped imports. The Panel further found that such cross-cumulation was inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, all of which use the expression "subsidized imports".<sup>287</sup>

### (b) Article 15.1 (positive evidence / objective examination)

204. Panels have addressed claims under Article 15.1 of the SCM Agreement in a number of disputes, mostly in conjunction with one or more other paragraphs of Article 15.

### (c) Article 15.2 (obligation to consider volume and price effects of imports)

205. In *China – GOES*, the Panel found that China acted inconsistently with Article 15.2 of the SCM Agreement in relation to MOFCOM's analysis of the price effects of subject imports.<sup>288</sup> In *China – GOES*, the Appellate Body upheld the Panel's finding that MOFCOM's price effects finding was inconsistent with Article 15.2.<sup>289</sup> Like the Panel, the Appellate Body rejected China's interpretation that Article 15.2 merely requires an investigating authority to consider the existence of price depression or suppression, and does not require the consideration of any link between subject

<sup>285</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.29-4.107.

<sup>286</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.339-7.356.

<sup>287</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.357-7.369.

<sup>288</sup> Panel Report, *China – GOES*, paras. 7.511-7.554.

<sup>289</sup> Appellate Body Report, *China – GOES*, paras. 116-232.

imports and these price effects.<sup>290</sup> With regard to the Panel's application of the legal standard under Article 15.2, read together with Article 15.1, the Appellate Body found that the Panel was correct to conclude that MOFCOM's finding as to the "low price" of subject imports referred to the existence of price undercutting, and that MOFCOM relied on this factor to support its finding of significant price depression and suppression.<sup>291</sup>

206. In *China – Broiler Products*, the United States claimed that MOFCOM's price effects findings were inconsistent with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement because, when performing a comparison of domestic and import prices for purposes of determining injury, MOFCOM inflated the extent of price undercutting by: (i) comparing prices for transactions at different levels of trade; and (ii) comparing transactions with a different product mix (the United States argued that US imports were composed of low-value chicken parts while Chinese domestic producers sold all chicken parts). The Panel upheld the United States' argument concerning differences in product mix and rejected its argument concerning level of trade. In addition, the Panel upheld claims by the United States that MOFCOM's findings of price suppression were inconsistent with the same provisions, because they were based on the WTO-inconsistent findings of price undercutting.<sup>292</sup>

207. In *China – Autos (US)*, the Panel found that China acted inconsistently with Article 3.2 of the Anti-Dumping Agreement and Article 15.2 of the SCM Agreement as a result of MOFCOM's price effects analysis, and consequent finding of price depression in its final determination.<sup>293</sup>

(d) Article 15.3 (cumulation)

208. In *US – Carbon Steel (India)*, the Panel examined a claim under Article 15.3 of the SCM Agreement with respect to a provision of US law requiring, in certain situations, a single injury assessment for both subsidized imports and dumped imports when there are simultaneous countervailing and anti-dumping investigations of the same product from different countries.<sup>294</sup> The Panel found that Article 15.3 of the SCM Agreement prohibits the "cross-cumulation" of the effects of subsidized imports with the effects of other unfairly traded imports, namely non-subsidized, dumped imports. The Panel further found that such cross-cumulation was inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, all of which use the expression "subsidized imports".<sup>295</sup> The Appellate Body reviewed the Panel's findings regarding "cross-cumulation" under Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.<sup>296</sup> The Appellate Body agreed with the Panel's finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations. The Appellate Body found that Section 1677(7)(G)(iii) of the US Statute is inconsistent "as such" with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

(e) Article 15.4 (injury factors)

209. In *US – Carbon Steel (India)*, the Panel examined whether the USITC properly evaluated growth, return on investment, and ability to raise capital as relevant economic factors under Article 15.4 of the SCM Agreement.<sup>297</sup> Based on the evidence, the Panel concluded that these factors

<sup>290</sup> Appellate Body Report, *China – GOES*, paras. 116-169.

<sup>291</sup> Appellate Body Report, *China – GOES*, paras. 170-232.

<sup>292</sup> Panel Report, *China – Broiler Products*, paras. 7.473-7.494, and 7.502-7.513.

<sup>293</sup> Panel Report, *China – Autos (US)*, paras. 7.254-7.296.

<sup>294</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.339-7.356.

<sup>295</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.357-7.369.

<sup>296</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.563-4.629.

<sup>297</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.398-7.408.



were evaluated by the USITC, even though a separate record of the evaluation of these factors had not been made.

(f) Article 15.5 (causation)

210. In *China – GOES*, the Panel found that China acted inconsistently with Article 15.5 of the SCM Agreement with respect to MOFCOM's causation analysis.<sup>298</sup>

211. In *China – Autos (US)*, the Panel found that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement as a result of MOFCOM's causation analysis in the two investigations at issue.<sup>299</sup>

## 8. Article 16: Definition of Domestic Industry

212. In *China – Broiler Products*, the United States claimed that MOFCOM improperly defined the domestic industry for two reasons. First, because MOFCOM did not seek to define the domestic industry as the "domestic producers as a whole" before settling on those producers representing a "major proportion" of total domestic production. Second, because MOFCOM's process for defining the domestic industry involved a self-selection process whereby those companies that supported the Petition would be more likely to be included in the domestic industry definition, thus introducing a "material risk of distortion" into the injury analysis. The Panel concluded that there was no obligation in Article 4.1 of the Anti-Dumping Agreement or Article 16.1 of the SCM Agreement to first attempt to define the "domestic industry" as the domestic producers as a whole before an investigating authority can define the domestic industry as those producers representing a "major proportion" of total domestic production. The Panel also concluded that the United States had not adduced evidence that MOFCOM's process for defining the domestic industry involved a self-selection process that introduced a material risk of distortion into the injury analysis. Therefore, the Panel found no inconsistency with these provisions.<sup>300</sup>

213. In *China – Autos (US)*, the Panel rejected the US claim that MOFCOM's domestic industry definition was distorted, and failed to include producers accounting for a major proportion of total domestic production of the domestic like product, inconsistently with Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.<sup>301</sup> The Panel therefore also rejected the US claim that China acted inconsistently with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement by basing its injury determination in the investigations at issue on a wrongly defined domestic industry.

## 9. Article 19: Imposition and Collection of Countervailing Duties

(a) Article 19.3

214. In *US – Countervailing and Anti-Dumping Measures (China)* (DS449), the Panel found that the United States acted inconsistently with Article 19.3 of the SCM Agreement.<sup>302</sup> The Panel followed a prior finding by the Appellate Body (in *US – Anti-Dumping and Countervailing Duties (China)* (DS379)) that the obligation in Article 19.3 of the SCM Agreement requires a Member to investigate and avoid the double remedies that could potentially arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated on the basis of a non-market economy (NME) methodology. With respect to the 25 investigations and reviews at issue in this dispute, the

<sup>298</sup> Panel Report, *China – GOES*, paras. 7.617-7.638.

<sup>299</sup> Panel Report, *China – Autos (US)*, paras. 7.320-7.363.

<sup>300</sup> Panel Report, *China – Broiler Products*, paras. 7.407-7.438.

<sup>301</sup> Panel Report, *China – Autos (US)*, paras. 7.205-7.231.

<sup>302</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.298-7.396.

Panel found that the United States had acted inconsistently with Article 19.3 of the SCM Agreement, and, consequently, Articles 10 and 32.1 of the SCM Agreement, by virtue of the USDOC's concurrent imposition of countervailing duties and anti-dumping duties calculated on the basis of an NME methodology on the same products, without having investigated, either in the CVD investigations and reviews or in the parallel anti-dumping investigations and reviews, whether double remedies arose from such concurrent duties.

(b) Article 19.4

215. In *China – Broiler Products*, the United States claimed that MOFCOM acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because it improperly calculated the amount of per unit subsidization in the subject imports. In particular, the United States claimed that MOFCOM improperly allocated subsidies received for the production of *all* chicken products *only* to the production of subject products. The Panel upheld the claims. It concluded that MOFCOM had not explained how its subsidy calculation ensured that it only countervailed those subsidies bestowed on the production of subject products even though US interested parties had raised doubts as to whether the data relied upon by MOFCOM pertained to all of their production, or only to their production of subject products.<sup>303</sup>

## 10. Article 21: Duration and Review of CVDs and Undertakings

(a) General

216. In *US – Carbon Steel (India)*, the Panel found that USDOC was entitled, in administrative reviews conducted under Articles 21.1 and 21.2 of the SCM Agreement, to consider new subsidy allegations – i.e. subsidy programmes not formally examined in the original investigation – in the administrative reviews at issue, rejecting India's argument that new subsidy allegations could only be considered in the context of an investigation initiated under Article 11.1 of the SCM Agreement, and undertaken consistently with Articles 13.1, 22.1, and 22.2 of the SCM Agreement.<sup>304</sup>

(b) Article 21.1 and 21.2 (administrative reviews)

217. In *US – Carbon Steel (India)*, the Appellate Body reviewed the Panel's analysis of whether the requirements set out in certain provisions of the SCM Agreement apply to an investigating authority's examination of new subsidy allegations in the conduct of an administrative review.<sup>305</sup> The Appellate Body rejected India's argument that the requirements set out in Articles 11.1 and 13.1 of the SCM Agreement apply to administrative reviews, carried out pursuant to Articles 21.1 and 21.2 of the SCM Agreement. However, the Appellate Body found that the Panel erred insofar as it found that the obligations under Articles 22.1 and 22.2 of the SCM Agreement are not applicable to administrative reviews carried out pursuant to Articles 21.1 and 21.2 of the SCM Agreement.

(c) Article 21.3 (sunset reviews)

218. In *US – Carbon Steel (India)*, India claimed that a provision of US law on cumulative assessment in sunset reviews, and its application in the sunset review determination at issue, were inconsistent with a number of obligations in Article 15 of the SCM Agreement, which is the provision governing injury determinations in original investigations. The Panel agreed with the United States that Article 15 does not impose obligations with regard to sunset reviews.<sup>306</sup>

<sup>303</sup> Panel Report, *China – Broiler Products*, paras. 7.255-7.266.

<sup>304</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.500-7.508.

<sup>305</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.521-4.562.

<sup>306</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.388-7.392.

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**11. Article 22: Public Notice and Explanation of Determinations****(a) Article 22.3 (of preliminary and final determinations)**

219. In *China – GOES*, the Panel found no violation of Article 22.3 of the SCM Agreement in connection with regard to MOFCOM's explanation of the findings and conclusions supporting its determination that the bidding process under the United States Government procurement statutes at issue did not result in prices that reflected market conditions.<sup>307</sup> In *China – GOES*, the Panel also found that China acted inconsistently with Article 22.3 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate.<sup>308</sup>

220. In *China – Autos (US)*, the Panel rejected a US claim that MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement in connection with the imposition of the residual AD/CVD duty rates at issue.<sup>309</sup> The Panel considered that whether or not the IA should have resolved a particular issue of fact or law differently, or whether it failed to address a necessary issue, is a matter that arises under the relevant substantive provisions of the SCM Agreement governing determinations, and not under these provisions.

**(b) Article 22.5 (of conclusion or suspension of an investigation)**

221. In *China – GOES*, the Panel found that China acted inconsistently with Article 22.5 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate.<sup>310</sup> The Panel also found that China acted inconsistently with Article 22.5 by failing adequately to disclose "all relevant information on matters of fact" underlying MOFCOM's conclusion regarding the existence of "low" import prices.<sup>311</sup> The Panel further found that China acted inconsistently with Article 22.5 in relation to the public notice and explanation of its causation analysis with respect to non-subject imports.<sup>312</sup> On appeal, the Appellate Body upheld the Panel's finding that China acted inconsistently with Article 22.5 because MOFCOM failed to disclose in its final determination all relevant information on the matters of fact relating to the "low price" of subject imports on which it relied for its price effects finding.<sup>313</sup> The Appellate Body found that MOFCOM was required to disclose under Article 22.5 the price comparisons of subject imports and domestic products that were necessary to understand MOFCOM's finding regarding the "low price" of subject imports.

222. In *China – Autos (US)*, the Panel rejected a US claim that MOFCOM acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement and Articles 22.3 and 22.5 of the SCM Agreement in connection with the imposition of the residual AD/CVD duty rates at issue.<sup>314</sup> The Panel considered that whether or not the IA should have resolved a particular issue of fact or law differently, or whether it failed to address a necessary issue, is a matter that arises under the relevant substantive provisions of the Agreement governing determinations, and not under these provisions.

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<sup>307</sup> Panel Report, *China – GOES*, paras. 7.354-7.367.

<sup>308</sup> Panel Report, *China – GOES*, paras. 7.472-7.474.

<sup>309</sup> Panel Report, *China – Autos (US)*, paras. 7.151-7.158, 7.179-7.181.

<sup>310</sup> Panel Report, *China – GOES*, paras. 7.472-7.474.

<sup>311</sup> Panel Report, *China – GOES*, paras. 7.587-7.592.

<sup>312</sup> Panel Report, *China – GOES*, paras. 7.669-7.675.

<sup>313</sup> Appellate Body Report, *China – GOES*, paras. 252-267.

<sup>314</sup> Panel Report, *China – Autos (US)*, paras. 7.151-7.158, 7.179-7.181.

223. In *US – Carbon Steel (India)*, the Panel examined a number of claims under Article 22.5 of the SCM Agreement.<sup>315</sup>

## **12. Annex V: Procedures for Developing Information Concerning Serious Prejudice**

224. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for the initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus to initiate the procedure.<sup>316</sup> The Appellate Body found that the Panel erred in denying various requests made by the European Communities with respect to the information-gathering procedure under Annex V of the SCM Agreement. However, the Appellate Body declined to make findings on whether the conditions for an initiation of an Annex V procedure were fulfilled in this dispute.

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<sup>315</sup> Panel Report, *US – Carbon Steel (India)*, paras. 7.526-7.535.

<sup>316</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

## J. SAFEGUARDS AGREEMENT

### 1. Article 2: Conditions

#### (a) Article 2.1 (conditions for safeguards)

225. In *Dominican Republic – Safeguard Measures*, the Panel found the following violations of Article 2.1 of the Agreement on Safeguards: (i) the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994<sup>317</sup>; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that is inconsistent with Article 4.1(c) of the Agreement on Safeguards<sup>318</sup>; (iii) the determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry<sup>319</sup>; and (iv) the imposition of a safeguard measure on the basis of a determination of the existence of "serious injury" that is inconsistent with Article 4.1(a) of the Agreement on Safeguards.<sup>320</sup>

#### (b) Article 2.2 (to be applied irrespective of source)

226. In *Dominican Republic – Safeguard Measures*, the Panel found that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard those imports from developing country Members that meet the requirements laid down in Article 9.1, even when those imports were taken into account in the substantive analysis during the investigation.<sup>321</sup> The Panel found that the Dominican Republic did not act inconsistently with its obligations under Article 2.2 of the Agreement on Safeguards and certain other provisions of the Safeguards Agreement as regards the principle of "parallelism" by not conducting a new analysis, i.e. a new analysis that excluded imports from those developing countries that the Dominican Republic had excluded from the scope of application of the safeguard measure by virtue of Article 9.1, to determine the existence of an increase in imports, serious injury and causation in respect of imports from non-excluded countries.

### 2. Article 3: Investigation

#### (a) Article 3.1 (general requirements)

227. In *Dominican Republic – Safeguard Measures*, the Panel found the following violations of Article 3.1 of the Agreement on Safeguards: (i) the report published by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994<sup>322</sup>; (ii) the imposition of a safeguard measure on the basis of a definition of the "domestic industry" that is inconsistent with Article 4.1(c) of the Agreement on Safeguards<sup>323</sup>; and (iii) failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.<sup>324</sup>

<sup>317</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

<sup>318</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.

<sup>319</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.

<sup>320</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

<sup>321</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.367-7.392.

<sup>322</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

<sup>323</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.

<sup>324</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

### 3. Article 4: Determination of Serious Injury or Threat Thereof

#### (a) Article 4.1(a) (definition of serious injury)

228. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.1(a) of the Agreement on Safeguards by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.<sup>325</sup>

#### (b) Article 4.1(c) (definition of domestic industry)

229. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.1(c) of the Agreement on Safeguards in how it defined the "domestic industry".<sup>326</sup> More specifically, the Panel found that by excluding from the definition of the directly competitive domestic product certain like or directly competitive products and, ultimately, producers of the like or directly competitive product, for the purpose of defining the domestic industry in its preliminary and definitive determinations, the Dominican Republic acted inconsistently with its obligations under Article 4.1(c).

#### (c) Article 4.2(a) (relevant injury factors)

230. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with Article 4.2(a) of the Agreement on Safeguards in its determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry.<sup>327</sup> On this issue, the Panel found that the report of the competent authority contained a reasoned and adequate explanation of the way in which the relevant factors corroborate the determination of the existence of an absolute increase in imports of the products in question. However, the Panel went on to find that the Dominican Republic acted inconsistently with Article 4.2(a) by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.<sup>328</sup> The Panel found that the indicators of serious injury mentioned in Article 4.2(a) were inadequately evaluated and that the explanations provided by the competent authority in the preliminary and final determinations do not support the conclusion that the overall position of the domestic industry indicated significant overall impairment.

#### (d) Article 4.2(b) (causation)

231. In *Dominican Republic – Safeguard Measures*, the Panel, having already found that the competent authority failed to adequately establish the existence of serious injury to the domestic industry, concluded that it would not be possible for the Panel to find that the competent authority had demonstrated the existence of a "causal link" between the increase in imports and serious injury, as required by Article 4.2(b) of the Agreement on Safeguards.<sup>329</sup> The Panel therefore considered that it was not necessary to issue any finding with respect to causal link. However, the Panel proceeded to offer several observations on the competent authority's determination of the existence of causation.

#### (e) Article 4.2(c) (duty to publish detailed analysis)

232. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 4.2(c) of the Agreement on Safeguards because the report published

<sup>325</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

<sup>326</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.171-7.204.

<sup>327</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.

<sup>328</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

<sup>329</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.327-7.329.

by the competent authorities failed to provide an explanation of the existence of "unforeseen developments", or of "the effect of the obligations incurred" under the GATT 1994.<sup>330</sup> The Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with Article 4.2(c) of the Agreement on Safeguards in its determination that the product was being imported "in such increased quantities, in absolute or relative terms", as to cause or threaten to cause serious injury to the domestic industry.<sup>331</sup> Instead, the Panel found that the report of the competent authority contained a reasoned and adequate explanation of the way in which the relevant factors corroborate the determination of the existence of an absolute increase in imports of the products in question. In addition, the Panel found that the Dominican Republic acted inconsistently with Article 4.2(c) by failing to provide reasoned and adequate explanations with respect to the existence of "serious injury" to the domestic industry.<sup>332</sup>

#### 4. Article 6: Provisional Safeguard Measures

233. In *Dominican Republic – Safeguard Measures*, the Panel considered it unnecessary to make any separate findings on the provisional safeguard measure which had expired and been replaced by the definitive safeguard measure at the time of the establishment of the panel, given that the complainants' principal claims in respect of the expired provisional measure were the same claims made in respect of the definitive safeguard measure.<sup>333</sup>

#### 5. Article 8: Level of Concessions or Other Obligations

##### (a) Article 8.1 (trade compensation)

234. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article 8.1 of the Safeguards Agreement by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.<sup>334</sup>

#### 6. Article 9: Developing Country Members

##### (a) Article 9.1 (exclusion from safeguards under certain conditions)

235. In *Dominican Republic – Safeguard Measures*, the Panel found that Article 9.1 of the Agreement on Safeguards imposes the obligation to exclude from the application of the safeguard those imports from developing country Members that meet the requirements laid down in Article 9.1, even when those imports were taken into account in the substantive analysis during the investigation.<sup>335</sup> The Panel found that the Dominican Republic did not act inconsistently with its obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Safeguards Agreement as regards the principle of "parallelism" by not conducting a new analysis, i.e. a new analysis that excluded imports from those developing countries that the Dominican Republic had excluded from the scope of application of the safeguard measure by virtue of Article 9.1, to determine the existence of an increase in imports, serious injury and causation in respect of imports from non-excluded countries. As a separate matter, the Panel found that the Dominican Republic did act inconsistently with its obligations under Article 9.1 of the Safeguards Agreement by failing to specifically and expressly include imports from Thailand in the list of developing countries that the Dominican Republic excluded, by virtue of Article 9.1, from the application of the provisional and definitive safeguard

<sup>330</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

<sup>331</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.217-7.242.

<sup>332</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.257-7.326.

<sup>333</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.22.

<sup>334</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.

<sup>335</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.367-7.392.

measures.<sup>336</sup> The Panel found that it was not enough for the Dominican Republic to assert without any further substantiation that imports from Thailand were de facto excluded from the measure's application.

## **7. Article 11: Prohibition and Elimination of Certain Measures**

### (a) Article 11.1(a) (requirement to conform to WTO obligations)

236. In *Dominican Republic – Safeguard Measures*, the Panel found that the Dominican Republic acted inconsistently with Article 11.1(a) as a consequence of other violations of the Agreement Safeguards.<sup>337</sup>

### (b) Article 11.1(b) (prohibition)

237. The Panel in *China – GOES* observed that Article 11(1)(b) of the Safeguards Agreement prohibits the use of voluntary export restraints, to reinforce its conclusion that voluntary export restraints were not intended to be disciplined by the SCM Agreement.<sup>338</sup>

## **8. Article 12: Notification and Consultation**

### (a) Article 12.1 (notification requirements)

238. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligation under Article 12.1(c) of the Safeguards Agreement by failing to properly notify the definitive safeguard measure.<sup>339</sup>

### (b) Article 12.3 (consultation requirements)

239. In *Dominican Republic – Safeguard Measures*, the Panel rejected the complainants' claim that the Dominican Republic acted inconsistently with its obligations under Article 12.3 of the Safeguards Agreement by failing to provide the complainants with an adequate opportunity to carry out prior consultations and to obtain an adequate means of trade compensation.<sup>340</sup>

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<sup>336</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.393-7.402.

<sup>337</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.126-7.152.

<sup>338</sup> Panel Report, *China – GOES*, footnote 109.

<sup>339</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.415-7.438.

<sup>340</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.439-7.441.



## K. GATS

### 1. Article I: Scope and Definitions

#### (a) Article I:2 (modes of supply)

240. In *China – Electronic Payment Services*, the Panel considered the concept of a "service", in the context of payment and money transmission services.<sup>341</sup> The Panel found that the measures at issue constituted an "integrated" service.<sup>342</sup> The Panel further found that in the absence of a specific Mode 3 limitation in China's Schedule that restricts the supply of EPS from within China into the territory of other WTO Members, China's commitment under Mode 3 covered not only the supply of EPS to clients within China, but also the supply of EPS to clients located in the territory of other WTO Members.<sup>343</sup>

### 2. Article XVI: Market Access

#### (a) Article XVI:1 (obligation to accord treatment provided for in Schedule)

241. In *China – Electronic Payment Services*, the Panel considered that there was no need to offer additional findings under Article XVI:1 of the GATS, after having found a violation of Article XVI:2(a) of the GATS.<sup>344</sup>

#### (b) Article XVI:2 (prohibited measures where commitments are undertaken)

242. In *China – Electronic Payment Services*, the Panel found that certain requirements were inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) Mode 3 market access commitments, they maintain a limitation on the number of service suppliers in the form of a monopoly. However, the Panel found that the United States failed to demonstrate that any of the other requirements that it challenged violated Article XVI:2(a), in some cases because China had not undertaken a relevant market access commitment in its Schedule, and in other cases because they did not impose a limitation that falls within the scope of Article XVI:2(a).<sup>345</sup>

### 3. Article XVII: National Treatment

243. In *China – Electronic Payment Services*, the Panel found that most of the challenged requirements were inconsistent with Article XVII of the GATS, insofar as these requirements failed to accord to services and service suppliers of other Members treatment no less favourable than China accorded to its own like services and service suppliers.<sup>346</sup>

### 4. Article XX: Schedules of Specific Commitments

#### (a) Interpretation of Schedules

244. In *China – Electronic Payment Services*, the Panel examined whether the services at issue — electronic payment services for payment card transactions — are covered under subsector 7.B(d) of

<sup>341</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.95-7.97.

<sup>342</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.58-7.62.

<sup>343</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.616-7.618.

<sup>344</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.628-7.631. See also para. 7.748.

<sup>345</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.508-7.636.

<sup>346</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.637-7.748.

China's GATS Schedule and decided in the affirmative.<sup>347</sup> The Panel rejected the United States' view that China's Schedule includes a market access commitment concerning subsector 7.B(d) to allow the cross-border (Mode 1) supply of EPS into China by foreign EPS suppliers. However, the Panel found that China's Schedule includes a market access commitment that allows foreign EPS suppliers to supply their services through commercial presence in China, so long as a supplier meets certain qualifications requirements related to local (RMB) currency business. In addition, the Panel concluded that China's Schedule contains a full national treatment commitment for the cross-border (Mode 1) supply of EPS, as well as a national treatment commitment under Mode 3 that is also subject to certain qualifications requirements related to local (RMB) currency business.

(b) Article XX:2 (inscriptions for Article XVI and XVII)

245. In *China – Electronic Payment Services*, the Panel applied the rule in Article XX:2 of the GATS to determine the scope of China's rights and obligations.<sup>348</sup>

## **5. Article XXVIII: Definitions**

(a) "sector" (Art. XXVIII(e))

246. In *China – Electronic Payment Services*, the Panel considered the concept of a "sector" under the GATS.<sup>349</sup>

## **6. Annex on Financial Services**

(a) General

247. In *China – Electronic Payment Services*, the Panel treated the Annex on Financial Services as context for interpreting GATS commitments.<sup>350</sup>

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<sup>347</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.63-7.207.

<sup>348</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.658-7.661, 7.663-7.664.

<sup>349</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.177-7.181.

<sup>350</sup> Panel Report, *China – Electronic Payment Services*, para. 7.139.

## L. DSU

### 1. Article 2: Administration

#### (a) Article 2.4 (DSB decisions)

248. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus.<sup>351</sup>

### 2. Article 3: General Provisions

#### (a) Article 3.2 (customary rules of interpretation of public international law)

##### (i) Article 31(3)(a) of the Vienna Convention ("subsequent agreement between the parties")

249. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement. The Appellate Body found that Article 2.12, when interpreted in the context of Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, normally requires a minimum of six months between the publication and the entry into force of a technical regulation.<sup>352</sup> In reaching this conclusion, the Appellate Body found that in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, Paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement. However, the Appellate Body agreed with the Panel that Paragraph 5.2 of the Doha Ministerial Decision constitutes a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.

250. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.<sup>353</sup> In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement, the definition of "international body or system" in Annex 1.4 to the TBT Agreement, as well as the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). The Appellate Body also relied on the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement, which it considered a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.

#### (b) Article 3.10

251. In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested that the Panel make a preliminary ruling that China's panel request did not comply with the requirements of Article 6.2 of the DSU. China subsequently represented that it did not intend to pursue some of the claims at issue. In these circumstances, the Panel decided that it was not necessary for it to rule on

<sup>351</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

<sup>352</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

<sup>353</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

whether, insofar as those claims were concerned, the panel request complied with Article 6.2 of the DSU.<sup>354</sup> In the course of its reasoning, the Panel stated that in the light of Article 3.10 of the DSU, in situations where a complaining party abandons claims during a special preliminary ruling procedure, panels should not – save, perhaps, in extraordinary circumstances and subject to a well-substantiated explanation – allow that party to resurrect those claims after the preliminary phase has run its course.<sup>355</sup>

252. In *Peru – Agricultural Products*, the respondent argued that a free trade agreement between itself and Guatemala, the complainant in that case, reflected the parties' agreement that Peru could maintain the challenged measures. Peru argued that in these circumstances, should find that Guatemala had not acted in good faith in initiating the dispute. The Panel was not convinced by Peru's argument.<sup>356</sup> Nor did the Panel consider that the FTA resulted in the modification of WTO rights and obligations as between the parties<sup>357</sup>, or that Guatemala's claim involved an *abus de droit*.<sup>358</sup>

### 3. Article 6: Establishment of Panels

(a) Requirement to "identify the specific measures at issue"

253. Over the period 1 October 2011 to 4 June 2015, there were rulings in several disputes on whether one or more aspects of a panel request met the requirement, in Article 6.2 of the DSU, to "identify the specific measures at issue":

DS No.	Citation	Whether panel request identified specific measure(s) at issue
438, 444, 445	Appellate Body Reports, <i>Argentina – Import Measures</i> , paras. 5.32-5.89	Yes
438, 444, 445	Panel Reports, <i>Argentina – Import Measures</i> , Annex D-2, paras. 4.10-4.33, and 4.34-4.38	Yes / No
436	Panel Report, <i>US – Carbon Steel (India)</i> , paras. 1.39-1.41	Yes
430	Panel Report, <i>India – Agricultural Products</i> , paras. 7.3 and 7.29-7.114	Yes / No / Moot
430	<i>India – Agricultural Products</i> , Preliminary Ruling by the Panel (WT/DS430/5), paras. 3.8-3.66	Yes
384, 386	Panel Reports, <i>US – COOL</i> , paras. 7.9-7.22	Yes / No

<sup>354</sup> See WT/DS449/4, paras. 3.1-3.16.

<sup>355</sup> WT/DS449/4, para. 3.13.

<sup>356</sup> Panel Report, *Peru – Agricultural Products*, paras. 7.88-7.92.

<sup>357</sup> Panel Report, *Peru – Agricultural Products*, 7.526-7.527.

<sup>358</sup> Panel Report, *Peru – Agricultural Products*, para. 7.95.

- (b) Requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"

254. Over the period 1 October 2011 to 4 June 2015, there were rulings in several disputes on whether one or more aspects of a panel request met the requirement, in Article 6.2 of the DSU, to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly":

DS No.	Citation	Whether panel request provided a brief summary of the legal basis of the complaint
460	<i>China – HP-SSST (Japan)</i> , paras. 7.30-7.51	Yes / No
437	Appellate Body Report, <i>US – Countervailing Measures (China)</i> , paras.4.1-4.28	Yes
449	Appellate Body Report, <i>US – Countervailing and Anti-Dumping Measures (China)</i> , paras. 4.1-4.52	Yes
436	Panel Report, <i>US – Carbon Steel (India)</i> , paras. 1.28-1.38	Yes / No
430	Preliminary Ruling by the Panel (WT/DS430/5), <i>India – Agricultural Products</i> , paras. 3.67-3.141	Yes
449	Preliminary Ruling by the Panel (WT/DS449/4), <i>US – Countervailing and Anti-Dumping Measures (China)</i> , paras. 3.1-3.52	Moot / Yes
437	Preliminary Ruling by the Panel (WT/DS437/4), <i>US – Countervailing Measures (China)</i> , paras. 4.1-4.20	Yes
412, 426	Preliminary Ruling by the Panel (WT/DS412/8 and WT/DS426/7), <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , paras. 17-25	Yes
413	Panel Report, <i>China – Electronic Payment Services</i> , paras. 7.1-7.4	Yes
394, 395, 398	Appellate Body Reports, <i>China – Raw Materials</i> , paras. 211-235	No
405	Panel Report, <i>EU – Footwear (China)</i> , paras. 7.12-7.24, 7.50	Yes

#### 4. Article 7: Terms of Reference

##### (a) Terminated, expired, and amended measures

255. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which a panel or the Appellate Body considered whether it was appropriate to make findings and/or recommendations in respect of measures that had been terminated, repealed, amended, or replaced prior to, or in the course of, the proceeding:

DS No.	Citation	Result
413	Panel Report, <i>China – Electronic Payment Services</i> , paras. 7.221-7.229	No findings or recommendations
415, 416, 417, 418	Panel Report, <i>Dominican Republic – Safeguard Measures</i> , para. 7.22	No findings or recommendations
394, 395, 398	Appellate Body Reports, <i>China – Raw Materials</i> , paras. 236-269	The panel did not err in making a recommendation
384, 386	Panel Reports, <i>US – COOL</i> , paras. 7.28-7.33	Taken into account to the extent relevant to the analysis of other measures
405	Panel Report, <i>EU – Footwear (China)</i> , paras. 8.6-8.8	Findings, but no recommendations

##### (b) Measures/claims not subject to consultations

256. Over the period 1 October 2011 to 4 June 2015, there were rulings in several disputes on whether one or more measures and/or claims set forth in a panel request fell outside of the panel's terms of reference by virtue of not having been included in the request for consultations:

DS No.	Citation	Claim(s) in question falling within terms of reference:
429	<i>US – Shrimp II (Viet Nam)</i> , Preliminary Ruling by the Panel (WT/DS429/R/Add.1, Annex 3), paras. 2.11-2.22 and 3.1-3.5	Yes / Moot
438, 444, 445	Appellate Body Reports, <i>Argentina – Import Measures</i> , paras. 5.5-5.31	Yes
438, 444, 445	Panel Reports, <i>Argentina – Import Measures</i> , Annex D-1, paras. 3.1-3.33	Yes
427	Panel Report, <i>China – Broiler Products</i> , paras. 7.218-7.233	No
405	Panel Report, <i>EU – Footwear (China)</i> , paras. 7.51-7.61	Yes

## 5. Article 10: Third Parties

### (a) Enhanced third party rights

257. Over the period 1 October 2011 to 4 June 2015, there were rulings in several disputes on requests for enhanced third party rights:

DS No.	Citation	Request(s) granted
381	Panel Report, <i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i> , paras. 1.7-1.8	No
384, 386	Panel Reports, <i>US – COOL (Article 21.5 – Canada and Mexico)</i> , paras. 1.15-1.16	Yes
438, 444, 445	Panel Reports, <i>Argentina – Import Measures</i> , paras. 1.23-1.24	No
437	Panel Report, <i>US – Countervailing Measures (China)</i> , paras. 1.9-1.13	No
431, 432, 433	Panel Reports, <i>China – Rare Earths</i> , paras. 7.1-7.10.	No
400, 401	Panel Reports, <i>EC – Seal Products</i> , paras. 1.15-1.16	No
412, 426	Panel Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , para. 1.11	Yes
415, 416, 417, 418	Panel Report, <i>Dominican Republic – Safeguard Measures</i> , para. 1.8	No
384, 386	Panel Reports, <i>US – COOL</i> , paras. 2.7-2.8	Yes

## 6. Article 11: Function of Panels

### (a) "including an objective assessment of the facts of the case"

#### (i) *Allegations of a failure to conduct an objective assessment of the facts*

258. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which the Appellate Body ruled on whether one or more factual findings by the panel was based on an "objective assessment of the facts" as required by Article 11 of the DSU (the following table does not cover all claims of error under Article 11):

DS No.	Citation	Whether inconsistency with Article 11 established
430	Appellate Body Report, <i>India – Agricultural Products</i> , paras. 5.44, 5.180-5.184, 5.265, 5.267-5.286	No
429	Appellate Body Report, <i>US – Shrimp II (Viet Nam)</i> , paras. 4.1-4.50	No
438, 444, 445	Appellate Body Reports, <i>Argentina – Import Measures</i> , paras. 5.51-5.80	No
437	Appellate Body Report, <i>US – Countervailing Measures (China)</i> , paras. 4.180-4.209	Yes

436	Appellate Body Report, <i>US – Carbon Steel (India)</i> , paras. 476-481, 4.436-4.456, 4.497-4.509	No / Yes
431, 432, 433	Appellate Body Reports, <i>China – Rare Earths</i> , paras. 5.181-5.243	No
412, 426	Appellate Body Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , paras. 5.205-5.210	No
414	Appellate Body Report, <i>China – GOES</i> , paras. 229-231	No
384, 386	Appellate Body Reports, <i>US – COOL</i> , paras. 299-310, 314-326, 397-429	No
381	Appellate Body Report, <i>US – Tuna II (Mexico)</i> , paras. 253-281.	No
406	Appellate Body Report, <i>US – Clove Cigarettes</i> , paras. 146-155, 208-212, 227-232.	No
353	Appellate Body Report, <i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i> , paras. 711-723, 990-996, 1128-1145	Yes / No
394, 395, 398	Appellate Body Reports, <i>China – Raw Materials</i> , paras. 338-344	No
396, 403	Appellate Body Reports, <i>Philippines – Distilled Spirits</i> , paras. 134-141, 155-157, 162-165, 229-241	No

(ii) *Timing of submission of evidence*

259. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which panels ruled on objections to admissibility relating to the timing of the submission of evidence:

DS No.	Citation	Timing of submission	Whether new evidence admissible
440	Panel Report, <i>China – Autos (US)</i> , paras. 7.79-7.83	At the second meeting	Yes
431, 432, 433	Panel Reports, <i>China – Rare Earths</i> , paras. 7.11-7.28	Comments on other party's response to final set of questions	No
400, 401	Panel Reports, <i>EC – Seal Products</i> , paras. 6.53-6.55	Interim review	No

(b) "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements"

260. In *Philippines – Distilled Spirits*, the Appellate Body found that the Panel erred in characterizing the EU claim under the second sentence of Article III:2 of the GATT 1994 as being made in the "alternative" to its claim under the first sentence of Article III:2, and concluded that the Panel acted inconsistently with Article 11 of the DSU by failing to make a finding on this separate and independent claim.<sup>359</sup>

261. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the Panel erred by "refusing to undertake a more comprehensive analysis of the legal issue of how the DSB is to initiate

<sup>359</sup> Appellate Body Reports, *Philippines – Distilled Spirits*, paras. 185-193.



an Annex V procedure", which "deprived Members of the benefit of a 'a clear enunciation of the relevant WTO law' and failed to advance a key objective of WTO dispute settlement, namely, the resolution of disputes 'in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law'".<sup>360</sup>

262. In *US – Tuna II (Mexico)*, the Panel found no violation of Article 2.1 of the TBT Agreement, and proceeded to exercise judicial economy in respect of the complainant's claims under Articles I:1 and III:4 of the GATT 1994. The Appellate Body, having reversed the Panel's interpretation of Article 2.1, and having rejected the Panel's assumption that the obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 are substantially the same, proceeded to find that the Panel erred in exercising judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994.<sup>361</sup>

263. In *Canada – Renewable Energy / Feed-In Tariff Program*, the Panel found that the measure at issue was inconsistent with Article III:4 of the GATT 1994. The Panel based this finding on its conclusion that the measure was covered by the Illustrative List annexed to the TRIMs Agreement. Having reached that finding, the Panel exercised judicial economy with respect to Japan's additional, "stand-alone" claim under Article III:4. The Appellate Body saw no error in the Panel's approach.<sup>362</sup> In the same case, the Panel declined to make a finding on whether the measures at issue constitute "income or price support" under Article 1.1(a)(2) of the SCM Agreement, after finding that they constitute a "financial contribution" within the meaning of Article 1.1(a)(1). The Appellate Body rejected Japan's claim that, in so doing, the Panel exercised false judicial economy and acted inconsistently with Article 11 of the DSU.<sup>363</sup>

264. In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested that the Panel make a preliminary ruling that China's panel request did not comply with the requirements of Article 6.2 of the DSU. China subsequently stated that it did not intend to pursue some of the claims at issue. In these circumstances, the Panel decided that it was not necessary for it to rule on whether, insofar as those claims were concerned, the panel request complied with Article 6.2 of the DSU.<sup>364</sup> In the course of its reasoning, the Panel stated that "a ruling on the Article 6.2 issue that pertains to the abandoned claims is not necessary to 'assist the DSB in making the recommendations or in giving the rulings provided for' in the covered agreements", as "the abandoned claims will not result in DSB recommendations or rulings of any kind".<sup>365</sup>

265. In *Argentina – Import Measures*, the Appellate Body rejected Japan's claim that the Panel erred in exercising judicial economy with respect to claims of violation under Article X:1 of the GATT 1994.<sup>366</sup>

266. In *US – Carbon Steel (India)*, the Appellate Body was not convinced that the Panel acted inconsistently with Article 11 of the DSU by allegedly failing to make findings on certain claims and arguments advanced by the respondent.<sup>367</sup> However, the Appellate Body concluded that the Panel failed to make "such findings as will assist the DSB in making recommendations or giving rulings" by

<sup>360</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 500.

<sup>361</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 402-406.

<sup>362</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.86-5.105.

<sup>363</sup> Appellate Body Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, paras. 5.133-5.139.

<sup>364</sup> See WT/DS449/4, paras. 3.1-3.16.

<sup>365</sup> WT/DS449/4, para. 3.10.

<sup>366</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.185-5.203.

<sup>367</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.130-4.136, 4.192-4.196, 4.333-4.335, 4.397, and 4.554-4.558.

finding that the measure requires cross-cumulation "in certain situations" without specifying what those situations are.<sup>368</sup>

267. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel found that all three aspects of the amended tuna measure challenged by Mexico were provisionally justified under paragraph (g) of Article XX, and was therefore of the view that it need not decide whether the amended tuna measure was justified under paragraph (b) of Article XX.<sup>369</sup>

## 7. Article 12: Panel Procedures

(a) Article 12.11 (special and differential treatment)

268. Over the period 1 October 2011 to 4 June 2015, several panels referenced Articles 12.10 and 12.11 of the DSU, including *Dominican Republic – Safeguard Measures*<sup>370</sup>, *Argentina – Import Measures*<sup>371</sup>, and *Peru – Agricultural Products*.<sup>372</sup>

## 8. Article 13: Right to Seek Information

(a) General

269. In *EC – Seal Products*, the Panel declined Norway's request that the Panel exercise its authority under Article 13 of the DSU to seek copies of two legal opinions of the Legal Service of the Council of the European Union. The Panel did not consider that requesting those opinions from the European Union was necessary for the Panel to make an objective assessment of the matter before it, or was compelled by the requirements of due process.<sup>373</sup>

(b) Nature of the information that may be sought

270. In *India – Agricultural Products*, the Appellate Body rejected India's argument that Article 11.2 of the SPS Agreement and Article 13.2 of the DSU limit the permissible scope of a panel's consultation with an international organization to scientific and technical issues, and that the Panel erred in consulting with the OIE not only concerning the evidence submitted by the parties, but also regarding the interpretation of the OIE Code. The Appellate Body found that while the language of Article 11.2 indicates that experts should be consulted in disputes involving scientific or technical issues, neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU mandate that the advice sought be confined to such issues.<sup>374</sup>

(c) Duty to seek information in certain circumstances

271. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that, in the circumstances of the dispute, the Panel acted inconsistently with its obligation under Article 11 of the DSU in failing to exercise its authority to seek out certain relevant information relating to USDOD aeronautics subsidies.<sup>375</sup>

<sup>368</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.601-4.615.

<sup>369</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.542-7.545.

<sup>370</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.442.

<sup>371</sup> Panel Reports, *Argentina – Import Measures*, paras. 6.1-6.10.

<sup>372</sup> Panel Reports, *Peru – Agricultural Products*, paras. 7.529-7.531.

<sup>373</sup> Panel Reports, *EC – Seal Products*, paras. 7.71-7.81.

<sup>374</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.82-5.89.

<sup>375</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1128-1145.

(d) *Amicus curiae* briefs

272. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which panels and/or the Appellate Body received unsolicited *amicus curiae* brief:

DS No.	Citation	Number of submissions received
400, 401	Appellate Body Reports, <i>EC – Seal Products</i> , para. 1.15	3
400, 401	Panel Reports, <i>EC – Seal Products</i> , paras. 1.17-1.19	5
412, 426	Appellate Body Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , para. 1.30	2
412, 426	Panel Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , paras. 1.12-1.13	2
381	Appellate Body Report, <i>US – Tuna II (Mexico)</i> , para. 8	3
406	Appellate Body Report, <i>US – Clove Cigarettes</i> , para. 10	2
384, 386	Panel Reports, <i>US – COOL</i> , paras. 2.9-2.10	1

273. In *EC – Seal Products*, the Appellate Body deemed one of the *amicus curiae* briefs it received inadmissible on account of its late filing.<sup>376</sup>

## (e) Other international intergovernmental organizations

274. In *US – Clove Cigarettes*, the Appellate Body declined an offer of technical assistance from the WHO.<sup>377</sup>

275. In *Argentina – Import Measures*, the Panel requested information from the Secretariat of the World Customs Organization.<sup>378</sup>

276. In *India – Agricultural Products*, the Panel requested information from the World Organization for Animal Health ("OIE").<sup>379</sup>

## (f) Consultation with expert on translation issues

277. In *China – Electronic Payment Services*, the Panel appointed an independent expert to provide expert linguistic advice to assist with disputed translation issues.<sup>380</sup>

<sup>376</sup> Appellate Body Reports, *EC – Seal Products*, para. 1.15.

<sup>377</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 11

<sup>378</sup> Panel Reports, *Argentina – Import Measures*, paras. 1.37-1.38.

<sup>379</sup> Panel Report, *India – Agricultural Products*, para. 1.23.

<sup>380</sup> Panel Report, *China – Electronic Payment Services*, para. 7.236.

## 9. Article 14: Confidentiality

### (a) Article 14.3 (individual opinions)

278. The following table provides information on individual opinions in panel reports and preliminary rulings over the period 1 October 2011 to 4 June 2015:

DS No.	Citation	Description	Issue
381	<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i> , paras. 7.264-7.283, 7.606-7.607	"Separate opinion"	Whether the different certification requirements at issue were inconsistent with Article 2.1 of the TBT Agreement and/or the chapeau of Article XX of the GATT 1994
431, 432, 433	Panel Reports, <i>China – Rare Earths</i> , paras. 7.118-7.138	"Dissenting opinion"	Whether the general exceptions in Article XX of the GATT 1994 are available to justify a breach of the obligation in Paragraph 11.3 of China's Accession Protocol
449	Panel Report, <i>US – Countervailing and Anti-Dumping Measures (China)</i> , paras. 7.212-7.241	"Dissenting opinion"	Whether the law at issue was a measure "effecting an advance" in a rate of duty or imposing a "new or more burdensome requirement" within the meaning of Article X:2 of the GATT 1994
437	Preliminary ruling (WT/DS437/4), <i>US – Countervailing Measures (China)</i> , paras. 6.1-6.18	"Dissenting opinion"	Whether panel request complied with requirements of Article 6.2 of the DSU
412, 426	Panel Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , paras. 9.1-9.23	"Dissenting opinion"	Whether complainants demonstrated that financial contribution conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement

## 10. Article 17: Appellate Review

### (a) General

279. In *China – Rare Earths*, the United States appealed the Panel's decision to exclude certain evidence provided at a late stage of the proceeding by the co-complainants, notwithstanding that the Panel ultimately upheld the co-complainants' claim. The Appellate Body found that nothing in Articles 17.6 or 17.13 of the DSU prevents a party from appealing even a favourable finding or conclusion of a panel.<sup>381</sup>

280. In *China – Rare Earths* the Appellate Body noted that China had appealed certain intermediate findings by the Panel, without seeking reversal of the ultimate conclusions reach by the Panel on whether the measures were justified under Article XX of the GATT.<sup>382</sup>

<sup>381</sup> Appellate Body Reports, *China – Rare Earths*, Annex 4, para. 2.5.

<sup>382</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.2, 5.83.

## (b) Article 17.5 (time-period for appellate proceeding)

281. The following table provides information on the length of time taken in appeals over the period 1 October 2011 to 4 June 2015:

DS No.	Case	Days from Notice of Appeal to Circulation
430	<i>India – Agricultural Products</i>	129
384, 386	<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	171
429	<i>US – Shrimp II (Viet Nam)</i>	91
438, 444, 445	<i>Argentina – Import Measures</i>	111
437	<i>US – Countervailing Measures (China)</i>	118
436	<i>US – Carbon Steel (India)</i>	122
431, 432, 433	<i>China – Rare Earths</i>	121
449	<i>US – Countervailing and Anti-Dumping Measures (China)</i>	90
400, 401	<i>EC – Seal Products</i>	118
412, 426	<i>Canada – Renewable Energy / Feed-In Tariff Program</i>	90
414	<i>China – GOES</i>	90
384, 386	<i>US – COOL</i>	98
381	<i>US – Tuna II (Mexico)</i>	117
406	<i>US – Clove Cigarettes</i>	90
353	<i>US – Large Civil Aircraft (2nd complaint)</i>	346
394, 395, 398	<i>China – Raw Materials</i>	152
396, 403	<i>Philippines – Distilled Spirits</i>	89

## (c) Article 17.11 (individual opinions)

282. The following table provides information on individual opinions in Appellate Body reports over the period 1 October 2011 to 4 June 2015:

DS No.	Citation	Description	Issue
353	Appellate Body Report, <i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i> , footnotes 1118 and 1130	Individual opinion "qualifying" a point	Whether the information-gathering procedure under Annex V of the SCM Agreement is initiated automatically upon the complainant's request.

**11. Article 18: Communications with the Panel or Appellate Body**

## (a) Article 18.2 (confidentiality)

(i) *Additional procedures to protect business confidential information – panels*

283. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which one or both parties requested that a panel adopt additional procedures for the protection of business confidential information (for appeals, see below under Rule 16(1) of the Working Procedures for Appellate Review):

DS No.	Citation	Additional BCI Procedures
454, 460	<i>China – HP-SSST (Japan)</i> , paras. 1.10, 7.9-7.29	Yes
384, 386	<i>US – COOL (Article 21.5 – Canada and Mexico)</i> , para. 1.11	Yes
430	<i>India – Agricultural Products</i> , paras. 1.11-1.13	Yes
440	Panel Report, <i>China – Autos (US)</i> , para. 1.9, Annex A-2	Yes
415, 416, 417, 418	Panel Report, <i>Dominican Republic – Safeguard Measures</i> , para. 1.10	Yes
384, 386	Panel Reports, <i>US – COOL</i> , para. 2.4	Yes

(ii) *Panel hearings opened to public observation*

284. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which one or both parties requested that a panel have open hearings (for appeals, see below under Rule 16(1) of the Working Procedures for Appellate Review):

DS No.	Citation	Additional Procedures for Open Hearings
384, 386	<i>US – COOL (Article 21.5 – Canada and Mexico)</i> , para. 1.10	Yes
400, 401	Panel Reports, <i>EC – Seal Products</i> , para. 1.14	Yes
412, 426	Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , para. 1.9	Yes
384, 386	Panel Reports, <i>US – COOL</i> , paras. 1.10 and 2.5	Yes

## 12. Article 19: Panel and Appellate Body Recommendations

- (a) "The Panel ... may suggest ways in which the Member concerned could implement the recommendation"

285. Over the period 1 October 2011 to 4 June 2015, panels were requested to make suggestions on implementation in several disputes:

DS No.	Citation	Suggestion Made
454, 460	<i>China – HP-SSST (Japan)</i> , para. 8.11	No
430	<i>India – Agricultural Products</i> , paras. 8.5-8.7	No
438, 444, 445	<i>Argentina – Import Measures</i> , paras. 8.4-8.6	No
436	Panel Report, <i>US – Carbon Steel (India)</i> , para. 8.6	No
415, 416, 417, 418	Panel Report, <i>Dominican Republic – Safeguard Measures</i> , para. 6.22	No
405	Panel Report, <i>EU – Footwear (China)</i> , paras. 8.9-8.12	No

## 13. Article 21: Surveillance of Implementation of Recommendations and Rulings

- (a) Article 21.2 (developing country interests)

286. The Arbitrator in *US – COOL (Article 21.3(c))* was not persuaded that Mexico's status as a developing country, and the importance of the cattle sector to its economy, should change the Arbitrator's final determination of the period of time within which the United States could complete domestic implementation of the recommendations and rulings adopted by the DSB. The reason was that the period of time granted to the United States to complete domestic implementation of the DSB's recommendations and rulings was, in the Arbitrator's view, the shortest period possible within the US legal system.<sup>383</sup>

- (b) Article 21.3(c) (reasonable period of time determined through arbitration)

287. The Arbitrator in *US – COOL (Article 21.3(c))* concluded that the reasonable period of time under Article 21.3(c) was 10 months from the date of adoption of the Panel and Appellate Body Reports. In reaching this conclusion, the Arbitrator considered that this period of time should allow the United States to implement the recommendations and rulings of the DSB regardless of whether it decides to do so by regulatory action alone, or by legislative action followed by regulatory action.<sup>384</sup>

288. The Arbitrator in *China – GOES (Article 21.3(c))* concluded that the reasonable period of time under Article 21.3(c) was 8 months and 15 days from the date of adoption of the Panel and Appellate Body Reports.<sup>385</sup> The Arbitrator accepted China's assertion that, under its existing laws, there was no legal authority and mechanism allowing China to implement the DSB's recommendations and rulings in this dispute; however, the Arbitrator was not persuaded that China should be given extra time to fill this gap, the existence of which long pre-dated the DSB's recommendations and rulings in this dispute.<sup>386</sup> In addition, the Arbitrator was not convinced that

<sup>383</sup> Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 99-100.

<sup>384</sup> Award of the Arbitrator, *US – COOL (Art. 21.3(c))*, paras. 65-98.

<sup>385</sup> Award of the Arbitrator, *China – GOES (Article 21.3(c))*, para. 4.1.

<sup>386</sup> Award of the Arbitrator, *China – GOES (Article 21.3(c))*, paras. 3.17-3.34.

conducting a redetermination in a shorter period of time than China proposes would, in the circumstances of this dispute, infringe upon the due process rights of interested parties.<sup>387</sup>

(c) Article 21.5 (compliance proceeding)

(i) *Scope of compliance proceedings under Article 21.5*

289. In *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel found that reviewing the "consistency" of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU, and that the complainants' claims under Article XXIII:1(b) of the GATT 1994 were properly before it and fell within the competence of this Article 21.5 compliance Panel.<sup>388</sup>

290. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Panel agreed with the complainant that its task was not only to determine whether the "measure taken to comply" (in this case, the "2013 Final Rule") is in itself WTO-consistent, but rather, and more fundamentally, to assess whether, through or by way of the 2013 Final Rule, the United States had succeeded in bringing the tuna measure as a whole, as the measure found by the Appellate Body in the original proceedings to be WTO-inconsistent, into conformity with the WTO Agreement.<sup>389</sup>

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<sup>387</sup> Award of the Arbitrator, *China – GOES (Article 21.3(c))*, paras. 3.35-3.47.

<sup>388</sup> Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.647-7.663.

<sup>389</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.9-7.43.



#### 14. Working Procedures for Appellate Review

(a) Rule 16(1) (special or additional procedures)

(i) *Special procedure to protect business confidential information*

291. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body adopted additional procedures to protect BCI and HSBI in the appellate proceedings (for panels, see above under Article 18 of the DSU).<sup>390</sup>

(ii) *Special procedure for public observation of the oral hearing*

292. Over the period 1 October 2011 to 4 June 2015, there were several disputes in which one or both parties requested that the Appellate Body have open hearings (for panels, see above under Article 18 of the DSU):

DS No.	Citation	Additional Procedures for Open Hearings
384, 386	<i>US – COOL (Article 21.5 – Canada and Mexico)</i> , paras. 1.22-1.23, 1.25 and Annex 6	Yes
400, 401	Appellate Body Report, <i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i> , paras. 23-24, and Annex II	Yes
412, 426	Appellate Body Reports, <i>Canada – Renewable Energy / Feed-In Tariff Program</i> , paras. 1.29, 1.31 and Annex 4	Yes
384, 386	Appellate Body Reports, <i>US – COOL</i> , para. 12, and Annex IV	Yes
353	Appellate Body Report, <i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i> , para.31, and Annex IV	Yes

(iii) *Special procedure for consolidation of appeals*

293. In *China – Rare Earths*, the Appellate Body consolidated the proceedings in the three disputes at issue, pursuant to Rule 16(1) of the Working Procedures.<sup>391</sup>

(iv) *Special procedure for simultaneous appeals*

294. In *China – Rare Earths* and *US – Countervailing and Anti-Dumping Measures (China)*, the Appellate Body was presented with the unprecedented situation of simultaneous filings of appeals, with the result that the Appellate Body's usual manner of assigning appeal numbers – according to the sequence in which they were appealed – was not available. After soliciting the views of the parties and third parties involved, the Appellate Body ultimately assigned appeal numbers based on a random draw.<sup>392</sup>

<sup>390</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 23-24, and Annex II to the Appellate Body Report.

<sup>391</sup> Appellate Body Reports, *China – Rare Earths*, paras. 1.32-1.35, Annex 5

<sup>392</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 1.11-1.13.

## (b) Rule 16(2) (request to modify time-period)

295. Over the period 1 October 2011 to 4 June 2015, the Appellate Body considered several requests to modify time-periods in the proceeding:

DS No.	Citation	Request	Whether Request Granted
430	<i>India – Agricultural Products</i> , para. 1.17	Extension of time-period for third participants' submissions	Yes
384, 386	<i>US – COOL (Article 21.5 – Canada and Mexico)</i> , paras. 1.13-1.17 and Annex 4	Time-periods for filing written submissions	Yes
	<i>US – COOL (Article 21.5 – Canada and Mexico)</i> , para. 1.21 and Annex 5	Further extension of time-period for third participants' submissions	Yes
429	<i>US – Shrimp II (Viet Nam)</i> , para. 1.7 and Annex 2	Date for oral hearing	No
436	<i>US – Carbon Steel (India)</i> , para. 1.13 and Annex 3.	Deadline for filing appellees' submissions	Yes
438, 444, 445	<i>Argentina – Import Measures</i> , para. 1.24 and Annex 4	Date for oral hearing	No
431, 432, 433	Appellate Body Reports, <i>China – Rare Earths</i> , para. 1.31, and Annex 4	Deadline for filing Notice of Other Appeal and Other Appellant's Submission	Yes
	Appellate Body Reports, <i>China – Rare Earths</i> , paras. 1.32-1.35, Annex 5	Deadline for filing third participants' submissions	Rendered moot by consolidation of proceedings
449	Appellate Body Report, <i>US – Countervailing and Anti-Dumping Measures (China)</i> , para. 1.14	Deadline for filing Notice of Other Appeal and Other Appellant's Submission	Yes
	Appellate Body Report, <i>US – Countervailing and Anti-Dumping Measures (China)</i> , para. 1.15	Deadline for filing third participants' submissions	No
400, 401	Appellate Body Reports, <i>EC – Seal Products</i> , para. 1.14, and Annex 5	Date for oral hearing	Yes
394, 395, 398	Appellate Body Report, <i>US – Tuna II (Mexico)</i> , para. 5	Date for the oral hearing	Yes
381	Appellate Body Reports, <i>China – Raw Materials</i> , para. 10	Time periods for filing submissions	Yes

## (c) Rule 18(1) (deadlines for submitting documents)

296. In *US – COOL*, the Appellate Body commented on the fact that certain filings were made outside of the deadlines prescribed in Rule 18(1).<sup>393</sup>

## (d) Rules 20(2)(d) and 23(2) (notice of appeal / other appeal requirements)

297. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the US Notice of Other Appeal sufficiently identified an allegation of error and, consequently, rejected the EU argument that the claim at issue was not properly within the scope of this appeal.<sup>394</sup>

298. In *China – Rare Earths*, the Appellate Body declined China's request to reject the United States' Notice of Appeal due to its "conditional" nature. The Division considered that its jurisdiction to hear the United States' appeal was validly established given that the United States' Notice of Appeal conformed to the requirements of Rule 20 of the Working Procedures. Such jurisdiction was not, in the opinion of the Division, affected by the possibility that it might not need to rule on the issues raised by the United States in the event that the scenarios identified by the United States in its Notice of Appeal were to materialize.<sup>395</sup>

## (e) Rule 26 (working schedule)

299. See above under Rule 16(2) (requests to modify time periods).

300. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body decided to suspend the deadlines that would otherwise apply under the Working Procedures for the filing of a Notice of Other Appeal and for the filing of written submissions, pending its decision on whether to adopt additional procedures to protect business confidential information.<sup>396</sup>

## 301. Rule 28 (written responses)

302. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body invited the participants and third participants to submit additional written memoranda, pursuant to Rule 28.<sup>397</sup>

## (f) Rule 30(1) (withdrawal of appeal)

303. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the European Union notified the Appellate Body Division hearing this appeal, as well as the United States and the third participants, that, pursuant to Rule 30(1), it was withdrawing its appeal insofar as it related to subsidies contingent upon export, with immediate effect.<sup>398</sup>

<sup>393</sup> Appellate Body Reports, *US – COOL*, footnote 55 and paragraph 13.

<sup>394</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 679-688.

<sup>395</sup> Appellate Body Reports, *China – Rare Earths*, paras. 1.30-1.31, and Annex 4.

<sup>396</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 26.

<sup>397</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 33.

<sup>398</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 28.

## II. OTHER DEVELOPMENTS IN WTO LAW AND PRACTICE

### A. MEMBERSHIP AND OBSERVER STATUS

#### 1. WTO accessions

##### (a) New WTO Members

##### (i) *Montenegro*

304. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference approved the text of the Protocol of Accession of Montenegro to the WTO Agreement<sup>399</sup>, and adopted the decision on Montenegro's WTO accession<sup>400</sup> and the accession working party report.<sup>401</sup> On the same day, Montenegro signed the Protocol, subject to ratification.<sup>402</sup>

305. After depositing its instrument of acceptance, Montenegro became a WTO Member on 29 April 2012.<sup>403</sup>

##### (ii) *Samoa*

306. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference approved the text of the Protocol of Accession of Samoa to the WTO Agreement<sup>404</sup>, and adopted the decision on Samoa's WTO accession<sup>405</sup> and the accession working party report.<sup>406</sup> On the same day, Samoa signed the Protocol, subject to ratification.<sup>407</sup>

307. After depositing its instrument of acceptance, Samoa became a WTO Member on 10 May 2012.<sup>408</sup>

##### (iii) *Russian Federation*

308. On 16 December 2011, the 8<sup>th</sup> Ministerial Conference approved the text of the Protocol of Accession of the Russian Federation to the WTO Agreement<sup>409</sup>, and adopted the decision on the

<sup>399</sup> The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/28 and WT/L/841. The certified true copy of the Protocol was circulated in WT/Let/857 on 11 June 2012.

<sup>400</sup> WT/MIN(11)/28 and WT/L/841.

<sup>401</sup> WT/ACC/CGR/38, WT/MIN(11)/7, WT/ACC/CGR/38/Add.1, WT/MIN(11)/7/Add.1, WT/ACC/CGR/38/Add.2 and WT/MIN(11)/7/Add.2.

<sup>402</sup> WT/Let/842.

<sup>403</sup> WT/Let/857.

<sup>404</sup> The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/27 and WT/L/840. The certified true copy of the Protocol was circulated in WT/Let/856 on 8 June 2012.

<sup>405</sup> WT/MIN(11)/27 and WT/L/840.

<sup>406</sup> WT/ACC/SAM/30, WT/MIN(11)/1, WT/ACC/SAM/30/Add.1, WT/MIN(11)/1/Add.1, WT/ACC/SAM/30/Add.2 and WT/MIN(11)/1/Add.2.

<sup>407</sup> WT/Let/841.

<sup>408</sup> WT/Let/856.

<sup>409</sup> The text of the Protocol as adopted by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(11)/24 and WT/L/839. The certified true copy of the Protocol was circulated in WT/Let/860 on 25 July 2012.

Russian Federation's WTO accession<sup>410</sup> and the accession working party report.<sup>411</sup> These acts were preceded by a statement of the Chair of the Ministerial Conference, according to which the working party report would be authentic in English only.<sup>412</sup>

309. On 16 December 2011, the Russian Federation signed the Protocol, subject to ratification.<sup>413</sup>

310. After depositing its instrument of acceptance, the Russian Federation became a WTO Member on 22 August 2012.<sup>414</sup>

311. On 15 December 2011, the United States<sup>415</sup> and the Russian Federation<sup>416</sup> each invoked Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the other.

312. On 21 December 2012, the United States<sup>417</sup> and the Russian Federation<sup>418</sup> each withdrew its earlier invocation of Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the other.

(iv) *Vanuatu*

313. On 26 October 2011, the General Council approved the text of the Protocol of Accession of Vanuatu to the WTO Agreement<sup>419</sup>, and adopted the decision on Vanuatu's WTO accession<sup>420</sup> and the accession working party report.<sup>421</sup> On the same day, Vanuatu signed the Protocol, subject to ratification.<sup>422</sup>

314. On 26 July 2012, the General Council reopened the acceptance period of the Protocol for Vanuatu<sup>423</sup>, as ratification had not taken place during the originally established period. After depositing its instrument of acceptance, Vanuatu became a WTO Member on 24 August 2012.<sup>424</sup>

(v) *Lao People's Democratic Republic*

315. On 26 October 2012, the General Council approved the text of the Protocol of Accession of the Lao People's Democratic Republic to the WTO Agreement<sup>425</sup>, and adopted the decision on the

<sup>410</sup> WT/MIN(11)/24 and WT/L/839.

<sup>411</sup> WT/ACC/RUS/70, WT/MIN(11)/2, WT/ACC/RUS/70/Add.1, WT/MIN(11)/2/Add.1, WT/ACC/RUS/70/Add.2 and WT/MIN(11)/2/Add.2.

<sup>412</sup> "In adopting the Decision on the Accession of the Russian Federation, it is understood that only the Protocol on the Accession of the Russian Federation is authentic in the three official WTO languages, while the Report of the Working Party on the Accession of the Russian Federation and Schedules are authentic in English only." WT/MIN(11)/SR/3, para. 9.

<sup>413</sup> WT/Let/840.

<sup>414</sup> WT/Let/860.

<sup>415</sup> WT/L/837.

<sup>416</sup> WT/L/838.

<sup>417</sup> WT/L/877.

<sup>418</sup> WT/L/878.

<sup>419</sup> The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/823. The certified true copy of the Protocol was circulated in WT/Let/861 on 30 July 2012.

<sup>420</sup> WT/L/823.

<sup>421</sup> WT/ACC/VUT/17 and WT/ACC/VUT/17/Add.1 and WT/ACC/VUT/17/Add.2.

<sup>422</sup> WT/Let/836.

<sup>423</sup> WT/L/862.

<sup>424</sup> WT/Let/861.

Lao People's Democratic Republic's WTO accession<sup>426</sup> and the accession working party report.<sup>427</sup> On the same day, the Lao People's Democratic Republic signed the Protocol, subject to ratification.<sup>428</sup>

316. Having deposited its instrument of acceptance on 3 January 2013, the LAO People's Democratic Republic became a WTO Member on 2 February 2013.<sup>429</sup>

(vi) *Tajikistan*

317. On 10 December 2012, the General Council approved the text of the Protocol of Accession of Tajikistan to the WTO Agreement<sup>430</sup>, and adopted the decision on Tajikistan's WTO accession<sup>431</sup> and the working party report.<sup>432</sup> On the same day, Tajikistan signed its WTO accession protocol, subject to ratification.<sup>433</sup>

318. Prior to this, on 7 December 2012, the United States invoked Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to Tajikistan.<sup>434</sup>

319. Having deposited its instrument of acceptance on 31 January 2013, Tajikistan became the 159<sup>th</sup> WTO Member on 2 March 2013.<sup>435</sup>

(vii) *Yemen*

320. On 4 December 2013, the 9<sup>th</sup> Ministerial Conference approved the text of the Protocol on the Accession of the Republic of Yemen to the WTO Agreement<sup>436</sup>, and adopted the decision on Yemen's WTO accession<sup>437</sup> and the accession working party report.<sup>438</sup> On the same day, Yemen signed the Protocol, subject to ratification.<sup>439</sup>

321. After depositing its instrument of acceptance, Yemen became the 160<sup>th</sup> WTO Member on 26 June 2014.<sup>440</sup>

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<sup>425</sup> The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/865. The certified true copy of the Protocol was circulated in WT/Let/876 on 4 February 2013.

<sup>426</sup> WT/L/865.

<sup>427</sup> WT/ACC/LAO/45 and WT/ACC/LAO/45/Add.1 and WT/ACC/LAO/45/Add.2.

<sup>428</sup> WT/Let/869.

<sup>429</sup> WT/Let/872.

<sup>430</sup> The text of the Protocol as adopted by the General Council is attached to the decision of the General Council contained in WT/L/872. The certified true copy of the Protocol was circulated in WT/Let/879 on 12 March 2013.

<sup>431</sup> WT/L/872.

<sup>432</sup> WT/ACC/TJK/30, WT/ACC/TJK/30/Add.1 and WT/ACC/TJK/30/Add.2.

<sup>433</sup> WT/Let/871.

<sup>434</sup> WT/L/871.

<sup>435</sup> WT/Let/878.

<sup>436</sup> The text of the Protocol as approved by the Ministerial Conference is attached to the decision of the Ministerial Conference contained in WT/MIN(13)/24 and WT/L/905. The certified true copy of the Protocol was circulated in WT/Let/979 on 18 July 2014.

<sup>437</sup> WT/MIN(13)/24 and WT/L/905.

<sup>438</sup> WT/ACC/YEM/42, WT/ACC/YEM/42/Add.1, WT/ACC/YEM/42/Add.2.

<sup>439</sup> WT/Let/918.

<sup>440</sup> WT/Let/979.

(viii) *Seychelles*

322. On 10 December 2014, the General Council approved the text of the Protocol on the Accession of the Republic of Seychelles to the WTO Agreement<sup>441</sup>, and adopted the decision on Seychelles' WTO accession<sup>442</sup> and the accession working party report.<sup>443</sup> On the same day, Seychelles signed the Protocol, subject to ratification.<sup>444</sup>

323. After depositing its instrument of acceptance, Seychelles became the 161<sup>st</sup> WTO Member on 26 April 2015.<sup>445</sup>

## (b) Withdrawal of the United States' Article XIII invocation with respect to the Republic of Moldova

324. On 21 December 2012, the United States withdrew its invocation<sup>446</sup> of Article XIII of the WTO Agreement (Non-Application of Multilateral Trade Agreements between Particular Members) with respect to the Republic of Moldova<sup>447</sup>, which had acceded to the WTO Agreement on 26 July 2001.<sup>448</sup>

## (c) China – Transitional review under Section 18.2 of the Protocol of Accession to the WTO Agreement

325. On 30 November 2011, the General Council conducted its final review of China's implementation of the WTO Agreement and the provisions of the Protocol of Accession. The General Council considered a communication from China that provided information required under Sections I and III of Annex 1A of the Protocol of Accession<sup>449</sup>, as well as reports of the subsidiary bodies on their respective reviews<sup>450 451</sup>.

326. The General Council took note of the statements and of the reports submitted by the subsidiary bodies on their respective reviews, and agreed that the final review by the General Council of China's implementation of the WTO Agreement and the provisions of its Protocol of Accession had been concluded.<sup>452</sup>

## (d) General developments on WTO accessions

(i) *LDC accessions*

327. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted the following decision on the Accession of Least-Developed Countries:

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<sup>441</sup> The text of the Protocol as approved by the General Council is attached to the decision of the General Council contained in WT/L/944.

<sup>442</sup> WT/L/944.

<sup>443</sup> WT/ACC/SYC/64, WT/ACC/SYC/64/Add.1 and WT/ACC/SYC/64/Add.2.

<sup>444</sup> WT/Let/1031.

<sup>445</sup> WT/Let/1036.

<sup>446</sup> WT/L/395.

<sup>447</sup> WT/L/879.

<sup>448</sup> WT/Let/399.

<sup>449</sup> WT/GC/136.

<sup>450</sup> G/L/977, S/C/37, IP/C/60, WT/BOP/R/103 and G/TBT/30. Other transitional reviews submitted to subsidiary bodies of the General Council include G/AG/25 and G/SPS/57.

<sup>451</sup> WT/GC/M/134, paras. 1-18.

<sup>452</sup> WT/GC/M/134, para. 19.

"We reaffirm the LDC accession guidelines adopted in 2002. Taking note of the accession proposal made by the LDCs, we direct the Sub-Committee on LDCs to develop recommendations to further strengthen, streamline and operationalize the 2002 guidelines by, *inter alia*, including benchmarks, in particular in the area of goods, which take into account the level of commitments undertaken by existing LDC Members. Benchmarks in the area of services should also be explored.

We recognize that transparency in the accession negotiations should be enhanced, including by complementing bilateral market access negotiations with multilateral frameworks.

We reiterate that S&D provisions, as stipulated in the 2002 guidelines, shall be applicable to all acceding LDCs, and that requests for additional transition periods will be considered taking into account individual development needs of acceding LDCs.

We underline the need for enhanced technical assistance and capacity building to help acceding LDCs to complete their accession process, implement their commitments and to integrate them into the multilateral trading system. Appropriate tools should be developed to assess the needs and to ensure greater coordination in the delivery of technical assistance, making optimal use of all facilities, including the EIF.

We instruct the Sub-Committee on LDCs to complete this work and make recommendations to the General Council no later than July 2012."<sup>453</sup>

328. On 25 July 2012, the General Council adopted a decision on the Accession of Least-Developed Countries<sup>454</sup> to strengthen, streamline and operationalize the 2002 LDC Accession Guidelines.<sup>455</sup> The 2012 General Council Decision addresses: (i) benchmarks on goods; (ii) benchmarks on services; (iii) transparency in accession negotiations; (iv) special and differential treatment and transition periods; and (v) technical assistance. It is an addendum to the 2002 LDC Accession Guidelines.<sup>456</sup>

## **2. Observership**

### **(a) WTO observer requests**

#### *(i) Arab Group proposal on improving the Guidelines for granting observer status to intergovernmental organizations in the WTO*

329. In November 2011, the General Council agreed that the Chair of the General Council start a process of consultations on improving the guidelines for granting observer status to intergovernmental organizations in the WTO, following a communication by the Arab Group on the same matter.<sup>457</sup> The Chair regularly reported to the General Council on the consultations undertaken, without however being able to report any change in the positions previously expressed.<sup>458</sup>

<sup>453</sup> WT/L/846. See also WT/L/508.

<sup>454</sup> WT/L/508/Add.1.

<sup>455</sup> WT/L/508.

<sup>456</sup> WT/L/508/Add.1, para. 1.

<sup>457</sup> WT/GC/W/643.

<sup>458</sup> See WT/GC/W/662, paras. 69-77, WT/GC/M/143, para. 5.1, WT/GC/M/145, para. 3.1 and WT/GC/M/146.



*(ii) South Sudan*

330. On 20 April 2012, the Republic of South Sudan submitted a request for obtaining observer status in the General Council and its subsidiary bodies.<sup>459</sup> The request specified that the Government of the South Sudan intends to prepare and initiate negotiations for accession to the WTO Agreement in the near future, within a maximum period of five years.

331. South Sudan's observer request was not addressed by the General Council.

*(b) Observer participation at the 8<sup>th</sup> Ministerial Conference**(i) International intergovernmental organizations (IGOs)*IGOs in general

332. On 30 November 2011, the General Council took note<sup>460</sup> of the following statement by the Chair concerning the attendance of observers from IGOs:

"[I]n line with Members' discussion at the 26 October meeting, the General Council had agreed to revert to this matter at its next meeting. In October, he had proposed that the General Council follow past practice with respect to the attendance of Observers from IGOs. From the consultations he had undertaken on this matter, it appeared that there was no consensus on this approach."<sup>461</sup>

League of Arab States

333. On 30 November 2011, the Chair of the General Council made a statement on the request by the League of Arab States for observer status at the 8<sup>th</sup> Ministerial Conference:

"The Chairman recalled that at the General Council meeting on 26 October, he had informed delegations that a request by the League of Arab States (LAS) for observer status at MC8 had been received. He had then proposed that unless any objection was received by the Secretariat from any [WTO] Member by 15 November 2011, the LAS would be granted observer status at MC8, he would inform the General Council at its next meeting of the status of this request, and delegations would have an opportunity at that meeting to engage in a discussion on this request. Since then, written communications had been received from two [WTO] Members stating that they were not in a position to agree to this request, as he had announced in a fax to all [WTO] Members on 16 November, and there was therefore no consensus to grant the request from the LAS at the present stage. In the interests of transparency of the process, he opened the floor."<sup>462</sup>

334. The General Council took note of the Chair's statement and of the statements made by WTO Members in that context.<sup>463</sup>

*(ii) Non-governmental organizations*

335. On 26 October 2011, the General Council Chair summarized the established practice of NGO participation at Ministerial Conferences as follows:

<sup>459</sup> WT/L/852.

<sup>460</sup> WT/GC/M/134, para. 228.

<sup>461</sup> WT/GC/M/134, para. 227.

<sup>462</sup> WT/GC/M/134, para. 229.

<sup>463</sup> WT/GC/M/134, para. 241.

"[F]or all previous Ministerial Conferences, attendance of Non-Governmental Organizations (NGOs) had been governed by a procedure which had been agreed by the General Council in July 1996. This procedure was as follows: (i) a limited number of accredited NGO representatives were allowed to attend only the Plenary Sessions of the Conference, without the right to speak; (ii) applications from NGOs to be registered were accepted on the basis of Article V, paragraph 2 of the WTO Agreement, i.e. NGOs 'concerned with matters related to those of the WTO'; and (iii) a deadline was established for the registration of NGOs that wished to attend the Conference. He proposed that the General Council continue to follow the procedure he had just read out, with a deadline for registration fixed at 11 November. Once the registration procedure was finalized, the Secretariat would circulate the list of registered NGOs to all [WTO] Members. He trusted this was acceptable to delegations. He proposed that the General Council take note of his statement and agree to follow the procedure he had outlined."<sup>464</sup>

336. The General Council agreed to follow this practice with regard to NGO participation at the 8<sup>th</sup> Ministerial Conference.<sup>465</sup>

(iii) *Palestine*

337. On 30 November 2011, the General Council agreed<sup>466</sup> to Palestine's request for observer status at the 8<sup>th</sup> Ministerial Conference.<sup>467</sup>

(c) Observer participation at the 9<sup>th</sup> Ministerial Conference

(i) *Governments*

338. At its meeting of 4 June 2013, the General Council agreed that past practice be repeated regarding the attendance of observers from Governments, namely to invite the Governments with Observer Status at MC8 to attend MC9.<sup>468</sup> As the Chair explained, this concerned the governments with regular observer status in the General Council – with the due adjustments related to the accessions since MC8 – plus six Governments which had previously been granted observer status only at Ministerial Conferences: Cook Islands, Eritrea, Niue, San Marino, Timor-Leste and Tuvalu.<sup>469</sup>

(ii) *International intergovernmental organizations (IGOs) and the League of Arab States*

339. Regarding the issue of the participation of IGOs at MC9, and the related request of the League of Arab States to attend the Conference, at the General Council meeting of 24-25 July 2013, the Chair stated that the request from the League of Arab States was not agreeable to some Members at that time, and there was no clarity on whether past practice could be repeated with regard to IGO Observers. He proposed to continue his consultations after the summer break.<sup>470</sup>

(iii) *Non-governmental organizations*

<sup>464</sup> WT/GC/M/133, para. 72.

<sup>465</sup> WT/GC/M/133, para. 73.

<sup>466</sup> WT/GC/M/134, para. 225.

<sup>467</sup> WT/L/822.

<sup>468</sup> WT/GC/M/145, para. 4.5.

<sup>469</sup> WT/GC/M/145, para. 4.4. See also WT/MIN(09)/INF/6/REV.1, Category II.

<sup>470</sup> WT/GC/M/146.

340. At its meeting of 4 June 2013, the General Council agreed to repeat past practice with regard to NGO participation<sup>471</sup> at the 9<sup>th</sup> Ministerial Conference, with a deadline for registration fixed at 13 October 2013.<sup>472</sup>

(iv) *Palestine*

341. On 29 May 2013, Palestine requested observer status at the 9<sup>th</sup> Ministerial Conference.<sup>473</sup> At the General Council meeting of 24-25 July 2013, the Chair stated that more time was needed for some Members to consider the request.<sup>474</sup>

(d) Observership at WTO subsidiary bodies

342. The issue of IGO observership has arisen in various WTO subsidiary bodies, including the Council for TRIPS, the Committee on Sanitary and Phytosanitary Measures and the Committee on Trade and Development.

(ii) *Council for TRIPS*

343. At its meeting in November 2012, the Council for TRIPS agreed<sup>475</sup> to grant *ad hoc* observer status on a meeting-by-meeting basis to the Cooperation Council of the Arab States of the Gulf (GCC) and the European Free Trade Association (EFTA). Decisions on requests for observer status from 12 other international intergovernmental organizations are pending.<sup>476</sup> With regard to these organizations, in November 2012 the Council for TRIPS agreed to request that the Chair continue his consultations on the requests from the five IGOs that had recently provided updated information, as well as on the requests from the remaining seven organizations that had not yet updated their information.<sup>477</sup>

(iii) *Committee on Agriculture*

344. At its 58<sup>th</sup> regular meeting, on 10 March 2010, the Committee on Agriculture agreed to grant observer status, on an *ad hoc*, meeting by meeting basis, to the Inter-American Institute for Agricultural Cooperation (IICA).<sup>478</sup> At the March 2012 meeting, the Chairman suggested to the Committee, in order to expedite procedures, to consider the possibility of extending *ad hoc* observer status to IICA on an annual basis, unless the issue was to be specifically placed on the agenda by a Member in the intervening meetings. The Committee accordingly agreed to invite IICA to participate in its regular meetings in 2012 (June, September and November).<sup>479</sup> A similar approach was adopted

<sup>471</sup> As the Chair recalled on 4 June 2013, "for all previous Ministerial Conferences, attendance of Non-Governmental Organizations (NGOs) had been governed by a procedure which had been agreed by the General Council in July 1996. This procedure was as follows: (i) A limited number of accredited NGO representatives were allowed to attend only the Plenary Sessions of the Conference, without the right to speak; (ii) applications from NGOs to be registered were accepted on the basis of Article V, paragraph 2 of the WTO Agreement, i.e. NGOs 'concerned with matters related to those of the WTO'; and (iii) a deadline was established for the registration of NGOs that wished to attend the Conference." WT/GC/M/145, para. 4.8.

<sup>472</sup> WT/GC/M/145, paras. 4.9-4.10.

<sup>473</sup> WT/L/884.

<sup>474</sup> WT/GC/M/146.

<sup>475</sup> IP/C/61, paras. 1 and 16.

<sup>476</sup> The organizations in question are listed in document IP/C/W/52/Rev.13.

<sup>477</sup> IP/C/68, para. 16.1.

<sup>478</sup> G/AG/R/48, para. 48.

<sup>479</sup> G/AG/R/66, para. 32.

by the Committee to invite IICA as an *ad hoc* observer to participate in its regular meetings in 2013, 2014, and 2015 regular sessions.<sup>480</sup>

(iv) *Committee on Sanitary and Phytosanitary Measures*

345. At its July 2012 meeting, the Committee on Sanitary and Phytosanitary Measures agreed to grant observer status, on an *ad hoc*, meeting-by-meeting basis, to the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS/CEEAC), and the Gulf Co-operation Council Standardization Organization (GSO).<sup>481</sup>

346. At its meeting of October 2012, the Committee on Sanitary and Phytosanitary Measures agreed to invite the organizations with *ad hoc* observer status to participate in all of its meetings in 2013 – with the exception of any closed meetings such as with regard to observers – unless any Member raised an objection to the participation of any of these observers in advance of a meeting.<sup>482</sup> At its meetings of 15 January 2014 and 2 December 2014, the Committee took similar decisions regarding its meetings in 2014 and 2015, respectively.<sup>483</sup> The Committee also agreed that if for any one-year period an *ad hoc* observer organization did not attend meetings, the Committee could consider that its observer status had ceased only after the Secretariat had advised the observer organization and received confirmation that it was no longer interested in maintaining its observer status.<sup>484</sup>

347. At its March 2013 meeting, the Committee on Sanitary and Phytosanitary Measures agreed to grant *ad hoc* observer status to the Intergovernmental Authority on Development (IGAD).<sup>485</sup> At its meeting in March 2014, the Committee on Sanitary and Phytosanitary Measures decided to remove the Agency for International Trade Information and Cooperation (AITIC) and the Latin American Economic System (SELA) from the list of organizations benefiting from *ad hoc* observer status in the SPS Committee.<sup>486</sup> At its meeting in March 2015, the Committee on Sanitary and Sanitary Measures decided to remove the Community of Sahel-Saharan States (CEN-SAD) from the list of organizations benefiting from *ad hoc* observer status in the SPS Committee.<sup>487</sup> The current list of observer organizations is contained in document G/SPS/W/78/Rev.13.

(v) *Committee on Technical Barriers to Trade*

348. At its November 2014 meeting, the Committee on Technical Barriers to Trade agreed to grant *ad hoc* observer status to the Gulf Cooperation Council (GCC) Standardization Organization (GSO).<sup>488</sup>

(vi) *Committee on Trade and Development*

349. In March 2013, the Committee on Trade and Development agreed to grant *ad hoc* observer status to the Economic Community of Central African States.<sup>489</sup>

<sup>480</sup> G/AG/R/69, G/AG/R/72 and G/AG/R/76.

<sup>481</sup> G/SPS/R/67, para. 139.

<sup>482</sup> G/SPS/R/69, para. 171.

<sup>483</sup> G/SPS/R/73, para. 12.2; G/SPS/R/76, para. 12.7.

<sup>484</sup> G/SPS/R/69, para. 171.

<sup>485</sup> G/SPS/R/70, para. 12.4.

<sup>486</sup> G/SPS/R/74, paras. 12.7-12.8.

<sup>487</sup> G/SPS/R/78, paras. 12.6-12.8.

<sup>488</sup> The full list of observer organizations working with the TBT Committee is available at: [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm#tbt](http://www.wto.org/english/thewto_e/igo_obs_e.htm#tbt).

<sup>489</sup> WT/COMTD/M/87, para 6. See WT/COMTD/W/22/Rev.7 for the updated list of CTD Observers.

## B. GOODS

### 1. Rectification of Article 8(1)(B)(iv) of the Agreement on Customs Valuation

350. The Director General initiated a *procès-verbal* procedure to rectify the Spanish and English versions of Article 8(1)(B)(iv) of the Agreement on Customs Valuation in the margin of the authentic text of the Agreement. The Director General signed the *procès-verbal* of Rectification on 27 August 2014.<sup>490</sup>

### 2. Waivers<sup>491</sup>

#### (a) CARIBCAN

351. On 30 November 2011, the General Council adopted a waiver from Article I:1 of the GATT 1994 until 31 December 2013, to permit Canada to provide duty-free treatment to eligible imports of Commonwealth Caribbean countries benefiting from the provision of CARIBCAN, without being required to extend the same duty-free treatment to like products of any other WTO Member.<sup>492</sup>

#### (b) EU – Western Balkans

352. On 30 November 2011, the General Council further extended the waiver from Article I:1 of the GATT 1994 until 31 December 2016, to permit the European Union to afford duty-free or preferential treatment to eligible products originating in the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Kosovo<sup>493</sup>, Montenegro and Serbia) without being required to extend the same duty-free or preferential treatment to like products of any other WTO Member.<sup>494</sup>

#### (c) Cuba – Article XV:6

353. On 14 February 2012, the General Council further extended the waiver from Article XV:6 of the GATT 1994 granted to Cuba by decision of 7 August 1964, as extended on 18 October 1996, 20 December 2001 and 15 December 2006, from 1 January 2012 to 31 December 2016.<sup>495</sup>

#### (d) EU – Pakistan

354. On 14 February 2012, the General Council adopted a waiver from Articles I:1 and XIII of the GATT 1994 from 1 January 2012 until 31 December 2013, to permit the European Union to afford unlimited duty-free or other preferential tariff treatment to products originating in Pakistan without being required to extend the same treatment to like products of any other WTO Member.<sup>496</sup>

<sup>490</sup> WT/Let/986. Also see G/VAL/M/59, para 10.1.

<sup>491</sup> Waivers relating to the implementation of successive changes to the Harmonized System (HS) are referenced in section II.B.3 on the Harmonized System below.

<sup>492</sup> WT/L/835.

<sup>493</sup> Under United Nations Security Council Resolution 1244/99.

<sup>494</sup> WT/L/836. The General Council adopted the original waiver on 8 December 2000 until 31 December 2006 (WT/L/380), and extended the period of this waiver in 28 July 2006 until 31 December 2011 (WT/L/654).

<sup>495</sup> WT/L/850.

<sup>496</sup> WT/L/851.

## (e) Kimberley Process Certification Scheme for Rough Diamonds

355. On 11 December 2012, the General Council adopted a decision extending the waiver from Articles I:1, XI:1 and XIII:1 of the GATT 1994 until 31 December 2018, with respect to the measures taken by certain Members necessary to prohibit the export of rough diamonds, consistent with the Kimberley Process Certification Scheme, to and from non-Participants in this Scheme.<sup>497</sup>

## (f) Extension of the EU – Moldova waiver

356. On 26 November 2013, the General Council decided to extend the waiver granted to the European Union regarding its obligations under paragraph 1 of Article I and Article XIII of the GATT 1994 for products originating in Moldova. The existing waiver<sup>498</sup> was to expire on 31 December 2013. The General Council extended the waiver until 31 December 2015.<sup>499</sup>

## (g) The Philippines' request for a waiver relating to special treatment for rice

357. In July 2014, the General Council adopted the waiver decision<sup>500</sup> relating to special treatment for the Philippines concerning rice, under the terms and conditions of which the obligations of the Philippines under Article 4.2 and paragraphs 8 and 10 of Annex 5, Section B, of the Agreement on Agriculture and under the Extension Agreement<sup>501</sup> are waived until 30 June 2017.

358. In accordance with the provisions of this waiver decision, a draft<sup>502</sup> containing modifications and rectifications to *Schedule LXXV – Philippines* was communicated to all Members. In the absence of any objections to the proposed modifications within three months from the date of the draft, the modifications in the Schedule were certified.<sup>503</sup>

## (h) Renewal of the US – Caribbean Basin Economic Recovery Act waiver

359. On 5 May 2015, the General Council decided to renew the existing waiver granted to the United States regarding its obligations under paragraph 1 of Article I and paragraphs 1 and 2 of Article XIII of the GATT 1994 for products originating from certain Central American and Caribbean countries and territories designated pursuant to the provisions of the Caribbean Basin Economic Recovery Act of 1983, as amended by the Caribbean Basin Economic Recovery Expansion Act of 1990 (CBERA). The existing waiver<sup>504</sup> had expired on 31 December 2014. The General Council renewed the waiver until 31 December 2019, and broadened its scope.<sup>505</sup>

**3. Harmonized System**

## (a) HS2002

360. On 18 July 2001, the General Council adopted a decision on the Procedure for the introduction of HS2002 changes into the schedules of concessions.<sup>506</sup> On 15 February 2005, the

<sup>497</sup> WT/L/876. See also WT/L/676 and WT/L/518.

<sup>498</sup> WT/L/722.

<sup>499</sup> WT/L/903.

<sup>500</sup> WT/L/932.

<sup>501</sup> G/MA/TAR/RS/99/Rev.1 or WT/Let/562.

<sup>502</sup> G/MA/TAR/RS/395.

<sup>503</sup> WT/Let/1024.

<sup>504</sup> WT/L/753.

<sup>505</sup> WT/L/950.

<sup>506</sup> WT/L/407.

General Council adopted a decision with revised procedures which required Members and the Secretariat to use the Consolidated Tariff Schedule (CTS) database as a working tool.<sup>507</sup>

361. The General Council has adopted thirteen "collective waivers", as well as an individual one, from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2002 Changes into WTO Schedules of Tariff Concessions.<sup>508</sup> The latest version was adopted by the General Council on 11 December 2014, which suspended the application of the provisions of Article II of GATT 1994 for five Members until 31 December 2015.<sup>509</sup>

(b) HS2007

362. On 15 December 2006, the General Council adopted a decision on the Procedure for the introduction of HS2007 changes into schedules of concessions using the Consolidated Tariff Schedule (CTS) database.<sup>510</sup>

363. The General Council has adopted nine "collective waivers" from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2007 Changes into WTO Schedules of Tariff Concessions.<sup>511</sup> The latest version was adopted by the General Council on 11 December 2014, which suspended the application of the provisions of Article II of GATT 1994 for twenty-two Members until 31 December 2015.<sup>512</sup>

(c) HS2012

364. On 30 November 2011, the General Council adopted a decision on the Procedure for the Introduction of Harmonized System 2012 Changes to Schedules of Concessions Using the Consolidated Tariff Schedules (CTS) Database.<sup>513</sup>

365. The General Council has adopted four "collective waivers" from Article II of the GATT 1994 for certain WTO Members relating to the Introduction of Harmonized System 2012 Changes into WTO Schedules of Tariff Concessions.<sup>514</sup> The latest version was adopted by the General Council on 11 December 2014, which suspended the application of the provisions of Article II of GATT 1994 for twenty-nine Members until 31 December 2015.<sup>515</sup>

#### 4. Changes to goods schedules

366. The Director-General, acting as depositary, has certified a large number of modifications and rectifications to individual WTO Members' goods schedules. Detailed information can be found in a note by the WTO Secretariat entitled "Situation of Schedules of WTO Members", which is periodically updated.<sup>516</sup>

<sup>507</sup> WT/L/605

<sup>508</sup> WT/L/832. See also WT/L/511, WT/L/562, WT/L/598, WT/L/638, WT/L/674, WT/L/712, WT/L/744, WT/L/786 and WT/L/808.

<sup>509</sup> WT/L/945.

<sup>510</sup> WT/L/673.

<sup>511</sup> WT/L/675, WT/L/713, WT/L/745, WT/L/787, WT/L/809, WT/L/833, WT/L/874, WT/L/901, and WT/L/946.

<sup>512</sup> WT/L/946.

<sup>513</sup> WT/L/831.

<sup>514</sup> WT/L/834, WT/L/875, WT/L/902, and WT/L/947.

<sup>515</sup> WT/L/947

<sup>516</sup> The latest version can be found in document G/MA/W/23/Rev.11.

## (a) Bananas

367. On 30 October 2012, the Director-General certified<sup>517</sup> the modifications, effective 27 October 2012, to Schedule CXL – European Communities, resulting from the Geneva Agreement on Trade in Bananas (GATB) circulated on 15 December 2009.<sup>518</sup>

368. The GATB sets forth annual reductions in the European Union's banana tariffs until 2017. Further, the GATB provides that upon certification, the pending disputes<sup>519</sup> and all claims filed to date by Latin American MFN banana suppliers under the procedures of Articles XXIV and XXVIII of the GATT 1994 with respect to the EU trading regime for bananas<sup>520</sup> shall be settled as of the date of certification. Within two weeks after certification, the relevant parties to this Agreement were to jointly notify the DSB that they have reached a mutually agreed solution through which they have agreed to end these disputes. Under the GATB, the settlement of these disputes does not affect any party's right to initiate a new dispute under the DSU, or future rights under the procedures of Articles XXIV and XXVIII of the GATT 1994.

369. Further, on 8 November 2012, Brazil, Colombia, Costa Rica, Ecuador, the European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela jointly notified a mutually agreed solution to disputes DS27, DS361, DS364, DS16, DS105, DS158, and the related arbitrations contained in WT/L/616 and WT/L/625.<sup>521</sup>

## (b) European Union Enlargement: Procedures under Article XXVIII:3 of the GATT 1994

370. On 30 March and 26 November 2012, the Council for Trade in Goods agreed to the extension of the deadlines proposed by the European Union.<sup>522</sup>

## (c) Ukraine's request to renegotiate concessions under Article XXVIII of the GATT 1994

371. On 12 September 2012, Ukraine made a request to renegotiate concessions under Article XXVIII of the GATT 1994.<sup>523</sup> Various WTO Members made statements on this request at the General Council on 3 October<sup>524</sup> and 11 December 2012<sup>525</sup>, as well as on 25 February<sup>526</sup> and 24-25 July 2013.<sup>527</sup>

## (d) Korea's Special Treatment of Rice

372. In January 2005, Korea successfully negotiated a continuation of the special treatment pursuant to paragraph 8 of Annex 5 to the Agreement on Agriculture. The resulting modifications to Korea's Schedule were certified<sup>528</sup> on 12 April 2005 and became effective as from 23 November 2005.<sup>529</sup> In advance of the termination of the special treatment by the end of 2014, Korea circulated a

<sup>517</sup> WT/Let/868.

<sup>518</sup> WT/L/784.

<sup>519</sup> WT/DS27, WT/DS361, WT/DS364, WT/DS16, WT/DS105, WT/DS158, WT/L/616 and WT/L/625.

<sup>520</sup> Including G/SECRET/22 item 0803.00.19 and G/SECRET/22/Add.1; G/SECRET/20 and G/SECRET/20/Add.1; and G/SECRET/26.

<sup>521</sup> WT/DS27/98, G/L/63/Add.1, G/LIC/D/2/Add.1, S/L/17/Add.1, G/AG/W/18/Add.1 and G/TRIMS/4/Add.1. See also WT/DSB/M/325, item 7.

<sup>522</sup> G/L/695/Add.15; G/L/821/Add.10; G/L/695/Add.16; and G/L/821/Add.11.

<sup>523</sup> G/SECRET/34.

<sup>524</sup> WT/GC/M/138, paras. 111-131.

<sup>525</sup> WT/GC/M/141, item 6. See also WT/GC/150, WT/GC/151, para. 122 and G/C/W/678.

<sup>526</sup> WT/GC/M/143, item 4.

<sup>527</sup> WT/GC/M/146.

<sup>528</sup> WT/Let/492.

<sup>529</sup> WT/Let/504.



draft<sup>530</sup> containing rectifications and modifications to its Schedule, with a view to terminating the application of special treatment on rice and subjecting it to ordinary customs duties as of 1 January 2015 pursuant to paragraph 10 of Annex 5 to the Agreement on Agriculture. Certification of this draft is on-going, and reservations were raised.<sup>531</sup>

## 5. Notification requirements

### (a) Notifications of quantitative restrictions

373. On 22 June 2012, the Council for Trade in Goods adopted<sup>532</sup> a Decision on Notification Procedures for Quantitative Restrictions.<sup>533</sup>

### (b) Frequency of notifications of state trading enterprises under Article XVII of GATT 1994 and the Understanding on the Interpretation of Article XVII of GATT 1994

374. At its meeting on 22 June 2012, the Council for Trade in Goods took note of the statement sent to it by the Chair of the Working Party on State Trading Enterprises on the frequency of notifications.<sup>534</sup> The Council approved the recommendation adopted by the Working Party in document G/STR/8 on the indefinite extension of the current frequency of notifications.<sup>535</sup>

## 6. Review of the exemption provided under paragraph 3(a) of the language incorporating GATT 1947 and other instruments into the GATT 1994

375. Paragraph 3(a) of the language incorporating GATT 1947 and other instruments into the GATT 1994 provides an exemption from Part II of the GATT 1994 for measures under specific mandatory legislation – enacted by a Member before it becomes a contracting party to GATT 1947 – which prohibit the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial

<sup>530</sup> G/MA/TAR/RS/396.

<sup>531</sup> G/MA/W/23/Rev.11, p. 45.

<sup>532</sup> G/C/M/111, para. 2.5.

<sup>533</sup> Circulated as G/L/59/Rev.1

<sup>534</sup> "By way of background, on 11 November 2003 the Working Party on State Trading Enterprises adopted a recommendation contained in G/STR/5 regarding the frequency of notifications. This recommendation modified the frequency of state trading notifications to new and full notifications every two years rather than every three years. It also eliminated the need for updating notifications in the intervening years. This was an effort to reduce the notification burden on Members and therefore help Members improve compliance with their notification obligations in the Working Party. The recommendation took effect from 2004 and was implemented for an initial four-year trial period, until 30 June 2008. This frequency was extended by the Working Party in 2008 (document G/STR/6) and again in 2010 (document G/STR/7) until 30 June 2012.

Following informal consultations, Members indicated that they could agree on an indefinite extension of the current frequency. At its formal meeting on 8 June 2012, the Working Party adopted the recommendation in G/STR/8 to extend the current, less burdensome frequency of notifications on an indefinite basis.

Thereby, the Working Party recommends to the Goods Council that:

(a) This indefinite extension shall enter into force as of the year 2012, with the next new and full notification being due by 30 June 2014; and

(b) The guidelines for completing the Questionnaire on State Trading Enterprises are those contained in G/STR/3/Rev.1." G/C/M/111, para. 3.1.

<sup>535</sup> G/C/M/111, para. 3.3.

applications between points in national waters or waters of an exclusive economic zone. On 20 December 1994, the United States invoked the provisions of paragraph 3(a) with respect to specific legislation that met the requirements of that paragraph. Paragraph 3(b) calls for a review of this exemption five years after the date of entry into force of the WTO Agreement – and thereafter every two years for as long as the exemption is in force – in order to examine whether the conditions which created the need for the exemption still prevail.

376. On 30 November 2011, the General Council agreed that the 2011 review would be based on the statements and questions submitted by Members as well as the responses provided by the United States in this context at the February 2011 meeting of the General Council.<sup>536</sup> It was also agreed that the 2011 review would draw upon the annual report provided by the United States under paragraph 3(c).<sup>537</sup> It was further agreed that for the purposes of the review, this matter would be on the agenda of subsequent General Council meetings in the course of 2011 as the Chair deemed appropriate, or at the request of any WTO Member.<sup>538</sup> The Chair drew attention to a questionnaire to the United States from Japan with regard to US legislation under this exemption<sup>539</sup> and to the United States' responses to Japan's questions.<sup>540</sup> The General Council took note of the statements made by Members in this context and that the subsequent review under the two-yearly cycle provided in paragraph 3(b) would normally be held in 2013.<sup>541</sup>

377. At its meeting of 25 February 2013<sup>542</sup>, the General Council initiated the 2013 review based on the United States' notification.<sup>543</sup> The General Council agreed to revert to this item at a further meeting.<sup>544</sup>

## **7. Agriculture including follow-up to the 9<sup>th</sup> Ministerial Conference**

378. On 21 March 2012, the Committee on Agriculture expanded the WTO List of Net Food-Importing Developing Countries to include Antigua and Barbuda and El Salvador.<sup>545</sup>

379. In March 2014, the Committee on Agriculture concluded work on updating the list of Significant Exporters for the purposes of Table ES:2 notification.<sup>546</sup> In the absence of an agreement on the revised list of significant exporters, the Chairman circulated a report<sup>547</sup> outlining the progress that was achieved with regard to various transparency issues and encouraged Members to start implementing on a voluntary basis the progress already achieved towards an enhanced transparency of Table ES:2 notifications. Some Members started to incorporate additional transparency elements in their Table ES:2 notifications pursuant to Chairman's report.

380. As a follow-up to the Bali Ministerial Decision on tariff quota administration<sup>548</sup>, the Committee on Agriculture discussed suggestions on how tariff rate quota (TRQ) fill rate information could be provided in Members' Table MA:2 notifications. At the meeting of the Committee on Agriculture in November 2014, the Chairperson advised Members to follow the modified MA:2

<sup>536</sup> WT/GC/M/130, paras. 45-51.

<sup>537</sup> WT/L/810 and Corr.1

<sup>538</sup> WT/GC/M/134, para. 242.

<sup>539</sup> WT/GC/W/648.

<sup>540</sup> WT/GC/W/651.

<sup>541</sup> WT/GC/134, para. 251.

<sup>542</sup> WT/GC/M/143, item 3.

<sup>543</sup> WT/L/880.

<sup>544</sup> WT/GC/M/143, para. 3.11.

<sup>545</sup> G/AG/5/Rev.10.

<sup>546</sup> Section 2.3 of G/AG/R/74.

<sup>547</sup> G/AG/W/123.

<sup>548</sup> WT/L/914.

format<sup>549</sup> as a best practice to encourage consistent presentation of fill rates in their MA:2 notifications.

381. Pursuant to the Bali Ministerial Declaration on export competition<sup>550</sup>, the Committee on Agriculture carried out the first annual dedicated discussion to examine developments in the field of export competition at its June 2014 regular session.<sup>551</sup>

## 8. Sanitary and phytosanitary (SPS) measures<sup>552</sup>

382. At its meeting in July 2011, the Committee adopted its Thirteenth Annual Report under the Procedure to Monitor the Process of International Harmonization.<sup>553</sup>

383. At its meeting of October 2011, the Committee on Sanitary and Phytosanitary Measures adopted a decision on Joint Work by Codex, IPPC and OIE on Cross-Cutting Issues. In the decision, "[t]he Committee encourages joint work by two or all three of the relevant international organizations on cross-cutting issues such as, *inter alia*, certification, inspection, approval procedures and/or risk analysis."<sup>554</sup>

384. At its meeting in March 2012, the Committee on Sanitary and Phytosanitary Measures considered the report on the implementation of Article 6 of the SPS Agreement (*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*), covering the period from 2009 until 2011.<sup>555</sup> The report contains information provided by Members concerning: (i) requests for recognition of pest- or disease-free areas or areas of low pest or disease prevalence; (ii) determinations on whether to recognize a pest- or disease-free area or area of low pest or disease prevalence; and/or (iii) Members' experiences in the implementation of Article 6 and the provision of relevant background information by Members on their decisions to other interested Members.

385. At its July 2012 meeting, the Committee adopted its Fourteenth Annual Report under the Procedure to Monitor the Process of International Harmonization.<sup>556</sup>

386. At its June 2013 meeting, the Committee on Sanitary and Phytosanitary Measures adopted its Fifteenth Annual Report under the Procedure to Monitor the Process of International Harmonization.<sup>557</sup>

387. At the same meeting, the Committee also considered the annual report on the implementation of Article 6 of the SPS Agreement (*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*).<sup>558</sup>

388. At its July 2014 meeting, the Committee on Sanitary and Phytosanitary Measures adopted the "Procedure to encourage and facilitate the resolution of specific sanitary or phytosanitary issues

<sup>549</sup> G/AG/W/137, page 2.

<sup>550</sup> WT/MIN(13)/40 and WT/L/915 dated 11 December 2013.

<sup>551</sup> G/AG/R/75, section. 2.

<sup>552</sup> Major decisions and reference documents of the SPS Committee have been compiled in publications that are available online at [http://www.wto.org/english/tratop\\_e/sps\\_e/decisions06\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/decisions06_e.htm).

<sup>553</sup> G/SPS/56.

<sup>554</sup> G/SPS/58.

<sup>555</sup> G/SPS/GEN/1134.

<sup>556</sup> G/SPS/59.

<sup>557</sup> G/SPS/60. The previous fourteen annual reports are contained in G/SPS/13, G/SPS/16, G/SPS/18, G/SPS/21, G/SPS/28, G/SPS/31, G/SPS/37, G/SPS/42, G/SPS/45, G/SPS/49, G/SPS/51, G/SPS/54, G/SPS/56 and G/SPS/59.

<sup>558</sup> G/SPS/GEN/1245.

among Members in accordance with Article 12.2"<sup>559</sup>, thus concluding the last outstanding item from the Committee's second review of the SPS Agreement. This procedure aims to help Members wishing to use the good offices of the Chairperson or another facilitator to resolve trade concerns.

389. At the same meeting, the Committee also considered the Sixteenth Annual Report under the Procedure to Monitor the Process of International Harmonization<sup>560</sup> and the annual report on the implementation of Article 6 of the SPS Agreement (*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*).<sup>561</sup>

## 9. Technical barriers to trade (TBT)

390. On 28 November 2012, the Committee on Technical Barriers to Trade concluded its Sixth Triennial Review of the operation and implementation of the TBT Agreement pursuant to Article 15.4 of the TBT Agreement.<sup>562</sup> The Committee reaffirmed all previous decisions and recommendations as contained in G/TBT/1/Rev.10.<sup>563</sup> In addition, the Committee set out new work in the areas of good regulatory practice, conformity assessment procedures, standards, transparency, technical assistance, special and differential treatment and the operation of the Committee.<sup>564</sup>

391. With respect to **good regulatory practice (GRP)**, the Committee agreed to identify a non-exhaustive list of voluntary mechanisms and related principles, which seeks to help guide Members in the efficient and effective implementation of the TBT Agreement across the regulatory lifecycle.<sup>565</sup>

392. Regarding **conformity assessment procedures**, the Committee organized its future work into three thematic areas: approaches to conformity assessment; use of relevant international standards, guides or recommendations; and facilitating the recognition of conformity assessment results.<sup>566</sup> Within each of these areas, the Committee agreed to exchange information on specific topics in order to advance its work.

393. The Committee agreed to further work in three areas as regards **standards**:

- (a) With respect to the *Code of Good Practice*, the Committee reiterated the recommendations made at the Fifth Triennial Review<sup>567</sup>, and agreed to exchange information and experiences on reasonable measures taken by Members to ensure that local government and non-governmental standardizing bodies involved in the development of standards within their territories, accept and comply with the Code of Good Practice.<sup>568</sup>
- (b) As regards *international standards*, the Committee agreed to information exchange on efforts to promote the full application of the Six Principles set out in the 2000 Committee Decision<sup>569</sup>, and for this purpose would consider inviting relevant

<sup>559</sup> G/SPS/61.

<sup>560</sup> G/SPS/GEN/1332.

<sup>561</sup> G/SPS/GEN/1333.

<sup>562</sup> G/TBT/32.

<sup>563</sup> G/TBT/32, para. 2.

<sup>564</sup> G/TBT/32.

<sup>565</sup> G/TBT/32, para 4.

<sup>566</sup> G/TBT/32, para 5.

<sup>567</sup> The three recommendations contained in G/TBT/26, para. 26(a)–(c).

<sup>568</sup> G/TBT/32, para. 7.

<sup>569</sup> In 2000, the TBT Committee adopted a Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement. These principles include: (1) transparency; (2) openness; (3) impartiality and consensus; (4) effectiveness and

bodies involved in the development of international standards, guides or recommendations to share their experiences with the use of these same principles.<sup>570</sup> The Committee agreed to give particular attention to how the "development dimension" was taken into consideration in discussions of the Six Principles.<sup>571</sup>

- (c) Concerning *transparency in standard-setting*, the Committee agreed to exchange information on how relevant bodies involved in the development of standards – whether at the national, regional or international level – provided opportunity for public comment.<sup>572</sup>

394. Concerning **transparency** in relation to the TBT Agreement in general, the Committee reiterated the importance of the full implementation of existing decisions and recommendations, and agreed to:

- encourage Members to notify draft technical regulations and conformity assessment procedures even in situations when it is difficult to establish if such measures may have a "significant effect on trade of other Members" in the context of Articles 2.9 and 5.6 of the TBT Agreement;
- encourage Members to provide access, when notifying, to assessment documents (e.g. regulatory impact assessments) on the possible effects of draft measures;
- encourage Members to establish mechanisms at a national level to ensure that proposed technical regulations and conformity assessment procedures of local governments are notified in accordance with Article 3.2 and 7.2 of the TBT Agreement;
- exchange information on Members' practices and experiences in the use of notification formats. At its meeting of 18-19 June 2014, the Committee adopted a recommendation on coherent use of notification formats<sup>573</sup>;
- discuss means to improving the functioning of TBT enquiry points, including with respect to building support among interested stakeholders in the private sector for the services of the enquiry points; and
- request enhancement of WTO information technology tools for TBT, including online submission of notifications.<sup>574</sup> As a result, in October 2013, the Secretariat launched the "TBT on-line Notification Submission System" (TBT NSS), an alternative (voluntary) online method to foster more expedient processing and circulation of notifications by the Secretariat.<sup>575</sup>

395. On **special and differential treatment**, the Committee agreed to exchange views and explore ideas on the implementation of Article 12 of the TBT Agreement with respect to the preparation of technical regulations, standards and conformity assessment procedures, and the enhancement of the effective operation of Article 12, in coordination with the WTO Committee on Trade and Development.<sup>576</sup>

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relevance; (5) coherence; and (6) the development dimension. The full text of this Decision is contained in Annex B of G/TBT/1/Rev.10 (pp. 46-48).

<sup>570</sup> G/TBT/32, para. 8.

<sup>571</sup> G/TBT/32, para. 8.

<sup>572</sup> G/TBT/32, para. 9.

<sup>573</sup> G/TBT/35.

<sup>574</sup> G/TBT/32, paras. 10-18.

<sup>575</sup> The TBT NSS is available at: <https://nss.wto.org/tbtmembers>.

<sup>576</sup> G/TBT/32, para. 22.

**10. Trade Facilitation Agreement**

396. In December 2013, WTO members concluded negotiations on a Trade Facilitation Agreement at the 9<sup>th</sup> Ministerial Conference in Bali.<sup>577</sup> WTO members have undertaken a legal review of the text, resulting in the final text of the Trade Facilitation Agreement.<sup>578</sup> In line with the decision adopted in Bali, WTO members adopted on 27 November 2014 a Protocol of Amendment<sup>579</sup> to insert the new Agreement into Annex 1A of the WTO Agreement.

397. In accordance with Article X:3 of the WTO Agreement, the Trade Facilitation Agreement will enter into force upon acceptance by two thirds of the Members.<sup>580</sup> By 5 June 2015, six instruments of acceptance have been deposited.<sup>581</sup>

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<sup>577</sup> WT/L/911.

<sup>578</sup> WT/L/931.

<sup>579</sup> WT/L/940.

<sup>580</sup> According to the Protocol, "[f]or the purposes of calculation of acceptances under Article X.3 of the WTO Agreement, an instrument of acceptance by the European Union for itself and in respect of its Member States shall be counted as acceptance by a number of Members equal to the number of Member States of the European Union which are Members to the WTO."

<sup>581</sup> Hong Kong, China (WT/Let/1025); Singapore (WT/Let/1028); the United States of America (WT/Let/1029); Mauritius (WT/Let/1033); Malaysia (WT/Let/1041) and Japan (WT/Let/1042).

## C. SERVICES

### 1. LDC waiver

398. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted a waiver from Article II:1 of the GATS permitting the granting of preferential treatment to services and service suppliers of Least-Developed Countries.<sup>582</sup> The waiver covers measures falling within the six categories of market access listed in Article XVI of the GATS, or under other GATS provisions if approved by the Council for Trade in Services. The waiver is subject to annual review, and terminates 15 years from the date of its adoption.<sup>583</sup> As regards preferences with respect to any particular LDC, the waiver shall terminate when that country graduates from the United Nations' list of least-developed countries.<sup>584</sup>

399. On 11 December 2013, the 9<sup>th</sup> Ministerial Conference decided to take steps to encourage the operationalization of the waiver.<sup>585</sup> In line with this Decision<sup>586</sup>, the Council for Trade in Services convened a High-level Meeting on 5 February 2015 to allow "developed and developing Members, in a position to do so, [to] indicate sectors and modes of supply where they intend to provide preferential treatment to LDC services and services suppliers." More than twenty delegations indicated specific preferences that they are intending to notify in due course. These delegations based their announcements on a collective request that the WTO Group of LDCs submitted on 21 July 2014, in which they indicated services sectors and modes of supply of interest to them.<sup>587</sup> With regard to next steps, the Services Council agreed that delegations shall endeavour to notify preferences at the earliest possible date, and no later than 31 July 2015.<sup>588</sup>

### 2. Fifth Protocol to the General Agreement on Trade in Services

400. On 5 October 2012, the Council for Trade in Services reopened the Fifth Services Protocol<sup>589</sup> for acceptance by Jamaica until 4 December 2012.<sup>590</sup> On 16 October 2012, Jamaica accepted the Protocol, and the Protocol entered into force for Jamaica on the same day.<sup>591</sup>

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<sup>582</sup> WT/L/847.

<sup>583</sup> WT/L/847, para. 7.

<sup>584</sup> WT/L/847, para. 8.

<sup>585</sup> WT/L/918.

<sup>586</sup> WT/L/918, para. 1.2.

<sup>587</sup> S/C/W/356.

<sup>588</sup> JOB/GC/75, S/C/W/356/Corr.1 and S/C/W/356/Corr.2.

<sup>589</sup> S/L/45.

<sup>590</sup> S/L/395.

<sup>591</sup> WT/Let/866.

## D. INTELLECTUAL PROPERTY

### 1. Protocol Amending the TRIPS Agreement

401. On 30 November 2011, the General Council adopted a decision on the Third Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement.<sup>592</sup> On 27 November 2013, the General Council adopted a decision on the Fourth Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement.<sup>593</sup> These decisions further extend the acceptance period until 31 December 2013 and 31 December 2015, respectively, or such later date as may be decided by the Ministerial Conference.

402. Since October 2011<sup>594</sup>, the following Members have deposited instruments of acceptance for the Protocol Amending the TRIPS Agreement:

- Argentina on 20 October 2011<sup>595</sup>;
- Indonesia on 20 October 2011<sup>596</sup>;
- New Zealand on 21 October 2011<sup>597</sup>;
- Cambodia on 1 November 2011<sup>598</sup>;
- Panama on 24 November 2011<sup>599</sup>;
- Costa Rica on 8 December 2011<sup>600</sup>;
- Honduras on 16 December 2011<sup>601</sup>;
- Rwanda on 12 December 2011<sup>602</sup>;
- Togo on 13 March 2012<sup>603</sup>;
- Kingdom of Saudi Arabia on 29 May 2012<sup>604</sup>;
- Chinese Taipei on 31 July 2012<sup>605</sup>;
- Dominican Republic on 23 May 2013<sup>606</sup>;

<sup>592</sup> WT/L/829. See also WT/L/641.

<sup>593</sup> WT/L/899,

<sup>594</sup> A regularly updated list of acceptances since the adoption of the Protocol on 6 December 2005 is available online at [http://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm).

<sup>595</sup> WT/Let/830.

<sup>596</sup> WT/Let/831.

<sup>597</sup> WT/Let/832.

<sup>598</sup> WT/Let/833.

<sup>599</sup> WT/Let/837.

<sup>600</sup> WT/Let/838.

<sup>601</sup> WT/Let/843.

<sup>602</sup> WT/Let/839.

<sup>603</sup> WT/Let/848.

<sup>604</sup> WT/Let/855.

<sup>605</sup> WT/Let/870.



- Chile on 26 July 2013;<sup>607</sup>
- Montenegro on 9 September 2013<sup>608</sup>;
- Trinidad and Tobago on 19 September 2013<sup>609</sup>;
- Central African Republic on 13 January 2014<sup>610</sup>;
- Turkey on 14 May 2014<sup>611</sup>;
- Botswana on 18 June 2014;<sup>612</sup>
- Uruguay on 31 July 2014;<sup>613</sup> and
- Brunei Darussalam on 10 April 2015.<sup>614</sup>

403. The Protocol has not yet entered into force.<sup>615</sup>

## 2. TRIPS non-violation and situation complaints

404. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted the following decision on TRIPS non-violation and situation complaints:

"We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to our Decision of 2 December 2009 on 'TRIPS Non-Violation and Situation Complaints' (WT/L/783), and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session, which we have decided to hold in 2013. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement."<sup>616</sup>

405. On 7 December 2013, the 9<sup>th</sup> Ministerial Conference adopted an almost identical decision on TRIPS non-violation and situation complaints, with reference to WT/L/842 instead of WT/L/783, and extending the moratorium on non-violation and situation complaints to the next session, to be held in 2015.<sup>617</sup>

## 3. Transition period for LDCs under Article 66.1 of the TRIPS Agreement

406. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted the following decision concerning the transition period for least-developed countries under Article 66.1 of the TRIPS Agreement:

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<sup>606</sup> WT/Let/884.

<sup>607</sup> WT/Let/888.

<sup>608</sup> WT/Let/893.

<sup>609</sup> WT/Let/894.

<sup>610</sup> WT/Let/920.

<sup>611</sup> WT/Let/949.

<sup>612</sup> WT/Let/953.

<sup>613</sup> WT/Let/984.

<sup>614</sup> WT/Let/1037.

<sup>615</sup> The certified true copy of the Protocol was circulated in WT/Let/508 on 12 January 2006.

<sup>616</sup> WT/L/842.

<sup>617</sup> WT/L/906.

"We invite the TRIPS Council to give full consideration to a duly motivated request from Least-Developed Country Members for an extension of their transition period under Article 66.1 of the TRIPS Agreement, and report thereon to the WTO Ninth Ministerial Conference."<sup>618</sup>

407. On 5 November 2012, least-developed WTO Members submitted a request for an extension of the transitional period that was due to end on 1 July 2013<sup>619</sup> for as long as the WTO Member in question remains a least-developed country.<sup>620</sup>

408. A decision taken by the TRIPS Council on 11 June 2013 further extended the transition period for least developed country Members until 1 July 2021, recognizing their right to seek further extensions:

"1. Least developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until 1 July 2021, or until such a date on which they cease to be a least developed country Member, whichever date is earlier.

2. Recognizing the progress that least developed country Members have already made towards implementing the TRIPS Agreement, including in accordance with paragraph 5 of IP/C/40, least developed country Members express their determination to preserve and continue the progress towards implementation of the TRIPS Agreement. Nothing in this decision shall prevent least developed country Members from making full use of the flexibilities provided by the Agreement to address their needs, including to create a sound and viable technological base and to overcome their capacity constraints supported by, among other steps, implementation of Article 66.2 by developed country Members.

3. This Decision is without prejudice to the Decision of the Council for TRIPS of 27 June 2002 on 'Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with respect to Pharmaceutical Products' (IP/C/25), and to the right of least developed country Members to seek further extensions of the period provided for in paragraph 1 of Article 66 of the Agreement."<sup>621</sup>

409. On 23 February 2015, least-developed WTO Members submitted a request for an extension of the transitional period with respect to pharmaceutical products that expires on 1 January 2016, and for waivers from the obligation under Articles 70.8 and 70.9 of the TRIPS Agreement, in both cases for as long as the WTO Member in question remains a least developed country.<sup>622</sup>

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<sup>618</sup> WT/L/845.

<sup>619</sup> IP/C/40. See also IP/C/25.

<sup>620</sup> IP/C/W/583.

<sup>621</sup> IP/C/64.

<sup>622</sup> IP/C/W/605.

## E. DISPUTE SETTLEMENT

### 1. Appellate Body

#### (a) Appointment of Appellate Body members

410. At the DSB meeting of 24 May 2011, the Chair submitted a proposal regarding the procedures for selecting two new Appellate Body members. The proposal contained the following elements: (i) to launch as from 24 May 2011 the selection process for appointment of two new members of the Appellate Body; (ii) to set a deadline of 31 August 2011 for WTO Members' nominations of candidates for the two positions; (iii) to agree to establish a Selection Committee, based on the procedure set out in document WT/DSB/1, which would consist of the Director-General and the 2011 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, which would be presided by the 2011 DSB Chairperson; (iv) to request the Selection Committee to conduct interviews with candidates and to hear views of WTO Members in September/October, and to make recommendations to the DSB by no later than 10 November 2011, so that the DSB could take a final decision on this matter at the latest at its regular meeting on 21 November 2011.<sup>623</sup> The DSB agreed to the Chairperson's proposal regarding the selection process for the appointment of two new Appellate Body members.<sup>624</sup>

411. On 18 November 2011, the DSB appointed Mr Ujal Singh Bhatia of India and Mr Thomas Graham of the United States as members of the Appellate Body for four years beginning on 11 December 2011.<sup>625</sup>

412. On 22 February 2012, the DSB agreed to the Chair's proposal regarding the procedure for the selection of a new Appellate Body member and the process of consultations on the possible reappointment of one member. The proposal contained the following six elements: (i) to agree to launch as from 22 February 2012 the selection process for appointment of a new member of the Appellate Body for the position currently held by Mr Shotaro Oshima; (ii) to agree that the new member be appointed for a four-year term beginning 1 June 2012 or as soon thereafter as possible; (iii) to agree to set a deadline of 30 March 2012 for WTO Members' nominations of candidates for Mr Oshima's position; (iv) to agree to establish a Selection Committee based on the procedures set forth in document WT/DSB/1, which would consist of the Director-General and the 2012 Chairpersons of the General Council, Goods Council, Services Council, TRIPS Council and the DSB, and which would be chaired by the 2012 Chair of the DSB; (v) to request the Selection Committee to conduct interviews with candidates in April 2012, to hear the views of WTO Members in the first half of May 2012, and to make its recommendation to the DSB by 11 May 2012, if possible, so that the DSB could take a decision at its regular meeting on 24 May 2012; and (vi) to ask the DSB Chair to carry out consultations on the possible reappointment of Ms Yuejiao Zhang, who was eligible for reappointment for a second four-year term beginning on 1 June 2012, and who had expressed her interest and willingness to be reappointed.<sup>626</sup>

413. On 24 May 2012, the DSB agreed to appoint Mr Seung Wha Chang of Korea as a member of the Appellate Body for four years beginning on 1 June 2012. Furthermore, the DSB agreed to reappoint Ms Yuejiao Zhang of China for a second four-year term beginning 1 June 2012.<sup>627</sup>

<sup>623</sup> WT/DSB/M/296, para. 61.

<sup>624</sup> WT/DSB/M/296, para. 64.

<sup>625</sup> WT/DSB/M/307, para. 3.

<sup>626</sup> WT/DSB/M/312, paras. 126-127.

<sup>627</sup> WT/DSB/M/316, paras. 4 and 6.

414. On 26 March 2013, the DSB reappointed Mr. Ricardo Ramírez for a second four-year term of office, starting on 1 July 2013.<sup>628</sup>

415. On 24 May 2013, the DSB adopted a decision (i) to launch a selection process for one position in the Appellate Body, currently held by Mr. David Unterhalter; (ii) to establish a Selection Committee, consistent with the procedures set out in document WT/DSB/1 and with previous selection processes, comprising the Director-General and the 2013 Chairpersons of the General Council, Goods Council, Services Council, the TRIPS Council and the DSB, to be chaired by the DSB Chair; (iii) to set a deadline of 30 August 2013 for Members' nominations of candidates for the position currently held by Mr. Unterhalter, while encouraging Members to submit nominations as early as possible and to use best efforts to submit nominations by 31 July 2013, to facilitate due consideration of such candidates; (iv) that the Selection Committee shall carry out its work, including conducting interviews with candidates and hearing the views of delegations during September/October 2013, in order to make its recommendations to the DSB by no later than 7 November 2013, so that the DSB can take a final decision on this matter at the latest at its regular meeting on 20 November 2013; and (v) to request the DSB Chair to carry out consultations on the possible reappointment of Mr. Peter Van den Bossche.<sup>629</sup>

416. On 25 November 2013, the DSB reappointed Mr. Peter Van den Bossche for a second four-year term of office, starting on 12 December 2013.<sup>630</sup>

417. On 23 May 2014, the DSB agreed to the Chairman's proposal<sup>631</sup> on the Appellate Body selection process, which had been circulated to all Members by fax on 12 May 2014.<sup>632</sup> The proposal consisted of the following five elements: (i) to launch a selection process for the vacant position in the Appellate Body to invite nominations of candidates for that position; (ii) to agree that the candidates nominated for the 2013 process initiated by the DSB<sup>633</sup> will remain under consideration and that it will not be necessary for Members to re-nominate them; (iii) to set a deadline of 30 June 2014 for Members' nominations of any additional candidates for the vacant position; (iv) to establish a Selection Committee, consistent with the procedures set out in document WT/DSB/1 and with previous selection processes, composed of the Director-General and the 2014 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, to be chaired by the DSB Chair; and (v) to request the Selection Committee to carry out its work, including conducting interviews with all candidates and hearing the views of delegations on all candidates during July and September 2014, as necessary, in order to make a recommendation to the DSB no later than 15 September 2014 so that the DSB can take a decision to appoint a new Appellate Body member by its regular meeting scheduled for 26 September 2014.

418. On 26 September 2014, the DSB appointed Mr. Shree Baboo Chekitan Servansing as a member of the Appellate Body for a four-year term, starting on 1 October 2014.<sup>634</sup>

(b) Election of the Chair of the Appellate Body

419. Pursuant to Rule 5.1 of the *Working Procedures for Appellate Review*, in December 2011 the Members of the Appellate Body elected Ms. Yuejiao Zhang to serve as Chair for the period

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<sup>628</sup> WT/DSB/M/330, para. 4.2.

<sup>629</sup> WT/DSB/60.

<sup>630</sup> WT/DSB/M/339.

<sup>631</sup> WT/DSB/63.

<sup>632</sup> WT/DSB/M/345.

<sup>633</sup> WT/DSB/60.

<sup>634</sup> WT/DSB/M/350.

11 December 2011 to 31 May 2012. In June 2012, the Members of the Appellate Body re-elected Mrs. Yuejiao Zhang to serve as Chair for the period 1 June 2012 to 31 December 2012.<sup>635</sup>

420. In February 2013, pursuant to Rule 5.1 of the *Working Procedures for Appellate Review*, the Members of the Appellate Body elected Mr Ricardo Ramírez Hernández to serve as Chair of the Appellate Body as of 1 January 2013.<sup>636</sup> In December 2013, the Members of the Appellate Body re-elected Mr Ricardo Ramírez Hernández to serve as Chair for the period 1 January 2013 to 31 December 2013.<sup>637</sup>

421. Pursuant to Rule 5.1 of the *Working Procedures for Appellate Review*, on 4 December 2014, the Members of the Appellate Body elected Mr. Peter Van den Bossche to serve as Chair for the period 1 January 2015 until 31 December 2015.<sup>638</sup>

## 2. Indicative list of governmental and non-governmental panelists

422. The DSB approved the additional names contained in documents WT/DSB/W/473<sup>639</sup>, 478<sup>640</sup>, 480<sup>641</sup>, 483<sup>642</sup>, 492<sup>643</sup>, 495<sup>644</sup>, 497<sup>645</sup>, 500<sup>646</sup>, 503<sup>647</sup>, 505<sup>648</sup>, 512<sup>649</sup>, 514<sup>650</sup>, 518<sup>651</sup>, 522<sup>652</sup>, 530<sup>653</sup>, 533<sup>654</sup>, 536<sup>655</sup>, 543<sup>656</sup> and 545<sup>657</sup> proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. On 27 April 2015, a revised consolidated list of governmental and non-governmental panelists was published.<sup>658</sup>

## 3. Article 16.4 of the DSU: 60-day deadline for adopting/appealing panel reports

423. In several disputes, the DSB has continued to agree, at the joint request of the parties to the dispute, to extend the 60-day deadline set forth in Article 16.4 of the DSU. In each case, the parties' request made reference to the "workload of the Appellate Body".<sup>659</sup>

424. In *US – Tuna II (Mexico)*, "[t]he DSB agree[d] that, upon a request by Mexico or the United States, the DSB shall, no later than 20 January 2012, adopt the Report of the Panel in the

<sup>635</sup> WT/DSB/57.

<sup>636</sup> WT/DSB/59.

<sup>637</sup> WT/DSB/62.

<sup>638</sup> WT/DSB/65.

<sup>639</sup> WT/DSB/M/311, paras. 95-96.

<sup>640</sup> WT/DSB/M/315, paras. 81-82.

<sup>641</sup> WT/DSB/M/316, paras. 87-88.

<sup>642</sup> WT/DSB/M/318, paras. 96-97.

<sup>643</sup> WT/DSB/M/325, paras. 6.1-6.2.

<sup>644</sup> WT/DSB/M/327, paras. 10.1-10.2.

<sup>645</sup> WT/DSB/M/328, paras. 8.1-8.2.

<sup>646</sup> WT/DSB/M/330, paras. 5.1-5.2.

<sup>647</sup> WT/DSB/M/332, paras. 10.1-10.2.

<sup>648</sup> WT/DSB/M/333, paras. 9.1-9.2.

<sup>649</sup> WT/DSB/M/337, paras. 7.1-7.2.

<sup>650</sup> WT/DSB/M/338, paras. 7.1-7.2.

<sup>651</sup> WT/DSB/M/341, paras. 7.1-7.2.

<sup>652</sup> WT/DSB/M/344, paras. 9.1-9.2.

<sup>653</sup> WT/DSB/M/351, paras. 6.1-6.2.

<sup>654</sup> WT/DSB/M/352, paras. 8.1-8.2.

<sup>655</sup> WT/DSB/M/353, paras. 7.1-7.2.

<sup>656</sup> WT/DSB/M/359, paras 10.1-10.2.

<sup>657</sup> This nomination was approved by the DSB at its meeting on 22 April 2015. The minutes of this meeting are not yet available. WT/DSB/44/Rev.31, para. 2.

<sup>658</sup> WT/DSB/44/Rev.31.

<sup>659</sup> WT/DS381/9, WT/DS405/5, WT/DS384/11 and WT/DS386/10.

dispute: *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, contained in document WT/DS381/R, unless (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notified the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."<sup>660</sup>

425. In *EU – Footwear (China)*, "[t]he DSB agree[d] that, upon a request by China or the European Union, the DSB shall, no later than 22 February 2012, adopt the Report of the Panel in the dispute: *European Union – Anti-Dumping Measures on Certain Footwear from China*, contained in document WT/DS405/R, unless (i) the DSB decides by consensus not to do so or (ii) China or the European Union notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."<sup>661</sup>

426. In *US – COOL*, "[t]he DSB agree[d] that, upon a request by [Canada/Mexico] or the United States, the DSB shall, no later than 23 March 2012, adopt the Report of the Panel in the dispute: *United States – Certain Country of Origin Labelling (COOL) Requirements*, contained in document WT/DS384/R, unless (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."<sup>662</sup>

427. In *India – Agricultural Products*, "[t]he DSB agree[d] that, upon a request by India or the United States, the DSB shall no later than 26 January 2015 adopt the Report of the Panel in the dispute: *India – Measures Concerning the Importation of Certain Agricultural Products* contained in document WT/DS430/R and Add.1 unless (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."<sup>663</sup>

428. In *Peru – Agricultural Products*, "[t]he DSB decide[d] that it shall, no later than 25 March 2015, adopt the Panel Report in the dispute: *Peru – Additional Duty on Imports of Certain Agricultural Products* contained in document WT/DS457/R and Add.1 unless (i) the DSB decides by consensus not to do so or (ii) Guatemala or Peru notifies the DSB of its decision to appeal the Report pursuant to Article 16.4 of the DSU."<sup>664</sup>

429. In *China – HP-SSST (Japan)*, "[t]he DSB agree[d] that, upon a request by China or Japan, the DSB shall no later than 20 May 2015 adopt the Panel Report in the dispute: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* contained in document WT/DS454/R, unless: (i) the DSB decides by consensus not to do so or (ii) either party to the dispute notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU."<sup>665</sup>

#### 4. Other issues raised by Members at the DSB

430. At the DSB meeting held on 17 December 2012, Australia raised the matter regarding a systemic issue relating to Articles 3.7 and 3.10 of the DSU. Australia recalled that Article 3.10 of the DSU expressly enjoined that complaints should not be linked, while Article 3.7 expressly required that a Member exercise its judgement as to whether dispute settlement action would be fruitful. Australia was concerned about the apparent increase in disputes that seemed to be initiated in response to another Member exercising its right to seek redress through the dispute settlement system. Australia urged Members to be judicious and reasonable in their use of the dispute settlement system, so as to ensure that the integrity of the system was maintained. Turkey also made a statement.<sup>666</sup>

<sup>660</sup> WT/DSB/M/306, paras. 6-7.

<sup>661</sup> WT/DSB/M/308, paras. 100-101.

<sup>662</sup> WT/DSB/M/310, paras. 9-12.

<sup>663</sup> WT/DSB/M/352, paras. 6.5-6.6.

<sup>664</sup> WT/DSB/M/353, paras. 6.6-6.7.

<sup>665</sup> WT/DSB/M/359, paras. 8.6-8.7.

<sup>666</sup> WT/DSB/M/327, paras. 11.1-11.2.

431. At the DSB meeting held on 28 January 2013, Brazil wished to express its concern about the lack of uniformity and transparency with which requests for preliminary rulings in panel proceedings had been dealt recently. According to Brazil, it was also of the utmost importance that third parties were granted access to any submission requesting preliminary ruling and afforded an opportunity to comment on such requests. In Brazil's view, requests for preliminary rulings should not be overused and must conform to the rules and principles of the WTO dispute settlement system. Canada, the European Union, the United States, Australia and China also made statements.<sup>667</sup>

432. At the DSB meeting on 22 January 2014, the European Union recalled that at the DSB meeting on 23 August 2013, when Indonesia had made its unilateral request under Article 22.2 of the DSU, the European Union had made a statement. The European Union had noted that there was disagreement between the United States and Indonesia with respect to compliance and recalled that such disagreement must be decided through recourse to Article 21.5 of the DSU, before recourse to arbitration subsequent to a request under Article 22.2 of the DSU could be entertained. According to the European Union, that was the correct sequence, even if Indonesia strongly believed that the United States had failed to comply and even if that belief was reasonably held. The European Union had filed an application with the compliance/arbitration panel, seeking to ensure that it would have an opportunity to exercise its third-party rights, but the Arbitrator's decision had been designated as confidential and could not be circulated to all Members. Because of the systemic issues as to the interpretation of the DSU and several other important systemic issues of interest to the wider Membership at issue, the European Union considered this an egregious breach of its third-party rights, as provided for under Article 10 of the DSU, and the principle of due process. The European Union was of the firm view that Article 21.5 of the DSU was the proper procedure for settling compliance disputes, and that making an Article 22.2 of the DSU request in such a situation, whilst omitting to initiate and pursue compliance proceedings or to suspend the arbitration panel proceedings, was inconsistent with Articles 23.1 and 23.2(a) of the DSU. Mexico, China, Guatemala, Brazil, Canada, Japan, India, Indonesia and the United States also made statements.<sup>668</sup> At the DSB meeting held on 26 February 2014, the European Union raised this matter again as set out in its communication. The European Union, Mexico, Canada, Japan, Brazil, Chinese Taipei, Norway, India, Australia, China, Argentina, Ecuador, Indonesia, Honduras and the United States made statements.<sup>669</sup>

433. At the DSB meeting held on 26 September 2014, the Director-General made a presentation about the unprecedented high level of dispute settlement activity, and explained the actions he was taking in terms of budget and personnel allocations to address the situation. He also encouraged Members to give thought to actions they could take to respond to what he expected to be a continuing trend in WTO dispute settlement activities. The following delegations made statements: Korea, Canada, Norway, the United States, Mexico, China, Brazil, India, the European Union, Lesotho, South Africa, Ecuador, the Dominican Republic, Cuba, Japan, Argentina, Guatemala, Uganda and Hong Kong, China.<sup>670</sup>

434. At the DSB meeting held on 20 October 2014, the United States and Brazil made statements concerning a mutually agreed solution between them, in the form of a Memorandum of Understanding, in the dispute *United States – Subsidies on Upland Cotton*.<sup>671</sup>

435. At the DSB meetings on 17 December 2012 and 26 March 2014, the Chairman, at the request of several delegations, invited the Director of the Legal Affairs Division to make a report to Members on progress in the Digital DS Registry Initiative.<sup>672</sup> Progress was reported with respect to all three

<sup>667</sup> WT/DSB/M/328, paras. 7.2-7.9.

<sup>668</sup> WT/DSB/M/341, paras. 8.1-8.20.

<sup>669</sup> WT/DSB/M/342, paras. 5.1-5.22.

<sup>670</sup> WT/DSB/M/350, paras. 1.2-1.28.

<sup>671</sup> WT/DSB/M/351, paras. 7.1-7.3; WT/DS267/46.

<sup>672</sup> WT/DSB/M/327, WT/DSB/M/343.

elements of the project, namely: (i) development of a central electronic storage facility for all dispute settlement records; (ii) design of a research facility for Members and the Secretariat to search for dispute settlement information, and (iii) creation of a secure electronic registry for filing and serving dispute settlement documents on line. At the DSB meeting on 17 December 2012, progress was also reported with respect to cataloguing and scanning of old dispute settlement records that will be uploaded into the storage and research facility.<sup>673</sup>

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<sup>673</sup> WT/DSB/61, para. 5.1.



## F. TRADE POLICY REVIEW

### 1. Trade Policy Reviews

436. From October 2011 to May 2015, 57 Trade Policy Reviews (TPRs) were undertaken. All of these TPRs provided the WTO membership with a better understanding of trade and economic developments in each of the Members reviewed. These TPRs were all characterized by a full and candid discussion among delegations at the Trade Policy Review Body (TPRB) meetings and the constructive and insightful participation of discussants.

#### TRADE POLICY REVIEWS UNDERTAKEN BETWEEN OCTOBER 2011 AND MAY 2015

Member(s)	Dates of TPRB meetings	Document numbers of the minutes of the meetings (WT/TPR/M/)
Zimbabwe (2)	19 & 21 October 2011	252
Cambodia (1)	1 & 3 November 2011	253
Ecuador (2)	14 & 16 November 2011	254
Thailand (6)	28 & 30 November 2011	255
Saudi Arabia (1)	25 & 27 January 2012	256
Kuwait (1)	7 & 9 February 2012	258
Turkey (5)	21 & 23 February 2012	259
Trinidad and Tobago (3)	7 & 9 March 2012	260
Nepal (1)	13 & 15 March 2012	257
Philippines (4)	20 & 22 March 2012	261
United Arab Emirates (2)	27 & 29 March 2012	262
Uruguay (4)	25 & 27 April 2012	263
China (4)	12 & 14 June 2012	264
Colombia (4)	26 & 28 June 2012	265
Côte d'Ivoire (2), Guinea-Bissau (1), and Togo (3)	2 & 4 July 2012	266
Singapore (6)	24 & 26 July 2012	267
Republic of Korea (6)	19 & 21 September 2012	268
Norway (6)	9 & 11 October 2012	269
Bangladesh (4)	15 & 17 October 2012	270
Israel (4)	30 October and 1 November 2012	272
Iceland (4)	13 & 15 November 2012	273
East African Community <sup>a</sup> (2)	21 & 23 November 2012	271
Nicaragua (3)	4 & 6 December 2012	274
United States (11)	18 & 20 December 2012	275
Japan (11)	19 & 21 February 2013	276
Argentina (4)	20 & 22 March 2013	277
Indonesia (6)	10 & 12 April 2013	278
Mexico (5)	17 & 19 April 2013	279
Switzerland and Liechtenstein (4)	23 & 25 April 2013	280
Macao, China (4)	13 & 15 May 2013	281
Suriname (2)	10 & 12 June 2013	282
Brazil (6)	24 & 26 June 2013	283
European Union (11)	16 & 18 July 2013	284
CEMAC <sup>b</sup> (1)	29 & 31 July 2013	285
Costa Rica (4)	24 & 26 September 2013	286
Viet Nam (1)	17 & 19 September 2013	287
Kyrgyz Republic (2)	19 & 21 November 2013	288

Member(s)	Dates of TPRB meetings	Document numbers of the minutes of the meetings (WT/TPR/M/)
Peru (4)	13 & 15 November 2013	289
The Former Yugoslav Republic of Macedonia (1)	27 & 29 November 2013	290
Tonga (1)	11&13 February 2014	291
Malaysia (6)	3 & 5 March 2014	292
Myanmar (1)	11 & 13 March 2014	293
Bahrain (3), Oman (2), and Qatar (2)	22 & 24 April 2014	294, 295, 296
Ghana (4)	26 & 28 May 2014	298
OECS <sup>c</sup> (3)	17 & 19 June 2014	299
China (5)	1 & 3 July 2014	300
Panama (2)	23 & 25 July 2014	301
Chinese Taipei (3)	16 & 18 September 2014	302
Mongolia (2)	24 & 26 September 2014	297
Djibouti (2) and Mauritius (4)	22 & 24 October 2014	304, 305
Hong Kong, China (7)	19 & 21 November 2014	306
United States (12)	16 & 18 December 2014	307
Barbados (3)	27 & 29 January 2015	308
Brunei Darussalam (3)	10 & 12 February 2015	309
Japan (12)	9 & 11 March 2015	310
Pakistan (3)	24 & 26 March 2015	311
Australia (5)	21 & 23 April 2015	312

Note: Numbers in parentheses indicate how many times the Member has been reviewed, inclusive of the current review.

- a Burundi, Kenya, Rwanda, Tanzania, and Uganda.
- b The Central African Economic and Monetary Community (Cameroon, Central African Republic, Chad, Congo, and Gabon).
- c Organisation of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines).

Source: WTO documents.

## 2. Other activities of the Trade Policy Review Body

437. Between October 2011 and May 2015, two appraisals of the Trade Policy Review Mechanism (TPRM) were undertaken.<sup>674</sup> In the appraisals, Members recalled the importance of the TPRM for the functioning of the multilateral trading system by achieving greater transparency in, and mutual understanding of, the trade policies and practices of Members. They acknowledged that the TPRM had proven all the more vital in recent years in the aftermath of the economic crisis and in the collective efforts to keep protectionism at bay. Therefore Members stressed the need to ensure the proper operation of the TPRM, including through the full participation of all Members.

438. In the fourth appraisal, Members adopted some procedural changes concerning the preparation and organization of the TPRB meetings on a provisional basis. In the fifth appraisal, Members agreed that the changes introduced following the fourth appraisal will continue to apply on a provisional basis until the next (sixth) appraisal.

<sup>674</sup> WT/MIN(11)/6, 29 November 2011 and WT/MIN(13)/5, 28 October 2013.

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### 3. Trade monitoring

439. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted the following decision on the Trade Policy Review Mechanism:

"We recognize the regular work undertaken by the TPRB on the monitoring exercise of trade and trade-related measures in fulfilling its mandate. We take note of the work initially done in the context of the global financial and economic crisis, and direct it to be continued and strengthened. We therefore invite the Director-General to continue presenting his trade monitoring reports on a regular basis, and ask the TPRB to consider these monitoring reports in addition to its meeting to undertake the Annual Overview of Developments in the International Trading Environment. We also take note of the WTO's reports on its specific monitoring of G-20 measures. We commit to duly comply with the existing transparency obligations and reporting requirements needed for the preparation of these monitoring reports, and to continue to support and cooperate with the WTO Secretariat in a constructive fashion. We call upon the TPRB to continue discussing the strengthening of the monitoring exercise of trade and trade-related measures on the basis of Members' inputs."<sup>675</sup>

440. The draft of this decision was presented to the 8<sup>th</sup> Ministerial Conference as part of the Fourth Appraisal of the Trade Policy Review Mechanism<sup>676</sup>, conducted on the basis of Paragraph F of the Trade Policy Review Mechanism and a specific conclusion of the Third Appraisal.<sup>677</sup>

441. Since then, the Trade Policy Review Body has continued to meet regularly to consider the Director-General's trade monitoring reports prepared twice a year. The reports presented at the end of the year become the Director-General's input for the Annual Overview of Developments in the International Trading Environment as mandated in Paragraph G of Annex 3 establishing the Trade Policy Review Mechanism.

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<sup>675</sup> WT/L/848, 19 December 2011.

<sup>676</sup> WT/MIN(11)/6, 29 November 2011, para. 43.

<sup>677</sup> WT/TPR/229, 11 November 2008.

442.

## G. REGIONAL TRADE AGREEMENTS

### 1. Transparency Mechanism for Regional Trade Agreements<sup>678</sup>

443. From October 2011 to May 2015, 93 Regional Trade Agreements (RTAs) were considered under the Transparency Mechanism, based on factual presentations by the WTO Secretariat.<sup>679</sup> In the same period, 28 early announcements were received from Members – nine for newly signed RTAs and 19 for RTAs under negotiation. Of these 28 early announced RTAs, three were subsequently notified under Article XXIV of the GATT 1994, and six under both Article XXIV of the GATT 1994 and Article V of the GATS.

444. From October 2011 to May 2015, changes to 12 RTAs under Article XXIV of the GATT 1994, and one RTA under both Article XXIV of the GATT 1994 and Article V of the GATS were notified pursuant to paragraph 14 of the Transparency Mechanism. In November 2014, the first implementation report was submitted pursuant to paragraph 15 of the Transparency Mechanism<sup>680</sup>, and as of January 2015, implementation reports are due for 147 RTAs. In 2015, 16 RTAs will have their implementation period terminated while for 107 RTAs this will take place from 2016 onwards; for additional four RTAs, the end of implementation year is not available.

445. As of May 2015, there is a backlog of 121 RTAs (77 RTAs under Article XXIV of the GATT, 32 under Article V of the GATS and 12 under the Enabling Clause), including four RTAs for which the factual presentation is temporarily on hold.<sup>681</sup>

#### REGIONAL TRADE AGREEMENTS IN FORCE NOTIFIED BETWEEN OCTOBER 2011 AND MAY 2015

(in alphabetical order by RTA name/parties)

RTA name/parties	Notification date	Entry into force	Notified under
Canada - Colombia	7 Oct 2011	15 Aug 2011	GATT Art. XXIV & GATS Art. V
Canada - Jordan	10 Apr 2013	1 Oct 2012	GATT Art. XXIV
Canada - Honduras	5 Feb 2015	1 Oct 2014	GATT Art. XXIV & GATS Art. V
Canada - Panama	10 Apr 2013	1 Apr 2013	GATT Art. XXIV & GATS Art. V
Canada - Republic of Korea	20 Jan 2015	1 Jan 2015	GATT Art. XXIV & GATS Art. V
Chile - Guatemala (Chile - Central America)	30 Mar 2012	23 Mar 2010	GATT Art. XXIV & GATS Art. V
Chile - Honduras (Chile - Central America)	28 Nov 2011	19 Jul 2008	GATT Art. XXIV & GATS Art. V
Chile - Malaysia	12 Feb 2013	25 Feb 2012	GATT Art. XXIV
Chile - Nicaragua	14 Jun 2013	19 Oct 2012	GATT Art. XXIV & GATS Art. V

<sup>678</sup> Updated information on regional trade agreements is available on the WTO website (<http://rtais.wto.org>).

<sup>679</sup> 51 have been considered in the Committee on Regional Trade Agreements under Article XXIV of the GATT 1994, 41 under Article V of the GATS, and one has been considered in the Committee on Trade and Development. (2 RTAs involve WTO non-members).

<sup>680</sup> WT/REG164/R/I, EU-Chile Association Agreement.

<sup>681</sup> An RTA is placed "on hold" if it is an agreement on trade in services for which liberalization commitments have not yet been agreed by the parties. Once the RTA enters into force for all parties, or liberalization commitments are agreed upon, the RTA is automatically scheduled for consideration.

RTA name/parties	Notification date	Entry into force	Notified under
(Chile - Central America)			
China - Costa Rica	27 Feb 2012	1 Aug 2011	GATT Art. XXIV & GATS Art. V
Chile - Viet Nam	12 May 2015	1 Jan 2014	GATT Art. XXIV
Colombia - Northern Triangle	31 Aug 2012	12 Nov 2009	GATT Art. XXIV & GATS Art. V
Costa Rica - Peru	5 Jun 2013	1 Jun 2013	GATT Art. XXIV & GATS Art. V
Costa Rica – Singapore	16 Sept 2013	1 Jul 2013	GATT Art. XXIV & GATS Art. V
Dominican Republic- Central America	6 Jan 2012	4 Oct 2001	GATT Art. XXIV & GATS Art. V
East African Community (EAC)	1 Aug 2012	1 Jul 2010	GATS Art. V
East African Community (EAC) – Accession of Burundi and Rwanda	1 Aug 2012	1 Jul 2007	Enabling Clause
EFTA - Bosnia and Herzegovina	6 Jan 2015	1 Jan 2015	GATT Art. XXIV
EFTA – Central America (Costa Rica	19 Nov 2014	19 Aug 2014	GATT Art. XXIV & GATS Art. V
EFTA - Hong Kong, China	27 Sep 2012	1 Oct 2012	GATT Art. XXIV & GATS Art. V
EFTA - Montenegro	24 Oct 2012	1 Sep 2012	GATT Art. XXIV
EFTA - Ukraine	18 Jun 2012	1 Jun 2012	GATT Art. XXIV & GATS Art. V
El Salvador – Cuba	27 Nov 2013	1 Aug 2012	Enabling Clause
Eurasian Economic Union (EAEU)	12 Dec 2014	1 Jan 2015	GATT Art. XXIV & GATS Art. V
Eurasian Economic Union (EAEU) – Accession of Armenia	29 Dec 2014	2 Jan 2015	GATT Art. XXIV & GATS Art. V
European Union - Central America	26 Feb 2013	1 Aug 2013	GATT Art. XXIV & GATS Art. V
European Union - Colombia and Peru	26 Feb 2013	1 Mar 2013	GATT Art. XXIV & GATS Art. V
European Union - Eastern and Southern Africa States Interim EPA	9 Feb 2012	14 May 2012	GATT Art. XXIV
European Union (28) Enlargement	25 Apr 2013	1 Jul 2013	GATT Art. XXIV & GATS Art. V
European Union – Georgia	2 Jul 2014	1 Sept 2014	GATT Art. XXIV & GATS Art. V
European Union – Moldova	30 Jun 2014	1 Sept 2014	GATT Art. XXIV & GATS Art. V
European Union - Papua New Guinea / Fiji	18 Oct 2011	20 Dec 2009	GATT Art. XXIV
European Union – Serbia	20 Dec 2013	1 Sept 2013	GATS Art. V
European Union – Ukraine	1 July 2014	*	GATT Art. XXIV & GATS Art. V
Hong Kong, China – Chile	15 Oct 2014	9 Oct 2014	GATT Art. XXIV & GATS Art. V
Iceland – China	10 Oct 2014	1 Jul 2014	GATT Art. XXIV & GATS Art. V
Japan - Australia	12 Jan 2015	15 Jan 2015	GATT Art. XXIV & GATS Art. V
Japan - Peru	24 Feb 2012	1 Mar 2012	GATT Art. XXIV & GATS Art. V
Malaysia - Australia	13 May 2013	1 Jan 2013	GATT Art. XXIV & GATS Art. V
Mexico – Central America	20 Jan 2014	1 Sept 2012	GATT Art. XXIV & GATS Art. V
Mexico - Uruguay	28 Jun 2013	15 Jul 2004	GATT Art. XXIV & GATS Art. V
New Zealand – Chinese Taipei	25 Nov 2013	1 Dec 2013	GATT Art. XXIV & GATS Art. V
New Zealand - Malaysia	7 Feb 2012	1 Aug 2010	GATT Art. XXIV & GATS Art. V
Panama – Guatemala (Panama - Central America)	22 Apr 2013	20 Jun 2009	GATT Art. XXIV & GATS Art. V
Panama – Nicaragua (Panama - Central America)	25 Feb 2013	21 Nov 2009	GATT Art. XXIV & GATS Art. V
Peru - Chile	29 Nov 2011	1 Mar 2009	GATT Art. XXIV & GATS Art. V
Peru - Mexico	22 Feb 2012	1 Feb 2012	GATT Art. XXIV & GATS Art. V
Peru - Panama	23 Apr 2012	1 May 2012	GATT Art. XXIV & GATS Art. V
Republic of Korea – Australia	22 Dec 2014	12 Dec 2014	GATT Art. XXIV & GATS Art. V
Republic of Korea - Turkey	30 Apr 2013	1 May 2013	GATT Art. XXIV
Russian Federation - Azerbaijan	13 Sep 2012	17 Feb 1993	GATT Art. XXIV
Russian Federation - Belarus	13 Sep 2012	20 Apr 1993	GATT Art. XXIV

RTA name/parties	Notification date	Entry into force	Notified under
Russian Federation - Belarus - Kazakhstan	21 Dec 2012	3 Dec 1997	GATT Art. XXIV
Russian Federation - Kazakhstan	13 Sep 2012	7 Jun 1993	GATT Art. XXIV
Russian Federation - Republic of Moldova	13 Sep 2012	30 Mar 1993	GATT Art. XXIV
Russian Federation - Serbia	21 Dec 2012	3 Jun 2006	GATT Art. XXIV
Russian Federation - Tajikistan	13 Sep 2012	8 Apr 1993	GATT Art. XXIV
Russian Federation - Turkmenistan	18 Jan 2013	6 Apr 1993	GATT Art. XXIV
Russian Federation - Uzbekistan	18 Jan 2013	25 Mar 1993	GATT Art. XXIV
Singapore – Chinese Taipei	22 Apr 2014	19 Apr 2014	GATT Art. XXIV & GATS Art. V
Switzerland – China	30 Jun 2014	1 Jul 2014	GATT Art. XXIV & GATS Art. V
Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS)	6 Jun 2013	20 Sep 2012	GATT Art. XXIV
Turkey - Mauritius	30 May 2013	1 Jun 2013	GATT Art. XXIV
Ukraine - Montenegro	25 Apr 2013	1 Jan 2013	GATT Art. XXIV & GATS Art. V
United States - Colombia	8 May 2012	15 May 2012	GATT Art. XXIV & GATS Art. V
United States - Panama	29 Oct 2012	31 Oct 2012	GATT Art. XXIV & GATS Art. V
United States - Republic of Korea	15 Mar 2012	15 Mar 2012	GATT Art. XXIV & GATS Art. V

\* Date of entry into force: In accordance with the Parties' respective internal procedures.

## 2. Other activities of the Committee on Regional Trade Agreements

446. To encourage RTA notifications, from September 2011 the Chairman of the Committee on Regional Trade Agreements prepared a list of non-notified RTAs which appeared in factual presentations as being in force.<sup>682</sup> This list is regularly updated and circulated in advance of meetings of the Committee, and is subject to verification by the RTA parties.

447. Discussions on the requirement to provide RTA implementation reports pursuant to paragraph 15 of the Transparency Mechanism have been held since 2012. In April 2014, the Committee on Regional Trade Agreements took note of the Chairman's statement inviting Members to begin making notifications under paragraph 15 as they saw fit and to request any assistance needed from the Secretariat; draft outlines had been provided by the Secretariat.<sup>683</sup> The Committee will regularly receive an updated list of implementation reports due.<sup>684</sup>

448. Following the request of one Member, discussions were held on some staff working papers relating to RTAs cross-cutting issues which had been made available at the WTO website.<sup>685</sup> In 2014, the Committee was informed of a seminar organized by the Secretariat and open to Members, which focused on the Secretariat staff working papers issued on RTAs.<sup>686</sup> During 2012, Members exchanged views on issues of relevance for the CRTA that were raised at the 8<sup>th</sup> Ministerial Conference.<sup>687</sup>

<sup>682</sup> During the period under review: WT/REG/W/62, WT/REG/W/66, WT/REG/W/68, WT/REG/W/69, WT/REG/W/70, WT/REG/W/72, WT/REG/W/80/Rev.1, WT/REG/W/83, WT/REG/W/85, WT/REG/W/87 and WT/REG/W/91.

<sup>683</sup> See WT/REG/M/72, paragraphs 2.5-2.10; draft outlines in JOB/REG/1, 3 and 4.

<sup>684</sup> See WT/REG/W/82 and WT/REG/W/90.

<sup>685</sup> See WT/REG/M/67, WT/REG/M/68 and WT/REG/M/70.

<sup>686</sup> See WT/REG/M/73 and WT/REG/M/74.

<sup>687</sup> See WT/REG/M/64, WT/REG/M/66 and WT/REG/M/67.

### 3. Activities of the Committee on Trade and Development relating to RTAs

449. Between October 2011 and May 2015, the matter relating to RTA notifications concerning the Gulf Cooperation Council and other RTAs notified under both the Enabling Clause and Article XXIV of the GATT 1994 remained on the agenda of the Committee on Trade and Development.<sup>688</sup>

450. In July 2014, the Chairman of the Committee on Trade and Development called on Members to submit implementation reports under paragraph 15 of the Transparency Mechanism for RTAs as they saw fit.<sup>689</sup> The Committee had initially addressed this issue in April 2012<sup>690</sup> in light of discussions held in the CRTA. The Committee on Trade and Development will regularly receive an updated list of implementation reports due, and will ensure that similar procedures are followed in the two Committees.

451. In respect of the notification concerning the accession of Rwanda and Burundi to the Protocol on the Establishment of the EAC Customs Union, at the meeting of the Committee on Trade and Development in November 2012, reference was made to its legal basis and notification of customs unions.<sup>691</sup>

### 4. Activities of the Council for Trade in Services relating to RTAs

452. At the meetings of the Council for Trade in Services in June and October 2012, questions were raised on the Korea-United States and Colombia-United States RTAs, to which the delegations concerned provided answers.<sup>692</sup> Subsequently, questions relating to other agreements as well as issues of a more systemic nature relating to terms and mechanisms used in certain economic integration agreements were also addressed.<sup>693</sup> All RTAs notified under Article V of the GATS in the period under review were transferred for consideration to the Committee on Regional Trade Agreements, as foreseen by the Transparency Mechanism.<sup>694</sup>

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<sup>688</sup> See WT/COMTD/M/83, WT/COMTD/M/84, WT/COMTD/M/85, WT/COMTD/M/86, WT/COMTD/M/87, WT/COMTD/M/88, WT/COMTD/M/89, WT/COMTD/M/90, WT/COMTD/M/91 and WT/COMTD/M/92.

<sup>689</sup> See WT/COMTD/M/92, paragraphs 60-62 and WT/COMTD/RTA/W/1.

<sup>690</sup> See WT/COMTD/M/91.

<sup>691</sup> See WT/COMTD/M/86, para. 74.

<sup>692</sup> See S/C/M/110 and S/C/M/111.

<sup>693</sup> See S/C/M/112 and S/C/M/113.

<sup>694</sup> See S/C/M/115, S/C/M/116, S/C/M/117, S/C/M/118, S/C/M/119, S/C/M/120 and S/C/M/122.

## **H. OTHER MULTILATERAL TRADE DEVELOPMENTS**

### **1. Guidelines for appointment of officers to WTO bodies**

453. On 14 February 2012, the General Council agreed<sup>695</sup> that the incoming General Council Chair would initiate a process of consultations to review the Guidelines for Appointment of Officers to WTO Bodies adopted by the General Council in December 2002.<sup>696</sup>

454. At the meeting of the General Council on 25-26 July 2012, the Chair recalled the mandate for reviewing the Guidelines for Appointment of Officers to WTO Bodies, and set out the points of convergence which had emerged from her consultations.<sup>697</sup>

455. At the meeting of the General Council on 11 December 2013, the Chair recalled these practical points of convergence<sup>698</sup> to improve the implementation of the Guidelines, and outlined the steps for initiating the the consultations for the appointment of officers in early 2013.<sup>699</sup>

456. At its meeting of 25 February 2013<sup>700</sup>, the General Council appointed the officers of WTO bodies for 2013, following the Guidelines<sup>701</sup> and the practical points of convergence to improve their implementation.<sup>702</sup>

### **2. Election of officers for the 9<sup>th</sup> Ministerial Conference**

457. In line with the Rules of Procedure for the Ministerial Conference, at its meeting of 24-25 July 2013, the General Council elected the Minister of Trade of Indonesia as Chairman of MC9, and the three Vice-Chairs: the Minister of Trade and Industry of Rwanda, the Minister of Trade and Investment of the UK, and the Minister of Foreign Trade and Tourism of Peru.<sup>703</sup> This decision followed the agreement reached at the General Council meeting of 4 June 2013 that the General Council follow the customary practice in this regard.<sup>704</sup>

### **3. Coherence in global economic policy-making**

458. In the context of the 1994 Ministerial Declaration on the Contribution of the WTO in Achieving Greater Policy Coherence in Economic Policy-Making, and in accordance with paragraph 2 of the General Council Decision on "Agreements between the WTO, the IMF and the

<sup>695</sup> WT/GC/M/135, paras. 64-65.

<sup>696</sup> WT/L/510.

<sup>697</sup> WT/GC/M/137, paras. 186-189. The Chair's statement was circulated subsequently in JOB/GC/22.

<sup>698</sup> JOB/GC/22.

<sup>699</sup> WT/GC/M/141, item 15.

<sup>700</sup> WT/GC/M/143, item 6.

<sup>701</sup> WT/L/510.

<sup>702</sup> JOB/GC/22.

<sup>703</sup> WT/GC/M/146.

<sup>704</sup> WT/GC/M/145, para. 4.3. As the Chair explained on 4 June 2013, customary practice had always been that a representative of the Government hosting a Ministerial Conference outside Geneva, normally the Trade Minister, was elected as Chair, and the three vice-chairmanships were shared across the other broad groupings of Members. According to the Chair, since the Chair of the 9<sup>th</sup> Ministerial Conference would come from Asia, he invited the representatives of the other three broad groupings – Latin America and the Caribbean, Africa and developed countries – to consult with their constituents. WT/GC/M/145, para. 4.2.



World Bank"<sup>705</sup>, the Director-General prepared a report on Coherence in Global Economic Policy-Making to the 8<sup>th</sup> Ministerial Conference.<sup>706</sup>

#### **4. Aid for Trade**

459. At the General Council meeting of 24 July 2013, the Director-General reported on the Fourth Global Review of Aid for Trade, noting that the Review had greatly contributed to the debate on the connections between Aid for Trade and global value chains. He recalled that Members had highlighted the need to maintain Aid-for-Trade financing, to improve monitoring and to support the Enhanced Integrated Framework and LDC priorities.<sup>707</sup>

460. At the 9<sup>th</sup> Ministerial Conference in Bali, Ministers adopted a decision on Aid for Trade which welcomed progress and took note of the deliberations and outcomes of the 4<sup>th</sup> Global Review of Aid for Trade held on 8-10 July 2013. It also recognized the continuing need of Aid for Trade for developing countries, and in particular LDCs.<sup>708</sup>

461. At the General Council meeting of 12 May 2014, the Chairman delivered a statement on behalf of the Chairman of the Committee on Trade and Development. The General Council took note of the Aid-for-Trade Work Programme for the period 2014-2015.<sup>709</sup>

#### **5. Bali Ministerial Decision on the Monitoring Mechanism on Special and Differential Treatment**

462. The Monitoring Mechanism on Special and Differential Treatment (S&D) was established as per the decision<sup>710</sup> taken at the 9<sup>th</sup> Ministerial Conference in December 2013.<sup>711</sup> In accordance with this Decision, the monitoring of S&D provisions is to be undertaken on the basis of written inputs or submissions made by Members, as well as on the basis of reports received from other WTO bodies to which submissions by Members could also be made.

463. The Dedicated Session on the Monitoring Mechanism on Special and Differential Treatment of the Committee on Trade and Development held two meetings in 2014. However, no written submissions have been submitted by any Member as yet.

#### **6. Transparency Mechanism for Preferential Trade Arrangements**

464. The agreement on Preferential Trade Arrangements (PTA) concerning the European Union's Emergency Autonomous Trade Preferences for Pakistan was considered in the Committee on Trade and Development in April 2014.<sup>712</sup> This was done in accordance with the General Council decision of December 2010 to establish the Transparency Mechanism for Preferential Trade Arrangements (TM PTA).<sup>713</sup>

465. Paragraph 26 of the TM PTA states that Members will review the working of the Mechanism three years after its entry into force and, if necessary, modify it in light of the experience gained from

<sup>705</sup> WT/L/194.

<sup>706</sup> WT/MIN(11)/8 and WT/TF/COH/S/16.

<sup>707</sup> WT/GC/M/146, item 2. See also the summary report of the Fourth Global Review of Aid for Trade in document WT/COMTD/AFT/W/46.

<sup>708</sup> WT/L/909.

<sup>709</sup> WT/GC/M/151, item 4.

<sup>710</sup> WT/L/920.

<sup>711</sup> See WT/COMTD/MMSDT/M/1 and 2.

<sup>712</sup> See WT/COMTD/PTA/M/1.

<sup>713</sup> WT/L/806.

its provisional operation.<sup>714</sup> In order to assist Members in considering the review, the Chairman of the Committee on Trade and Development provided an overview of the working and implementation of the Mechanism in November 2014.<sup>715</sup>

## 7. Work Programme on LDCs

466. At its meeting of 28 June 2013, the Sub-Committee on LDCs adopted the revised Work Programme on LDCs.<sup>716</sup> At its meeting of 24 July 2013, the General Council took note of the revised Work Programme.

## 8. Bali Ministerial Decision on Duty-free, Quota-free (DFQF) Market Access for LDCs

467. The decision taken at the 9<sup>th</sup> Ministerial Conference in December 2013 on Duty-free, Quota-free (DFQF) market access for LDCs<sup>717</sup> instructs the Committee on Trade and Development to annually review the steps taken to provide DFQF market access to LDCs and report to the General Council for appropriate action. To aid in the review, the Secretariat is to prepare a report on Members' DFQF market access for LDCs at the tariff line level based on their notifications.

468. The Committee on Trade and Development's annual DFQF review was held in November 2014.<sup>718</sup> The Secretariat report was circulated in WT/COMTD/W/206.

## 9. Small economies

469. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference adopted the following decision on the Work Programme on Small Economies:

"We reaffirm our commitment to the Work Programme on Small Economies and take note of all the work conducted to date and duly reflected in document WT/COMTD/SE/W/22/Rev.6 and its previous revisions. We instruct the CTD to continue its work in Dedicated Sessions under the overall responsibility of the General Council. Furthermore, it shall consider in further detail the proposals contained in the various submissions that have been received to date, examine any additional proposals that Members might wish to submit and, where possible, and within its mandate, make recommendations to the General Council, on any of these proposals. We instruct the General Council to direct relevant subsidiary bodies to frame responses to the trade-related issues identified by the CTD with a view to making recommendations for action and instruct the WTO Secretariat to provide relevant information and factual analysis for discussion among Members in the CTD Dedicated Session, *inter alia*, in the areas identified in item k of paragraph 2 of the Work Programme on Small Economies, and on the identification and effects of non-tariff measures on Small Economies. We instruct the CTD in Dedicated Session to continue monitoring the progress of the SVE proposals in WTO bodies and negotiating groups with the aim of providing responses, as soon as possible, to the trade-related issues identified for the fuller integration of small, vulnerable economies in an appropriate manner in the multilateral trading system. We instruct the General Council to report on progress and action taken, together with any further recommendations as appropriate, to our next Session."<sup>719</sup>

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<sup>714</sup> See WT/COMTD/M/89, WT/COMTD/M/90 and WT/COMTD/M/91.

<sup>715</sup> See WT/COMTD/M/92.

<sup>716</sup> Subsequently circulated as WT/COMTD/LDC/11/Rev.1

<sup>717</sup> WT/L/919.

<sup>718</sup> See WT/COMTD/M/92.

<sup>719</sup> WT/L/844.

470. At the General Council meetings of 25 February and 4 June 2013, the Chair read out reports of the Chair of the Dedicated Session of the Committee for Trade and Development on work under the Work Programme on Small Economies.<sup>720</sup>

471. At the 9<sup>th</sup> Ministerial Conference, Ministers adopted a decision on the Work Programme on Small Economies.<sup>721</sup> As part of the work to implement the decision, Members agreed in November 2014 to an outline of research and analysis concerning the challenges and opportunities experienced by small economies when linking into global value chains in trade in goods and services, as mandated in the 2013 decision.<sup>722</sup>

472. Statements concerning progress on the Work Programme on Small Economies were made at the General Council meetings held on 14 March, 12 May, 24 July, 21 October, 10 December 2014 and 20 February and 5 May 2015.<sup>723</sup>

## 10. Working Group on Trade and Transfer of technology

473. The Working Group on Trade and Transfer of Technology, established at the 4th Ministerial Conference in Doha in November 2001, is to consider and finalize any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries.

474. In June 2014, the Working Group organized a Workshop on Technology Transfer in which a cross-section of experts from the public and private sectors, from IGOs and academia discussed the nexus between trade and transfer of technology.

475. The Working Group's last annual report to the General Council was made in November 2014.<sup>724</sup>

## 11. Electronic commerce

476. On 17 December 2011, the 8<sup>th</sup> Ministerial Conference recalled the "Work Programme on Electronic Commerce" adopted in September 1998<sup>725</sup>, and the mandate assigned by Members at the 7<sup>th</sup> Ministerial Conference to intensively reinvigorate that work with a view to the adoption of decisions on that subject at its next session, to be held in 2011.<sup>726</sup> Accordingly, the 8<sup>th</sup> Ministerial Conference adopted the following decision on the Work Programme on Electronic Commerce:

"To continue the reinvigoration of the Work Programme on Electronic Commerce, based on its existing mandate and guidelines and on the basis of proposals submitted by Members, including the development-related issues under the Work Programme and the discussions on the trade treatment, *inter alia*, of electronically delivered software, and to adhere to the basic principles of the WTO, including non-discrimination, predictability and transparency, in order to enhance internet connectivity and access to all information and telecommunications technologies and public internet sites, for the growth of electronic commerce, with special consideration in developing countries, and particularly in least-developed country

<sup>720</sup> WT/GC/M/143, item 2 and WT/GC/M/145, item 2.

<sup>721</sup> WT/MIN(13)/33, WT/L/908.

<sup>722</sup> WT/COMTD/SE/W/30/Rev.1.

<sup>723</sup> WT/GC/M/150, WT/GC/M/151, WT/GC/M/152, WT/GC/M/153, WT/GC/M/155 and WT/GC/M/156.

<sup>724</sup> WT/WGTTT/16.

<sup>725</sup> WT/L/274.

<sup>726</sup> WT/L/782.

Members. The Work Programme shall also examine access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers,

To instruct the General Council to emphasize and reinvigorate the development dimension in the Work Programme particularly through the CTD to examine and monitor development-related issues such as technical assistance, capacity building, and the facilitation of access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers, of developing countries and particularly of least-developed country Members. Further, any relevant body of the Work Programme may explore appropriate mechanisms to address the relationship between electronic commerce and development in a focused and comprehensive manner,

To further instruct the General Council to hold periodic reviews in its sessions of July and December 2012 and July 2013, based on the reports submitted by the WTO bodies entrusted with the implementation of the Work Programme, to assess its progress and consider any recommendations on possible measures related to electronic commerce in the next session of the Ministerial Conference,

We decide that Members will maintain the current practice of not imposing customs duties on electronic transmissions until our next session, which we have decided to hold in 2013."<sup>727</sup>

477. In its Annual Report for 2012, the General Council reported the following developments under the above decision:

"At the July [2012] General Council meeting, Deputy Director-General Singh, who had been dealing with the Work Programme on behalf of the General Council Chair and her predecessors since 2005, said that since the beginning of the year, work had continued in the Council for Trade in Services, Council for Trade in Goods and the Committee on Trade and Development. The DDG also reported on an informal consultation he had held, on behalf of the General Council Chair, on 2 July [2012] to consider the follow-up to Ministers' 2011 Decision on E-Commerce.

The Chair drew attention to the reports of the Chairs of the Council for Trade in Services and of the Goods Council, contained in documents S/C/38 and G/C/49, respectively.

The Chairman of the Committee on Trade and Development said that work in the CTD was taking place in the context of the 2011 Decision on E-Commerce. Cuba and Ecuador had submitted a proposal for a 'Workshop on E-Commerce, Development and SMEs' (WT/COMTD/W/189), with a particular focus on issues related to 'access and facilitation of access to e-commerce by small and medium-sized enterprises, including small producers and suppliers'. The CTD was making steady progress on other fronts in the effort to comply with instructions from MC8 to make the CTD a focal point on development issues in the WTO.

[...] The General Council took note of the reports by the Deputy Director-General and by the Chairmen of the subsidiary bodies and of the statements.

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<sup>727</sup> WT/L/843.

At the 11 December General Council, Deputy Director-General Singh, reported on work under the Work Programme since the Council's last review of progress in this area. He reported on activities in the Council for Trade in Services, the Council for Trade in Goods and the Committee on Trade and Development. He also reported on an informal meeting of the Dedicated Discussion on E-Commerce Cross-Cutting Issues under the auspices of the General Council, held on 30 November 2012. There had been no activity under the Work Programme in the Council for TRIPS.

Deputy Director-General Singh also read out a report on behalf of the Chairman of the CTD. The report focused on a proposal by Cuba and Ecuador (WT/COMTD/W/189) to organize a workshop on 'E-commerce, Development and SMEs'. At the 86th Session of the CTD held on 19 November 2012, it had been agreed that the workshop would be held on 8 and 9 April 2013.

The Chair drew attention to the reports of the Chairs of the Council for Trade in Services and of the Goods Council in documents S/C/40 and G/C/50, respectively.

[...] The General Council took note of the reports by the Deputy Director-General and by the Chairs of the subsidiary bodies, and of the statements."<sup>728</sup>

478. On 24 July 2013, the General Council took note of a report by DDG Singh concerning a number of developments on E-commerce in the Committee on Trade and Development, the Council for Trade in Services<sup>729</sup> and the Council for Trade in Goods.<sup>730</sup>

479. The Bali Ministerial Decision on the Work Programme on Electronic Commerce<sup>731</sup> was discussed at a meeting of the Committee on Trade and Development in April 2014. Members were asked how to take forward the work on e-commerce in the Committee on Trade and Development, including whether future work could build on the Workshop on Electronic Commerce, Development and Small and Medium-Sized Enterprises (SMEs) that was held on 8-9 April 2013.

## 12. Director-General Selection Process

480. In keeping with the Procedures for the Appointment of Directors-General adopted in December 2002<sup>732</sup>, the process for the appointment of the next Director-General started in October 2012 when delegations were provided with information on the nomination phase of the process. At a special meeting on 14 May 2013, the General Council approved the appointment of Ambassador Roberto Carvalho de Azevêdo (Brazil) as the next Director-General of the WTO, with his term of office to begin on 1 September 2013.<sup>733</sup>

## 13. Derestriction of some GATT 1947 historical bilateral negotiating documentation

481. At its meeting of 25 July 2013, the General Council decided to derestrict, as of 1 August 2013, the historical bilateral negotiating documentation regarding the Dillon Round and some negotiating material of the four earlier GATT Rounds listed in the annex to document

<sup>728</sup> WT/GC/151, paras. 25-32.

<sup>729</sup> The General Council took note of the report in S/C/41.

<sup>730</sup> The General Council took note of the report in G/C/53. The General Council also heard an oral report by the CTD Chair on the CTD's workshop on E-Commerce, Development and SMEs held in April 2013 for which a Secretariat background document had been prepared titled, "E-commerce in Developing Countries – Opportunities and Challenges for Small and Medium-sized Enterprises". WT/COMTD/W/193. A summary report of the workshop is available in WT/COMTD/W/193.

<sup>731</sup> WT/L/907.

<sup>732</sup> WT/L/509.

<sup>733</sup> WT/GC/M/144, para. 1.10.

G/MA/285.<sup>734</sup> At its meeting of 25 July 2014, the General Council decided to derestrict the historical bilateral negotiating documentation of the Kennedy Round listed in the annex to document G/MA/287.<sup>735</sup> A draft decision of the General Council to derestrict historical bilateral negotiating documentation regarding the Tokyo Round listed in the annex to document G/MA/301 was proposed by the Committee on Market Access on 22 May 2015.<sup>736</sup>

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<sup>734</sup> WT/L/892.

<sup>735</sup> WT/L/933.

<sup>736</sup> G/MA/W/115,

## I. PLURILATERAL TRADE AGREEMENTS

### 1. Agreement on Government Procurement

#### (a) Entry into force of the Protocol Amending the Agreement on Government Procurement

482. On 15 December 2011, the Committee on Government Procurement adopted a decision at the Ministerial level on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement.<sup>737</sup>

483. In line with this decision, on 30 March 2012 the Committee on Government Procurement adopted<sup>738</sup> the Protocol Amending the Agreement on Government Procurement, as contained in document GPA/W/316.<sup>739</sup>

484. The resulting amended Agreement on Government Procurement entered into force on 6 April 2014.<sup>740</sup> Subsequently, three additional Parties submitted their respective instruments of acceptance.<sup>741</sup>

#### (b) Observership and accessions

485. On 28 September 2012, New Zealand applied for accession to the Agreement on Government Procurement.<sup>742</sup> On 29 October 2014, the Committee on Government Procurement

<sup>737</sup> GPA/112.

<sup>738</sup> GPA/M/46, para. 7.

<sup>739</sup> A numbering error in the French version of the Protocol was rectified on 4 June 2012 (WT/Let/854). The certified (and rectified) true copy of the Protocol was circulated in WT/Let/858 on 12 June 2012. The package adopted by the Committee on 30 March 2012 was also reproduced in three separate language versions in GPA/113.

The Chair noted the following "understandings" before gavelling the decision:

- "Following deposit of the required instruments of acceptance, the schedules of the Parties, circulated in document GPA/W/316 of 27 March 2012, would need to be reformatted. At that stage, the titles that appeared over each Party's Appendix I offer or Appendix I future commitments in that document would be deleted in favour of a simple reference to the name of the relevant Party. Furthermore, the content of Appendices II-IV, which each Party was required to submit, at the latest, at the time of deposit of its instrument of acceptance, would be filled in. These changes would, in due course, need to be certified by the Director-General. Parties would be kept informed throughout the process." (GPA/M/46, para. 4); and
- "With regard to the offer of Armenia, the text relating to Armenia's offer that could be found on page 38 of document GPA/W/316 of 27 March 2012 under the heading "Final Appendix I Offer of the Republic of Armenia" would be replaced by the updated offer that had just been circulated, in document GPA/O/RFO/ARM/1 of 30 March 2012." (GPA/M/46, para. 5).

<sup>740</sup> GPA/M/55, paras. 2.1 and 2.2. On 12 March 2014, the Chair noted that the deposit by Israel of its instrument of acceptance brought to ten the total number of such instruments that had been deposited. It was his understanding that, in light of the acceptance by Israel, the condition set out in paragraph 3 of the Protocol Amending the Agreement on Government Procurement had been fulfilled, and the Protocol would accordingly enter into force on 6 April 2014. The Committee took note of this development. The instruments of acceptance deposited by that time were, in chronological order: Liechtenstein (WT/Let/883); Norway (WT/Let/912); Canada (WT/Let/913); Chinese Taipei (WT/Let/914); the United States (WT/Let/915); Hong Kong, China (WT/Let/916); the European Union (WT/Let/917); Iceland (WT/Let/933); Singapore (WT/Let/934); and Israel (WT/Let/935).

<sup>741</sup> These were Japan (WT/Let/936); the Kingdom of the Netherlands with respect to Aruba (WT/Let/945) and Armenia (WT/Let/1039). Korea and Switzerland have still to submit their instruments of acceptance.

<sup>742</sup> GPA/115.

adopted a decision on the terms of New Zealand's accession to the Agreement.<sup>743</sup> New Zealand will become a Party to the Agreement on the thirtieth day following the date on which its instrument of accession, reproducing the terms that have been agreed, has been received by the Director-General.<sup>744</sup>

486. On 9 August 2013, Panama announced its decision not to pursue its negotiations on accession to the GPA.<sup>745</sup>

487. On 4 October 2013, Montenegro applied for accession to the Agreement on Government Procurement.<sup>746</sup> On 29 October 2014, the Committee on Government Procurement adopted a decision on the terms of Montenegro's accession to the Agreement.<sup>747</sup> On 5 June 2015, Montenegro submitted its instrument of accession, reproducing the terms that were agreed, to the Director-General. The Agreement enters into force on the thirtieth day following the date on which such an instrument has been received.

488. On 10 February 2015, Tajikistan applied for accession to the Agreement on Government Procurement.<sup>748</sup> Tajikistan has been an observer in the Committee on Government Procurement since 25 June 2014.<sup>749</sup>

489. On 2 June 2015, Australia applied for accession to the Agreement on Government Procurement.<sup>750</sup> Australia has been an observer in the Committee on Government Procurement since 4 June 1996.<sup>751</sup>

490. The Committee on Government Procurement approved the following requests for observer status:

- the observer request by Malaysia<sup>752</sup> on 18 July 2012<sup>753</sup>;
- the observer requests by the Indonesia<sup>754</sup> and Montenegro<sup>755</sup> on 31 October 2012<sup>756</sup>;
- the observer request by Viet Nam<sup>757</sup> on 5 December 2012;<sup>758</sup>
- the observer request by the Russian Federation<sup>759</sup> on 29 May 2013<sup>760</sup>;
- the observer request by the Former Yugoslav Republic of Macedonia<sup>761</sup> on 27 June 2013<sup>762</sup>;

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<sup>743</sup> GPA/125.

<sup>744</sup> GPA/125, para. 2.

<sup>745</sup> GPA/ACC/PAN/1.

<sup>746</sup> GPA/120.

<sup>747</sup> GPA/124.

<sup>748</sup> GPA/127.

<sup>749</sup> GPA/M/56, para. 1.2.

<sup>750</sup> GPA/129.

<sup>751</sup> GPA/M/2, para. 3.

<sup>752</sup> GPA/W/318.

<sup>753</sup> GPA/M/47, para. 13.

<sup>754</sup> GPA/W/320.

<sup>755</sup> GPA/W/319.

<sup>756</sup> GPA/M/48, para. 5.

<sup>757</sup> GPA/W/321.

<sup>758</sup> GPA/M/49, para. 6.

<sup>759</sup> GPA/W/322.

<sup>760</sup> GPA/M/51, para. 1.2.

<sup>761</sup> GPA/W/323.



- the observer request by Tajikistan<sup>763</sup> on 25 June 2014<sup>764</sup>;
- the observer request by Pakistan<sup>765</sup> on 11 February 2015;<sup>766</sup>
- the observer request Costa Rica<sup>767</sup> on 3 June 2015;<sup>768</sup> and
- the observer request by Thailand<sup>769</sup> on 3 June 2015.<sup>770</sup>

(c) Modifications to GPA coverage schedules

491. The Director-General as depositary certified the following modifications and rectifications to individual Members' GPA schedules:

- modifications to pages 1/5 and 3/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 5 October 2011, certified on 10 October 2011<sup>771</sup>;
- modifications to page 2/5 of Annex 1 to Appendix I of the United States pursuant to Article XXIV:6(a) of the 1994 GPA, effective 16 December 2011, certified on 19 December 2011<sup>772</sup>;
- modifications to pages 3/5 and 5/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 8 January 2012, certified on 12 January 2012<sup>773</sup>;
- modifications to page 1/3 of Annex 1 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 15 March 2012, certified on 19 March 2012<sup>774</sup>;
- modifications to pages 2/5 and 4/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 8 April 2012, certified on 15 April 2012<sup>775</sup>;
- modifications to pages 1/5 and 3/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 13 June 2012, certified on 20 June 2012<sup>776</sup>;
- modifications to pages 1/3 of Annex 1 to Appendix I of Singapore pursuant to Article XXIV:6(a) of the 1994 GPA, effective 20 December 2012, certified on 11 January 2013<sup>777</sup>;

<sup>762</sup> GPA/M/52, para. 2.2

<sup>763</sup> GPA/W/329 and GPA/W/329/Corr.1.

<sup>764</sup> GPA/M/56, para. 1.2.

<sup>765</sup> GPA/W/330.

<sup>766</sup> GPA/M/59, para. 1.2.

<sup>767</sup> GPA/W/331.

<sup>768</sup> GPA/M/60.

<sup>769</sup> GPA/W/332.

<sup>770</sup> GPA/M/60.

<sup>771</sup> WT/Let/829.

<sup>772</sup> WT/Let/844.

<sup>773</sup> WT/Let/845.

<sup>774</sup> WT/Let/846.

<sup>775</sup> WT/Let/851.

<sup>776</sup> WT/Let/859.

<sup>777</sup> WT/Let/873.

- modifications to pages 1/3 and 2/3 of Annex 1 and to pages 1/5 to 5/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 18 January 2013, certified on 29 January 2013<sup>778</sup>;
- modifications to pages 1/4 and 2/4 of Annex 1 to Appendix I of Korea pursuant to Article XXIV:6(a) of the 1994 GPA, effective 22 September 2013, certified on 21 October 2013<sup>779</sup>;
- modifications to pages 2/5 and 3/5 of Annex 1 to Appendix I of the United States pursuant to Article XXIV:6(a) of the 1994 GPA, effective 8 January 2014, certified on 16 January 2014<sup>780</sup>;
- modifications to pages 1/3 and 2/3 of Annex 1 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 16 March 2014, certified on 21 March 2014<sup>781</sup>;
- Modifications to pages 1/2 and 2/2 of Annex 1 to Appendix I of Hong Kong, China pursuant to Article XXIV:6(a) of the 1994 GPA, effective 23 March 2014, certified on 27 March 2014<sup>782</sup>;
- Modifications to page 1/2 of Annex 1 to Appendix I of Israel pursuant to Article XXIV:6(a) of the 1994 GPA, effective 11 May 2014, certified on 14 May 2014<sup>783</sup>;
- modifications to Annexes 1 to 7 of Appendix I of Hong Kong, China pursuant to Article XIX:1 of the revised GPA, effective 26 May 2014, certified on 18 June 2014<sup>784</sup>;
- modifications to Annexes 1 to 7 of Appendix I, including its note, of Israel pursuant to Article XIX:1 of the revised GPA, effective 26 May 2014, certified on 18 June 2014<sup>785</sup>;
- modifications to Annexes 1 to 7 of Appendix I of Liechtenstein pursuant to Article XIX:1 of the revised GPA, effective 26 May 2014, certified on 18 June 2014<sup>786</sup>;
- modifications to Annexes 1 to 7 of Appendix I of the United States pursuant to Article XIX:1 of the revised GPA, effective 7 June 2014, certified on 20 June 2014<sup>787</sup>;
- modifications to Annexes 1 to 7 of Appendix I of Singapore pursuant to Article XIX:1 of the revised GPA, effective 9 June 2014, certified on 20 June 2014<sup>788</sup>;
- modifications to Annexes 1 to 7 of Appendix I of the Japan pursuant to Article XIX:1 of the revised GPA, effective 12 June 2014, certified on 20 June 2014<sup>789</sup>;

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<sup>778</sup> WT/Let/877 and WT/Let/877/Corr.1

<sup>779</sup> WT/Let/909.

<sup>780</sup> WT/Let/919.

<sup>781</sup> WT/Let/939.

<sup>782</sup> WT/Let/940.

<sup>783</sup> WT/Let/942

<sup>784</sup> WT/Let/946.

<sup>785</sup> WT/Let/947 and WT/Let/947/Corr.1.

<sup>786</sup> WT/Let/948.

<sup>787</sup> WT/Let/950.

<sup>788</sup> WT/Let/951 and WT/Let/951/Corr.1.

<sup>789</sup> WT/Let/952.

- modifications to Annexes 1 to 7 of Appendix I of Canada pursuant to Article XIX:1 of the revised GPA, effective 23 June 2014, certified on 30 June 2014<sup>790</sup>;
- modifications to pages 3/5 and 5/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 25 June 2014, certified on 11 July 2014<sup>791</sup>;
- modifications to Annexes 1 to 7 of Appendix I of the European Union pursuant to Article XIX:1 of the revised GPA, effective 7 July 2014, certified on 18 July 2014<sup>792</sup>;
- modifications to Annexes 1 to 7 of Appendix I of Chinese Taipei pursuant to Article XIX:1 of the revised GPA, effective 10 July 2014, certified on 18 July 2014<sup>793</sup>;
- modifications to pages 2/4 and 3/4 of Annex 3 to Appendix I of Japan pursuant to Article XIX:1 of the revised GPA, effective 4 August 2014, certified on 1 September 2014<sup>794</sup>;
- modifications to Annexes 1 to 7 of Appendix I of the Kingdom of the Netherlands with respect to Aruba pursuant to Article XIX:1 of the revised GPA, effective 21 August 2014, certified on 2 September 2014<sup>795</sup>;
- modifications to Annexes 1 to 7 of Appendix I of Iceland pursuant to Article XIX:1 of the revised GPA, effective 28 August 2014, certified on 5 September 2014<sup>796</sup>;
- modifications to pages 1/5 and 3/5 of Annex 3 to Appendix I of Japan pursuant to Article XXIV:6(a) of the 1994 GPA, effective 28 October 2014, certified on 13 November 2014<sup>797</sup>; and
- modifications to Annexes 1 to 7 of Appendix I of Norway pursuant to Article XIX:1 of the revised GPA, effective 18 December 2014, certified on 7 January 2015.<sup>798</sup>

492. On 27 June 2013, the Committee on Government Procurement adopted a decision<sup>799</sup> approving a modification to the European Union's GPA schedules to extend the coverage of the Agreement on Government Procurement to Croatia effective 1 July 2013, the date of Croatia's EU accession.<sup>800</sup>

## 2. Agreement on Trade in Civil Aircraft

### (a) Accession of Montenegro

493. In its accession working party report, which was incorporated by reference into its WTO accession protocol, Montenegro committed to "becom[ing] a signatory to the WTO Agreement

<sup>790</sup> WT/Let/954.

<sup>791</sup> WT/Let/962.

<sup>792</sup> WT/Let/977.

<sup>793</sup> WT/Let/978.

<sup>794</sup> WT/Let/981.

<sup>795</sup> WT/Let/982.

<sup>796</sup> WT/Let/985.

<sup>797</sup> WT/Let/1000. In the formal meeting held on 29 October 2014, the representatives of the European Union and Japan noted that this would also fulfil the purpose set out in Note 5 to Appendix I, Annex 3 of Japan under the revised Agreement. The Committee took note of this development. GPA/M/57, paras. 3.1-3.7.

<sup>798</sup> WT/Let//1026.

<sup>799</sup> GPA/118.

<sup>800</sup> GPA/M/52, para. 3.3. See also WT/Let/887.

on Trade in Civil Aircraft, without exemptions or transitional periods, from the date of accession to the WTO."<sup>801</sup>

494. Following deposit of an instrument of accession, on 10 November 2012 Montenegro acceded to the Agreement on Trade in Civil Aircraft, done at Geneva on 12 April 1979, as subsequently modified, rectified or amended. At the same time, Montenegro also explicitly accepted Protocol Amending the Annex to the Agreement on Trade in Civil Aircraft, done at Geneva on 6 June 2001.<sup>802</sup>

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<sup>801</sup> WT/ACC/CGR/38 and WT/MIN(11)/7, para. 193.

<sup>802</sup> WT/Let/865.