



## Dispute settlement

- > In 2014, the Dispute Settlement Body received 14 requests for consultations – the first stage in the dispute settlement process – and established 13 new panels.
- > A dispute about Australia's tobacco plain packaging requirements is the largest dispute ever brought before the dispute settlement system in terms of member participation.
- > In September, a new member – Shree Baboo Chekitan Servansing of Mauritius – was appointed to the seven-member Appellate Body for a four-year term.

Dispute settlement activity in 2014	92
Appellate Body	103

#### Background on implementation and monitoring

WTO members bring disputes to the WTO if they think their rights under trade agreements are being infringed. Settling disputes is the responsibility of the Dispute Settlement Body.

# Dispute settlement activity in 2014

**Dispute settlement had one of its most active years in 2014 since the inception of the WTO in 1995, with 34 active panel, compliance and arbitration proceedings and six appeals. A highly anticipated dispute against Australia's tobacco plain packaging requirements got under way. The Dispute Settlement Body (DSB), which met 14 times, received 14 requests for consultations – the first stage in the dispute settlement process – and established 13 panels.**

The upsurge in dispute settlement activity continued to present challenges for the three dispute settlement divisions (Legal Affairs Division, Rules Division and the Appellate Body Secretariat) as well as for translation services. In response, the Director-General reallocated resources within the WTO Secretariat to provide 15 additional posts to support these divisions. This has gone some way towards relieving the burden posed by the increase in dispute settlement proceedings.

## ➤ Overview of dispute settlement activity

During 2014, the DSB received 14 requests for consultations. Although the number of requests was less than in the previous two years (27 and 20, respectively – see Figure 1), this did not reduce the workload because WTO adjudicating bodies were dealing with a significant number of disputes that had started in previous years. In addition to the new matters, 40 active disputes were already proceeding through adjudication, whether before the Appellate Body, panels or in arbitration. The DSB established 13 new panels in 2014 (see Figure 1).

Requests for compliance panels (whereby WTO members challenge measures taken to comply with previous rulings) increased in 2014. The DSB referred three requests for compliance panels (see below) back to the panels that had originally adjudicated the disputes. This was in addition to the two large civil aircraft compliance panels (involving Airbus and Boeing), where proceedings were already under way prior to 2014.

In 2014, the DSB adopted nine panel reports covering five distinct matters and seven Appellate Body reports covering four distinct matters. The panels and the Appellate Body issued reports in disputes concerning: Chinese export restrictions on rare earths, which are materials used in a host of applications from cameras to aerospace, brought by the European Union, Japan and the United States; an EU measure regulating the importation and sale of seal products in a dispute brought by Canada and Norway; countervailing and anti-dumping measures imposed by the United

States on certain Chinese products, brought by China; and countervailing measures imposed by the United States on certain hot-rolled carbon steel flat products from India, brought by India. A panel report was issued in a dispute concerning anti-dumping and countervailing duties imposed by China on certain US automobiles, which was not appealed.

Five WTO members are challenging Australia's plain packaging requirements for tobacco products and 41 members have registered their interest in participating in the dispute as third parties, making it the largest dispute ever brought before the dispute settlement system in terms of member participation.

During the second half of 2014, parties in four disputes informed the DSB that they had settled their pending disputes and that a panel was no longer required (see page 98 and 100).

## Background on dispute settlement activity

The General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes between WTO members. Such disputes may arise with respect to any agreement contained in the Final Act of the Uruguay Round that is subject to the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB has authority to establish dispute settlement panels, refer matters to arbitration, adopt panel, Appellate Body and arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and authorize suspension of concessions in the event of non-compliance with those recommendations and rulings.

**Table 1: WTO members involved in disputes, 1995 to 2014**

Member	Complainant	Respondent	Member	Complainant	Respondent
Antigua and Barbuda	1	0	Korea, Republic of	17	14
Argentina	20	22	Malaysia	1	1
Armenia	0	1	Mexico	23	14
Australia	7	15	Moldova, Republic of	1	1
Bangladesh	1	0	Netherlands	0	3
Belgium	0	3	New Zealand	9	0
Brazil	27	15	Nicaragua	1	2
Canada	34	18	Norway	4	0
Chile	10	13	Pakistan	4	3
China	12	32	Panama	7	1
Colombia	5	4	Peru	3	5
Costa Rica	5	0	Philippines	5	6
Croatia	0	1	Poland	3	1
Cuba	1	0	Portugal	0	1
Czech Republic	1	2	Romania	0	2
Denmark	1	1	Russia	2	5
Dominican Republic	1	7	Singapore	1	0
Ecuador	3	3	Slovak Republic	0	3
Egypt	0	4	South Africa	0	4
El Salvador	1	0	Spain	0	3
European Union (formerly EC)	95	80	Sri Lanka	1	0
France	0	4	Sweden	0	1
Germany	0	2	Switzerland	4	0
Greece	0	3	Chinese Taipei	4	0
Guatemala	9	2	Thailand	13	3
Honduras	8	0	Trinidad and Tobago	0	2
Hong Kong, China	1	0	Turkey	2	9
Hungary	5	2	Ukraine	3	2
India	21	22	United Kingdom	0	3
Indonesia	8	11	United States	107	122
Ireland	0	3	Uruguay	1	1
Italy	0	1	Venezuela, Bolivarian Republic of	1	2
Japan	19	15	Viet Nam	2	0

## > Which members were active in 2014?

Developing countries initiated five of the 14 new requests for consultations filed in 2014, compared with nine requests initiated by developed countries. These figures were reversed for respondents: nine of the respondents were developed country members and five developing country members.

Among the developing countries initiating disputes was Brazil, which along with New Zealand and the United States, requested consultations with Indonesia on importation of chicken, horticultural and other products. Indonesia initiated consultations with the European Union regarding EU anti-dumping duties on Indonesian

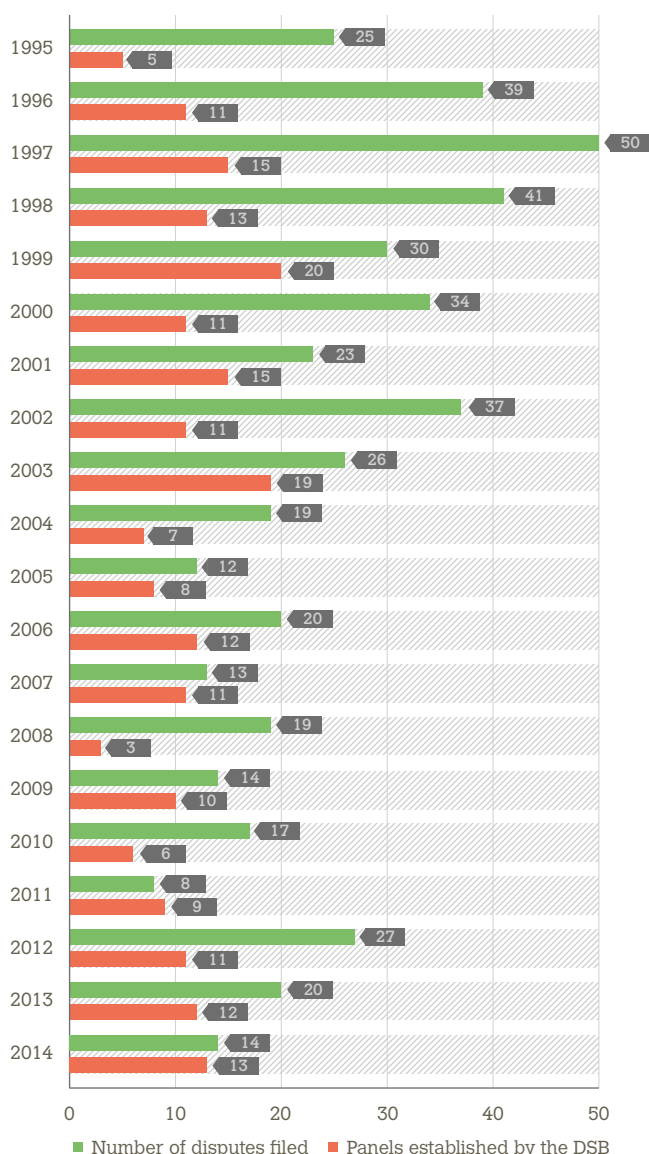
biodiesel. Chinese Taipei initiated dispute settlement proceedings for the fourth time only since becoming a member in 2002 when it requested consultations with Canada regarding anti-dumping duties on steel products. Tables 1 and 2 provide further information on the complainants and respondents involved in disputes.

Among developed countries, the European Union was the most active member, initiating five disputes, including three with Russia. Canada, the United States and New Zealand each initiated one dispute and Russia requested consultations with the European Union on certain measures related to the EU energy sector.

**Table 2: Requests for consultations in 2014**

Title of dispute	Dispute number	Complainant	Date of initial request	WTO agreements cited	Status as of 31 December 2014
United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea	WT/DS488	Republic of Korea	22 December 2014	General Agreement on Tariffs and Trade (GATT) 1994 Anti-Dumping Agreement (ADP)	In consultations
United States – Conditional Tax Incentives for Large Civil Aircraft	WT/DS487	European Union	19 December 2014	Agreement on Subsidies and Countervailing Measures (SCM)	In consultations
European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan	WT/DS486	Pakistan	28 October 2014	GATT 1994 SCM	In consultations
Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products	WT/DS485	European Union	31 October 2014	GATT 1994 Agreement on Implementation of Article VII (Customs Valuation)	In consultations
Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products	WT/DS484	Brazil	16 October 2014	GATT 1994 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) Agreement on Technical Barriers to Trade (TBT) Agreement on Import Licensing Procedures Agreement on Preshipment Inspection (PSI)	In consultations
China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada	WT/DS483	Canada	15 October 2014	GATT 1994 ADP	In consultations
Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	WT/DS482	Chinese Taipei	25 June 2014	GATT 1994 ADP	In consultations
Indonesia – Recourse to Article 22.2 of the DSU in the US – Clove Cigarettes Dispute	WT/DS481	European Union	13 June 2014	Dispute Settlement Understanding (DSU)	In consultations
EU – Anti-Dumping Measures on Biodiesel from Indonesia	WT/DS480	Indonesia	10 June 2014	GATT 1994 ADP Agreement Establishing the World Trade Organization (WTO)	In consultations
Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy	WT/DS479	European Union	21 May 2014	GATT 1994 ADP	Panel work has commenced
Indonesia – Importation of Horticultural Products, Animals and Animal Products	WT/DS478	United States	8 May 2014	GATT 1994 Agreement on Agriculture Import Licensing PSI	In consultations
Indonesia – Importation of Horticultural Products, Animals and Animal Products	WT/DS477	New Zealand	8 May 2014	GATT 1994 Agreement on Agriculture Import Licensing PSI	In consultations
European Union and its Member States – Certain Measures Relating to the Energy Sector	WT/DS476	Russia	30 April 2014	GATT 1994 General Agreement on Trade in Services (GATS) SCM Trade-Related Investment Measures (TRIMs) WTO	In consultations
Russian Federation – Measures on the Importation of Live Pigs, Pork and other Pig Products from the European Union	WT/DS475	European Union	8 April 2014	GATT 1994 SPS	Panel work has commenced

**Figure 1: Disputes filed by WTO members, and panels established by the DSB, 1995 to 2014**



As for on-going disputes, only seven of the 41 third parties participating in the tobacco plain packaging dispute are developed countries. There is also strong participation by developing country members as complainants, respondents and third parties in other on-going disputes (see Table 3). All panel and Appellate Body reports, bar one, issued in original proceedings in 2014 involved a developing country as either complainant or respondent. Even in the one dispute where this was not the case, "EC – Seal Products", there was strong participation by developing countries as third parties (see Table 4).

Figure 2 shows the variety of WTO agreements raised in disputes initiated in 2014 and the number of times an agreement has been referred to in requests for consultations since 1995. All but two of the disputes raised in 2014 included challenges under the General

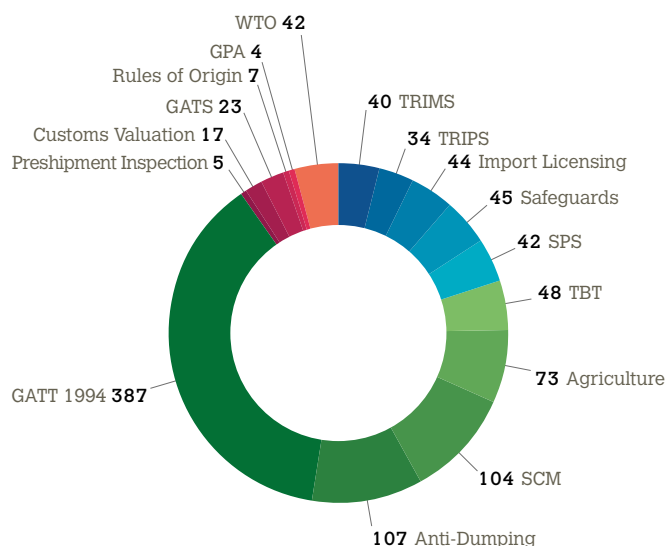
Agreement on Tariffs and Trade (GATT) 1994. Since 1995, 387 of the 488 requests for consultations have included a claim under this agreement. Disputes under the Subsidies and Countervailing Measures (SCM) Agreement and the Anti-Dumping (ADP) Agreement have been more frequent than disputes under other agreements.

## > Subject matter of the disputes

WTO members continue to litigate in many different trade areas (see Figure 2). Current disputes include three complaints concerning measures imposed by Indonesia on horticultural, agricultural, chicken and chicken meat products; one concerning measures imposed by Russia on EU pigs and pork; and another complaint against Russia concerning measures related to its energy sector. Following on from the Boeing and Airbus large civil aircraft complaints, the European Union has initiated another complaint concerning alleged tax incentives provided to Boeing.

As of the end of 2014, the Appellate Body was considering appeals related to measures imposed by Argentina on the import of goods (see below) and to US requirements on the mandatory country of origin labelling for certain beef and pork products. This latter dispute is a compliance proceeding brought by Canada and Mexico, which are challenging US measures taken to comply with the DSB's rulings and recommendation in the original "US – COOL" country of origin labelling dispute for meat products.

**Figure 2: WTO agreements referred to in requests for consultations, 1995-2014 (number of times)**



## > A sharp increase in panels during 2014

Dispute settlement was very active in 2014 as WTO adjudicating bodies considered disputes arising from the recent record number of requests for consultations received in the previous two years (see Table 3).

**Table 3: Active appeals and panels as of 31 December 2014**

Dispute number	Title of dispute	Complainant	Third parties	Date of panel composition or appeal	Agreements cited
WT/DS438	Argentina – Import Measures	European Union	Australia, Canada, China, Ecuador, Guatemala, India, Israel, Japan, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey, United States	Appeal filed 26 September 2014	Agreement on Agriculture General Agreement on Tariffs and Trade (GATT) 1994 Import Licensing Agreement Safeguards Agreement Agreement on Trade Related Aspects of Investment Measures (TRIMs)
WT/DS444	Argentina – Import Measures	United States	Australia, Canada, China, Ecuador, European Union, Guatemala, India, Israel, Japan, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey	Appeal filed 26 September 2014	Agreement on Agriculture GATT 1994 Import Licensing Agreement Safeguards Agreement TRIMs
WT/DS445	Argentina – Import Measures	Japan	Australia, Canada, China, Ecuador, European Union, Guatemala, India, Israel, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey, United States	Appeal filed 26 September 2014	Agreement on Agriculture GATT 1994 Import Licensing Agreement Safeguards Agreement TRIMs Agreement
WT/DS384	US – COOL (Article 21.5 – Canada)	Canada	Australia, Brazil, China, Colombia, European Union, Guatemala, India, Japan, Korea, Mexico, New Zealand	Appeal filed 28 November 2014	GATT 1994 Technical Barriers to Trade (TBT) Agreement
WT/DS386	US – COOL (Article 21.5 – Mexico)	Mexico	Australia, Brazil, Canada, China, Colombia, European Union, Guatemala, India, Japan, Korea, New Zealand	Appeal filed 28 November 2014	GATT 1994 TBT
WT/DS474	EU – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia	Russia	Argentina, Australia, Brazil, Canada, China, Indonesia, Mexico, Norway, Saudi Arabia, Turkey, Ukraine, United States	23 December 2013 22 July 2014 – panel established	GATT 1994 Anti-Dumping Agreement (ADP) Agreement on Subsidies and Countervailing Measures (SCM) Agreement Establishing the World Trade Organization (WTO)
WT/DS473	EU – Anti-Dumping Measures on Biodiesel from Argentina	Argentina	Australia, China, Colombia, Indonesia, Malaysia, Mexico, Norway, Russia, Saudi Arabia, Turkey, United States	23 June 2014	GATT 1994 ADP WTO
WT/DS472	Brazil – Certain Measures Concerning Taxation and Charges	European Union	Argentina, Australia, Canada, China, Colombia, India, Japan, Korea, Russia, South Africa, Chinese Taipei, Turkey, United States	19 December 2013 17 December 2014 – panel established	GATT 1994 SCM TRIMs
WT/DS471	US – Certain Methodologies and their Application to Anti-Dumping Proceedings involving China	China	Brazil, Canada, European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Chinese Taipei, Turkey, Ukraine, Viet Nam	28 August 2014	GATT 1994 ADP
WT/DS468	Ukraine – Definitive Safeguard Measures on Certain Passenger Cars	Japan	Australia, European Union, India, Korea, Russia, Turkey, United States	20 June 2014	GATT 1994 Safeguards Agreement
WT/DS467	Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging	Indonesia	Argentina, Brazil, Canada, Chile, China, Cuba, Dominican Republic, European Union, Guatemala, Honduras, India, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, United States, Uruguay, Zimbabwe	5 May 2014	GATT 1994 TBT Trade-related Aspects of Intellectual Property Rights (TRIPS)



Dispute number	Title of dispute	Complainant	Third parties	Date of panel composition or appeal	Agreements cited
WT/DS458	Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging	Cuba	Argentina, Brazil, Canada, Chile, China, Dominican Republic, European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Peru, Philippines, Russia, Saudi Arabia, South Africa, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, United States, Uruguay, Zimbabwe	5 May 2014	GATT 1994 TBT TRIPS
WT/DS441	Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging	Dominican Republic	Argentina, Brazil, Canada, Chile, China, Cuba, European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Peru, Philippines, Russia, Saudi Arabia, Singapore, South Africa, Chinese Taipei, Thailand, Trinidad and Tobago, Turkey, Ukraine, United States, Uruguay, Zimbabwe	5 May 2014	GATT 1994 TRIPS TBT
WT/DS435	Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging	Honduras	Argentina, Brazil, Canada, Chile, China, Cuba, Dominican Republic, European Union, Guatemala, India, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, Philippines, Singapore, South Africa, Chinese Taipei, Thailand, Turkey, Ukraine, United States, Uruguay, Zambia, Zimbabwe	5 May 2014	GATT 1994 TRIPS TBT
WT/DS434	Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements applicable to Tobacco Products and Packaging	Ukraine	Argentina, Brazil, Canada, Chile, China, Cuba, Dominican Republic, Ecuador, Egypt, European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, Moldova, New Zealand, Nicaragua, Nigeria, Norway, Oman, Peru, Philippines, Singapore, Chinese Taipei, Thailand, Turkey, United States, Uruguay, Zambia, Zimbabwe	5 May 2014	GATT 1994 TRIPS TBT
WT/DS460	China – Measures Imposing Anti-Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union	European Union	India, Japan, Korea, Russia, Saudi Arabia, Turkey, United States	11 September 2013	GATT 1994 ADP
WT/DS454	China – Measures Imposing Anti-Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan	Japan	European Union, India, Korea, Russia, Saudi Arabia, Turkey, United States	29 July 2013	GATT 1994 ADP
WT/DS461	Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear	Panama	China, Ecuador, El Salvador, European Union, Guatemala, Honduras, Philippines, United States	15 January 2014	GATT 1994
WT/DS456	India – Certain Measures Relating to Solar Cells and Solar Modules	United States	Brazil, Canada, China, Ecuador, European Union, Japan, Korea, Malaysia, Norway, Russia, Saudi Arabia, Chinese Taipei, Turkey	24 September 2014	GATT 1994 TRIMs SCM
WT/DS447	US – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina	Argentina	Australia, Brazil, China, European Union, India, Korea	8 August 2013	GATT 1994 Sanitary and Phytosanitary (SPS) Measures Agreement WTO



Dispute number	Title of dispute	Complainant	Third parties	Date of panel composition or appeal	Agreements cited
WT/DS453	Argentina – Measures Relating to Trade in Goods and Services	Panama	Australia, Brazil, China, Ecuador, European Union, Guatemala, Honduras, India, Oman, Saudi Arabia, Singapore, United States	11 November 2013	GATT 1994 General Agreement on Trade in Services (GATS)
WT/DS414 Article 21.5	China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States	United States	European Union, India, Japan, Russia	26 February 2014	ADP SCM GATT 1994
WT/DS397 Article 21.5	European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China	China	Japan, United States	27 March 2014	ADP GATT 1994
WT/DS381 Article 21.5	United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products	Mexico	Australia, Canada, China, European Union, Guatemala, Japan, Korea, New Zealand, Norway, Thailand	27 January 2014	TBT GATT 1994
WT/DS353 Article 21.5	United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)	EC	Australia, Brazil, Canada, China, Japan, Korea, Russia	30 October 2012	SCM
WT/DS316 Article 21.5	European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft	United States	Australia, Brazil, Canada, China, Japan, Korea	17 April 2012	SCM

Nine panels circulated reports covering 13 different complaints. The Legal Affairs Division assisted with nine disputes (relating to four separate matters). The other five panels (relating to five separate disputes) addressed the area of trade remedies and were assisted by the Rules Division (see page 100).

Aside from the panels where reports were adopted or circulated, the Legal Affairs Division and Rules Division continued to assist panellists with 12 other disputes. The Legal Affairs Division assisted with ten complaints covering six separate matters and the Rules Division provided assistance to panellists in six panels covering six separate matters. This is in addition to five on-going compliance proceedings, which involve lawyers from both divisions.

### › Reports circulated or adopted by the DSB

As of 31 December 2014, nine panel reports had been circulated during the year, of which five had been appealed. Three panel reports are pending either appeal to the Appellate Body or adoption by the DSB, and one panel report was adopted by the DSB without being appealed. Of the nine reports circulated, five were in the area of trade remedies (safeguards, anti-dumping etc.), highlighting the increasing number of disputes in this area (see Table 4).

### › Compliance panel and arbitration work

As the recent increased dispute activity moves through panel and Appellate Body proceedings, it is likely that compliance proceedings will also increase.

New compliance proceedings in 2014 concerned the US complaint regarding Chinese countervailing and anti-dumping duties on US grain oriented flat-rolled electrical steel, China's complaint about anti-dumping measures imposed by the European Union on Chinese iron or steel fasteners, and Mexico's complaint regarding US measures that affected the importation, marketing and sale of tuna and tuna products. Mexico is also challenging, along with Canada, US compliance measures on labelling requirements for meat products (see above). The compliance panel issued its report in October 2014 and these two members are now challenging certain aspects of the compliance panel's findings before the Appellate Body.

### › Settled complaints

In August 2014, the parties in the dispute "EU – Herring", regarding a complaint by the Faroe Islands over imports of certain fish stocks, informed the DSB that "the matter raised ... is settled".

**Table 4 : Reports circulated or adopted in 2014**

Dispute	Document number	Complainant	Respondent	Third parties	WTO agreements covered <sup>1</sup>	Date of adoption by DSB
EC – Seal Products	WT/DS400/R WT/DS400/AB/R	Canada	European Union	Argentina, China, Colombia, Ecuador, Iceland, Japan, Mexico, Norway, Russia, United States	Agreement on Agriculture General Agreement on Tariffs and Trade (GATT) 1994 Technical Barriers to Trade (TBT) Agreement	18 June 2014
EC – Seal Products	WT/DS401/R WT/DS401/AB/R	Norway	European Union	Argentina, Canada, China, Colombia, Ecuador, Iceland, Japan, Mexico, Namibia, United States	Agreement on Agriculture GATT 1994 TBT	18 June 2014
China – Autos (US)	WT/DS440/R	United States	China	Colombia, European Union, India, Japan, Korea, Oman, Saudi Arabia, Turkey	Anti-Dumping Agreement (ADP) GATT 1994 Subsidies and Countervailing Measures (SCM) Agreement	18 June 2014
US – Countervailing and Anti-Dumping Measures (China)	WT/DS449/R WT/DS449/AB/R	China	United States	Australia, Canada, European Union, India, Japan, Russia, Turkey, Viet Nam	ADP GATT 1994 SCM [Dispute Settlement Understanding <sup>2</sup> ]	22 July 2014
China – Rare Earths	WT/DS431/R WT/DS431/AB/R	United States	China	Argentina, Australia, Brazil, Canada, Colombia, European Union, India, Indonesia, Japan, Korea, Norway, Oman, Peru, Russia, Saudi Arabia, Chinese Taipei, Turkey, Viet Nam	GATT 1994 China's Protocol of Accession [WTO Agreement <sup>2</sup> ] [DSU <sup>2</sup> ]	29 August 2014
China – Rare Earths	WT/DS432/R WT/DS432/AB/R	European Union	China	Argentina, Australia, Brazil, Canada, Colombia, India, Indonesia, Japan, Korea, Norway, Oman, Peru, Russia, Saudi Arabia, Chinese Taipei, Turkey, United States, Viet Nam	GATT 1994 China's Protocol of Accession [WTO Agreement <sup>2</sup> ] [DSU <sup>2</sup> ]	29 August 2014
China – Rare Earths	WT/DS433/R WT/DS433/AB/R	Japan	China	Argentina, Australia, Brazil, Canada, Colombia, European Union, India, Indonesia, Korea, Norway, Oman, Peru, Russia, Saudi Arabia, Chinese Taipei, Turkey, United States, Viet Nam	GATT 1994 China's Protocol of Accession [WTO Agreement <sup>2</sup> ] [DSU <sup>2</sup> ]	29 August 2014
US – Carbon Steel (India)	WT/DS436/R WT/DS436/AB/R	India	United States	Australia, Canada, China, European Union, Saudi Arabia, Turkey	GATT 1994 SCM WTO Agreement [DSU <sup>2</sup> ]	19 December 2014
US – Countervailing Measures (China)	WT/DS437/R WT/DS437/AB/R	China	United States	Australia, Brazil, Canada, European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Turkey, Viet Nam	GATT 1994 SCM China's Protocol of Accession [DSU <sup>2</sup> ]	Panel report circulated 14 July 2014 Appellate Body report circulated 18 December 2014
Argentina – Import Measures	WT/DS438/R	European Union	Argentina	Australia, Canada, China, Ecuador, Guatemala, India, Israel, Japan, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey, United States	Agreement on Agriculture GATT 1994 Import Licensing Agreement Safeguards Agreement Trade-related Investment Measures (TRIMs) Agreement	Panel report circulated 22 August 2014 [Appeal filed 26 September 2014]

Dispute	Document number	Complainant	Respondent	Third parties	WTO agreements covered <sup>1</sup>	Date of adoption by DSB
Argentina – Import Measures	WT/DS444/R	United States	Argentina	Australia, Canada, China, Ecuador, European Union, Guatemala, India, Israel, Japan, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey	Agreement on Agriculture GATT 1994 Import Licensing Agreement Safeguards Agreement TRIMs	Panel report circulated 22 August 2014 [Appeal filed 26 September 2014]
Argentina – Import Measures	WT/DS445/R	Japan	Argentina	Australia, Canada, China, Ecuador, European Union, Guatemala, India, Israel, Korea, Norway, Saudi Arabia, Switzerland, Chinese Taipei, Thailand, Turkey, United States	Agreement on Agriculture GATT 1994 Import Licensing Agreement Safeguards Agreement TRIMs	Panel report circulated 22 August 2014 [Appeal filed 26 September 2014]
US – Shrimp II (Viet Nam)	WT/DS429/R	Viet Nam	United States	China, Ecuador, European Union, Japan, Norway, Thailand	ADP DSU GATT 1994 WTO Agreement	Panel report circulated 17 January 2014 [Appeal expected January 2015]
India – Agricultural Products	WT/DS430/R	United States	India	Argentina, Australia, Brazil, China, Colombia, Ecuador, European Union, Guatemala, Japan, Viet Nam	GATT 1994 SPS	Panel report circulated 14 October 2014
Peru – Agricultural Products	WT/DS457/R	Guatemala	Peru	Argentina, Brazil, China, Colombia, Ecuador, El Salvador, European Union, Honduras, India, Korea, United States	Agreement on Agriculture Customs Valuation Agreement GATT 1994	Panel report circulated 27 November 2014

<sup>1</sup> As indicated in the request for consultations.

<sup>2</sup> In appellate proceedings only.

In October 2014, Indonesia and the United States informed the DSB that they had reached a mutually agreed solution in their dispute concerning clove cigarettes, which involved a ban on certain flavoured cigarettes. Also in October 2014, Brazil and the United States informed the DSB that they had achieved an agreed solution in their dispute concerning subsidies on US upland cotton.

In December 2014, Canada informed the DSB that it formally withdrew the complaint it had initiated against the European Union concerning the treatment accorded to Canadian seal products as the measures at issue had been repealed. Later complaints initiated by Canada and Norway, also concerning EU measures on seal products, progressed through the dispute settlement system with an Appellate Body report issued in 2014.

## > Themes in dispute settlement

During the past year, panels considered a number of the “traditional” issues that often arise in WTO dispute settlement. For example, panels adjudicated matters relating to quantitative restrictions, which refer to limits on the volume or value of goods traded by WTO members. They also adjudicated matters relating to national treatment, trade remedies and the Sanitary and Phytosanitary (SPS) Measures Agreement. Trade remedies allow governments to take remedial action when a domestic industry is being injured by imports, provided certain conditions are established through an investigation by national authorities.

However, new and at times quite challenging issues also arose that required panels to adopt new procedures or to consider substantive matters that have arisen only rarely in the past. For example, as well as considering traditional import restrictions, the panel in “India – Agricultural Products” dealt with new legal matters relating to regionalization under Article 6 of the SPS Agreement, which covers such questions as pest- or disease-free areas within countries, and introduced procedural innovations to streamline the consultation process involving scientific experts.

The panel in “Argentina – Import Measures” was faced with determining whether a combination of unwritten actions could constitute a measure for the purposes of WTO dispute settlement. The panel in “China – Rare Earths” looked at the traditional issue of border restrictions from the new perspective of export controls. In the trade remedies area, the “China – Autos (US)” panel considered a number of traditional claims arising under the Anti-Dumping Agreement and the SCM Agreement in relation to respective investigations and duties, such as the obligation on investigating authorities to require the submission of adequate non-confidential summaries of confidential information in the petition, as well as taking a new look at the way an authority determines residual anti-dumping and countervailing duties for unknown exporters.

In “US – Carbon Steel (India)”, the panel dealt with the traditional issue of countervailing duties but it examined, from new angles, claims of systemic importance within the context of the SCM Agreement, such as the definitions of “public body” and “financial

contribution". Similarly, in "US – Countervailing Measures (China)", the panel dealt with countervailing measures but it had also to examine the simultaneous challenge of 17 anti-subsidy investigations and to consider for the first time whether an authority can presume majority state-owned enterprises to be "public bodies" under Article 1 of the SCM Agreement.

#### Argentina – Import Measures

In the dispute "Argentina – Import Measures", the European Union, the United States and Japan made a number of traditional claims under the GATT 1994 related to two measures that allegedly restricted the complainants' ability to import into Argentina. These were the Advance Sworn Import Declaration for imports and certain trade-related requirements. The panel agreed with the complainants that the challenged measures constituted import restrictions prohibited under Article XI:1 of the GATT 1994 (elimination of quantitative restrictions). With respect to the trade-related requirements, the panel found that Argentina required importers to incorporate a certain level of local content in their products, which is inconsistent with the national treatment obligation in Article III:4 of the GATT 1994.

In making these findings, the panel was faced with new and challenging evidentiary issues. The unwritten nature of Argentina's trade-related requirements, which were not stipulated in any law or regulation, meant that the panel had to examine more than 900 pieces of evidence (exhibits) so as to define the contours and the scope of the measure before considering whether the measure was consistent with Argentina's WTO obligations.

The panel report is currently under appeal. The Appellate Body report is expected in early 2015.

#### India – Agricultural Products

The panel in "India – Agricultural Products" considered a number of traditional claims under the SPS Agreement that required the use of experts to assist the panel in its examination of the scientific evidence. Panels started to rely on experts in SPS disputes as far back as 1997 when the first SPS dispute was brought to the WTO. The use of experts, while necessary and worthwhile, has tended to slow down the work of panels. Consequently, the panel in "India – Agricultural Products" adopted some procedural innovations in its consultation with the experts, e.g. shorter deadlines for all stages of the expert consultation process and a reduced number of experts, thereby achieving efficiencies and time savings in the process.

In terms of novelty, from a substantive point of view, this was the first dispute in which a respondent argued that its SPS measures "conform to" an international standard pursuant to Article 3.2 of the SPS Agreement and that, consequently, compliance with other provisions of the SPS Agreement (including those on the need for scientific foundation of SPS measures) must be presumed. Furthermore, this was the first panel to interpret the provisions on adaptation to regional conditions under Article 6 of the SPS Agreement.

The panel report is currently under appeal. The Appellate Body Report is expected in the first half of 2015.

#### China – Rare Earths

Like the panel on "Argentina – Import Measures", the rare earths panel considered traditional claims brought by the complainants – the United States, the European Union and Japan – under Article XI of the GATT 1994 relating to quantitative restrictions. The panel also considered China's defence of its export restrictions under Article XX of the GATT 1994. This case therefore dealt with traditional GATT disciplines but from the new perspective of export rather than import controls.

There is almost no jurisprudence on export controls, and the panel was required to closely analyse the effects, including certain unforeseen effects, of export restrictions on international trade. Additionally, while Article XX defences in relation to violations of Article XI of the GATT 1994 have often been raised in WTO dispute settlement proceedings, the first time being in the 1997 "US – Shrimp" dispute, this was only the second dispute in which Article XX was raised in defence of an export restriction.

Article XI refers to the elimination of quantitative restrictions while Article XX sets out general exceptions that WTO members may rely upon to excuse violations of GATT obligations. For example, a member may be permitted to take measures that violate its GATT obligations if they are necessary to protect human, animal or plant life or health.

#### US – Countervailing and Anti-Dumping Measures (China)

In this dispute, the panel had to consider a traditional GATT claim on the publication and administration of trade regulations (Article X) although such a claim is not frequently raised in trade remedy disputes. Notably, the panel examined the obligation on members not to enforce a measure of general application that increases a rate of duty or imposes a new or more burdensome requirement prior to its official publication and not to enforce such measure with retroactive effect.

The panel was required to examine, for only the second time, a relatively new type of claim concerning the simultaneous application of anti-dumping and countervailing duties in a non-market economy (NME) context ("double remedies").

#### China – Autos (US)

In this dispute, the panel considered a number of traditional claims under the Anti-Dumping Agreement and the SCM Agreement in relation to respective investigations and duties, such as the obligation on investigating authorities to require the submission of adequate non-confidential summaries of confidential information in the petition and to disclose the essential facts under consideration which form the basis for its decision to impose anti-dumping duties.

However, the panel took a new look at considering the way an authority defines the domestic industry, determines residual anti-dumping and countervailing duties for unknown exporters and conducts the analysis of price effects and causation.

#### US – Carbon Steel (India)

This dispute dealt with a traditional challenge of countervailing duties imposed by the United States on imports of hot-rolled carbon steel flat products from India.

Various new aspects of claims of systemic importance within the context of the SCM Agreement were addressed, including the definition of “public body”, the definition of “financial contribution”, benchmarks for calculating the benefit of the financial contributions and the use of “facts available”.

### US – Countervailing Measures (China)

Similar to “US – Carbon Steel”, this dispute addressed numerous traditional issues under the SCM Agreement. Rather unusually, the panel was faced with the simultaneous challenge of 17 countervailing duty investigations, which resulted in a dispute covering a myriad of determinations and claims.

From a substantive point of view, this was the first dispute to examine whether majority state-owned enterprises can be presumed by an authority to be “public bodies”. It was also one of the few disputes that addressed whether export restraints can constitute a “financial contribution”, how to reach market-determined benchmark prices for a benefit determination, whether there is a sequence in a specificity analysis, how to identify an unwritten subsidy programme, and the use of facts available.

### US – Shrimp II (Viet Nam)

This was the latest dispute in which a panel had to revisit the long-disputed issue of using “simple zeroing” in US anti-dumping administrative and sunset reviews (see page 42). Zeroing is a methodology employed by governments in anti-dumping investigations (see pages 59-60) so that whenever the export price of a product exceeds normal value the price of that sale is considered to be zero for purposes of calculating the dumping margin.

However, the panel also considered other matters such as whether, in anti-dumping proceedings involving NME countries, an authority may treat all companies within a NME country as a single, NME-wide entity and assign a single rate to that entity – all new issues for the panel's consideration.

The panel report is currently under appeal. The Appellate Body report is expected in the first half of 2015.

### EC – Seal Products

The “EC – Seal Products” panel was established to examine EU prohibition on the importation and marketing of seal products. The EU measure includes exceptions to the prohibition for seal products derived from hunts conducted by Inuit or indigenous communities and hunts conducted for marine resource management purposes, provided certain conditions are met. Canada and Norway challenged the EU measure under the Technical Barriers to Trade (TBT) Agreement and the GATT 1994. The panel report was circulated to WTO members in November 2013 and was appealed in January 2014 (see page 106).

## > Resource constraints in WTO dispute settlement

The statistics above reflect the high demand that is severely testing the capacity of the WTO dispute settlement mechanism.

As Director-General Roberto Azevêdo mentioned in his speech to the DSB on 26 September 2014, there are several constraints on the WTO's ability to extend that capacity. For example, DG Azevêdo noted that the WTO has faced difficulties in retaining staff in the three dispute settlement divisions (the Appellate Body Secretariat, Legal Affairs and Rules). He acknowledged that the private sector and other institutions can sometimes offer WTO dispute settlement lawyers more stable and lucrative long-term working conditions and better career advancement opportunities. Inevitably, this has led to the loss of a number of trained and experienced lawyers and consequently their institutional and case law memory.

In addition, as DG Azevêdo noted, the intensity of the work required to complete an appeal within the 90-day timeframe means that it is not possible for an Appellate Body member (see page 103) to serve on two divisions with identical or largely overlapping schedules. The “90 days” refers to how long the Appellate Body has to circulate its report from the date on which a notice of appeal is filed. These and other factors explain why members are experiencing delays in getting panels up and running after composition. It also explains why the Appellate Body occasionally needs more than 90 days to complete appeals and why parties may have to wait for an appeal slot to become available.

Given the ever-increasing dispute settlement workload, coupled with the recent loss of a number of trained and experienced dispute settlement lawyers, DG Azevêdo reallocated resources so that the three dispute settlement divisions could recruit junior lawyers through temporary contracts for a period of up to two years. In addition, some results were achieved by temporarily reassigning staff working in other Secretariat divisions, who had previously worked on disputes in professional and support capacities, to work on the pending disputes.

However, these solutions only provide temporary relief for what is a recurrent problem. The need for specialised skills, at both professional and support staff levels, means that the WTO needs to hire new staff at both the senior and junior levels. Moreover, while the WTO has been able to attract qualified people through temporary contracts, it is unable to retain them without offering more stability and long-term career opportunities.

To address this issue, in 2014 DG Azevêdo allocated 15 additional posts to the three dispute settlement divisions – six at the senior level and nine at the junior level. His intention is to significantly increase capacity in the dispute settlement area. In the unlikely event that dispute settlement activity were to wane in the coming years, these individuals could be put to work elsewhere in the Secretariat and brought back to work in dispute settlement when required. These remedial measures take into account the limitations imposed by WTO members, including the overall cap on the budget and the cap on the proportion of the budget that can be used for costs related to personnel.

Bearing in mind WTO members' continued reliance on, and faith in, the WTO dispute settlement system, it is paramount that adequate resources be allocated to serve this important function of the WTO. DG Azevêdo has made clear his commitment to doing so.



# Appellate Body

**The Appellate Body had a busy year in 2014, with seven appeals being filed and the Appellate Body issuing reports for five of those appeals. The Dispute Settlement Body (DSB) appointed a seventh member to the Appellate Body, Shree Baboo Chekitan Servansing of Mauritius, for a four-year term.**

## ➤ Appointment of new Appellate Body member

On 10 September 2014, the Selection Committee tasked with appointing a seventh Appellate Body member recommended that Shree Baboo Chekitan Servansing of Mauritius be appointed for a four-year term. The membership endorsed this recommendation and appointed Mr Servansing to the Appellate Body at the DSB meeting of 26 September 2014. He replaces David Unterhalter of South Africa, whose two terms expired in December 2013.

Mr Servansing was the Ambassador and Permanent Representative of the Republic of Mauritius to the United Nations Office and other international organizations in Geneva, including the WTO, from 2004 to 2012. As Ambassador to the WTO, Mr Servansing chaired a number of committees, including the Committee on Trade and Development for three consecutive terms from 2007 to 2009. Since March 2013, Mr Servansing has been Team Leader of the Project Monitoring Unit on the Technical Barriers to Trade (TBT) Programme of the African, Caribbean and Pacific Group of States (ACP) and the European Union, where he is responsible for capacity-building assistance to ACP countries to enhance their export competitiveness and improve quality infrastructure to comply with technical regulations.

The appointment of Mr Servansing to the Appellate Body followed a rigorous selection process that involved the vetting of candidates from seven WTO members: Cameroon, Egypt, Ghana, Kenya, Mauritius, Uganda and Zimbabwe. "The number and quality of the

candidates put forward for selection was an encouraging sign of members' continuing confidence in the WTO dispute settlement mechanism, and particularly in the role of the Appellate Body," said the Chair of the DSB, Fernando de Mateo, at the swearing-in ceremony in October.

As of 31 December 2014, the seven Appellate Body members were:

- Ujal Singh Bhatia (India) (2011-15)
- Seung Wha Chang (Republic of Korea) (2012-16)
- Thomas R. Graham (United States) (2011-15)
- Ricardo Ramírez-Hernández (Mexico) (2009-17)
- Shree Baboo Chekitan Servansing (Mauritius) (2014-18)
- Peter Van den Bossche (Belgium) (2009-17)
- Yuejiao Zhang (China) (2008-16)

## Background on the Appellate Body

The Appellate Body consists of seven members appointed by the Dispute Settlement Body. Each member is appointed for a term of four years, with the possibility of being reappointed for one further four-year term. Three members of the Appellate Body hear an appeal of a panel's ruling. Any party to a dispute may appeal the panel report to the Appellate Body. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.



✓ The Dispute Settlement Body (DSB) appointed Mr Shree Baboo Chekitan Servansing (right) to the Appellate Body at the DSB meeting of 26 September 2014. The Chair of the Appellate Body, Mr Ricardo Ramírez-Hernández, presided over the swearing-in ceremony.

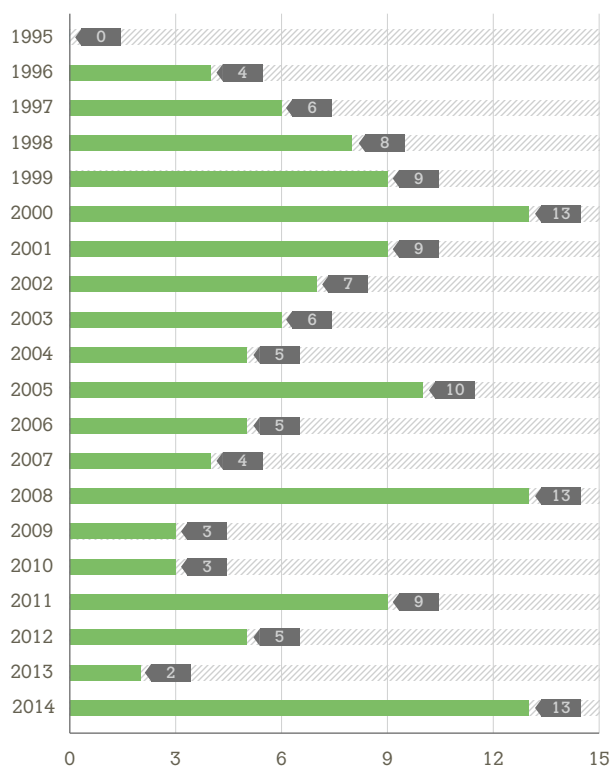


Members of the Appellate Body as of 31 December 2014, from left to right: Ujal Singh Bhatia, Peter Van den Bossche, Shree Baboo Chekitan Servansing, Thomas R. Graham, Yuejiao Zhang, Seung Wha Chang and Ricardo Ramírez-Hernández (Chair of the Appellate Body).

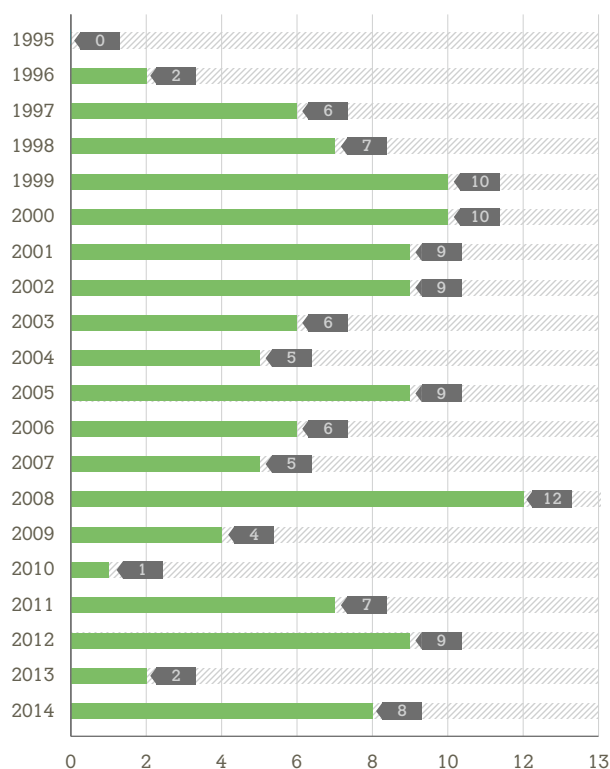
## > Appeals

During the year, the Appellate Body heard seven appeals, covering 13 disputes (see Figure 3 and Table 5). In 2014, the Appellate Body circulated eight reports (see Figure 4 and Table 6). In addressing the appeals, the Appellate Body discussed several issues of systemic significance. These included claims under the TBT Agreement, the general exceptions in Article XX of the General Agreement on Trade and Tariffs (GATT) 1994, the disciplines governing subsidies and countervailing duties and requirements that measures be published before they are applied (the publication of measures).

**Figure 3:** Number of notices of appeal filed, 1995 to 2014



**Figure 4:** Number of Appellate Body reports circulated, 1995 to 2014\*



\* Some Appellate Body reports were issued as a single document covering two or more reports.



**Table 5: Appeals filed in 2014**

Panel reports appealed	Date of appeal	Appellant	Document number for notification of an appeal	Other appellant	Document number for notification of an other appeal
United States — Certain Country of Origin Labelling (COOL) Requirements (Article 21.5 – Mexico)	28 November 2014	United States	WT/DS386/28	Mexico	WT/DS386/29
United States — Certain Country of Origin Labelling (COOL) Requirements (Article 21.5 – Canada)	28 November 2014	United States	WT/DS384/29	Canada	WT/DS384/30
Argentina – Measures Affecting the Importation of Goods	26 September 2014	Argentina	WT/DS438/15	European Union	WT/DS438/16
Argentina – Measures Affecting the Importation of Goods	26 September 2014	Argentina	WT/DS444/14	No other appeal	-
Argentina – Measures Affecting the Importation of Goods	26 September 2014	Argentina	WT/DS445/14	Japan	WT/DS445/15
United States — Countervailing Duty Measures on Certain Products from China	22 August 2014	China	WT/DS437/7	United States	WT/DS437/8
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	8 August 2014	India	WT/DS436/6	United States	WT/DS436/7
United States — Countervailing and Anti-Dumping Measures on Certain Products from China	8 April 2014	China	WT/DS449/6	United States	WT/DS449/7
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum	8 April 2014	United States	WT/DS431/9	China	WT/DS431/10
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum	25 April 2014	China	WT/DS/432/9	No other appeal	-
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum	25 April 2014	China	WT/DS/433/9	No other appeal	-
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products	24 January 2014	Norway	WT/DS401/9	European Union	WT/DS401/10
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products	24 January 2014	Canada	WT/DS400/8	European Union	WT/DS400/9

**Table 6: Appellate Body reports circulated in 2014**

Panel reports appealed	Date of appeal	Appellant	Document number for notification of an appeal	Other appellant	Document number for notification of an other appeal	Circulation date of report
United States — Countervailing Duty Measures on Certain Products from China	22 August 2014	China	WT/DS437/7	United States	WT/DS437/8	18 December 2014
United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India	8 August 2014	India	WT/DS436/6	United States	WT/DS436/7	8 December 2014
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum <sup>1</sup>	8 April 2014	United States	WT/DS431/9	China	WT/DS431/10	7 August 2014
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum <sup>1</sup>	25 April 2014	China	WT/DS432/9	No other appeal	-	7 August 2014
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum <sup>1</sup>	25 April 2014	China	WT/DS433/9	No other appeal	-	7 August 2014
United States — Countervailing and Anti-Dumping Measures on Certain Products from China	8 April 2014	China	WT/DS449/6	United States	WT/DS449/7	7 July 2014
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products <sup>2</sup>	24 January 2014	Canada	WT/DS400/8	European Union	WT/DS400/9	22 May 2014
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products <sup>2</sup>	24 January 2014	Norway	WT/DS401/9	European Union	WT/DS401/10	22 May 2014

<sup>1</sup> These three Appellate Body reports were circulated in a single document.

<sup>2</sup> These two Appellate Body reports were circulated in a single document.

## > TBT Agreement

The year saw a continuation of the recent trend of disputes involving claims raised under the TBT Agreement. In “EC – Seal Products”, Canada and Norway challenged measures adopted by the European Union that established the conditions under which seal products could be imported and/or placed on the EU market (EU Seal Regime). On appeal, the Appellate Body reversed the panel’s finding that the EU Seal Regime is a “technical regulation” within the meaning of Annex 1.1 to the TBT Agreement, which lays down product characteristics or their related processes and production methods.

Additionally, in addressing the relationship between the non-discrimination obligations in the TBT Agreement and the GATT 1994, the Appellate Body upheld the panel’s finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT 1994. Still in this regard, the Appellate Body upheld the panel’s conclusion that the EU Seal Regime is inconsistent with Article I:1 of the GATT 1994. The European Union did not appeal the panel’s finding that the measure at issue is inconsistent with Article III:4 of the GATT 1994.

## > General exceptions in Article XX of the GATT 1994

### EC - Seal Products

Two appeals that came before the Appellate Body in 2014 concerned the availability of the general exceptions in Article XX of the GATT 1994. “EC – Seal Products” was the first WTO case to examine whether a measure adopted to address public concerns regarding animal welfare may be justified on the grounds that it is “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994, which covers general exceptions. This aspect of the case, and the interests of the Inuit, indigenous peoples inhabiting Arctic regions, implicated in the measure has generated much interest among non-governmental organizations (NGOs) and the public.

The Appellate Body upheld the panel’s finding that the EU Seal Regime is provisionally deemed “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994. As regards the chapeau, an introductory text that broadly defines principles and objectives, of Article XX of the GATT 1994, the Appellate Body found that the panel erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement.

Instead, it should have conducted an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau. The Appellate Body completed the analysis and found, as the panel did, that the European Union had not demonstrated that the EU Seal Regime met the requirements of the chapeau of Article XX of the GATT 1994. Consequently, the Appellate Body found that the European Union had not justified the EU Seal Regime under Article XX(a) of the GATT 1994.

### China – Rare Earths

In “China – Rare Earths” (see page 101), two issues regarding the general exceptions under the GATT 1994 arose. First, China appealed an intermediate finding made by the panel in reaching its conclusion

that Article XX of the GATT 1994 could not be used to justify a breach of Paragraph 11.3 of China’s Accession Protocol regarding export duties. In upholding the panel’s finding, the Appellate Body found that the Marrakesh Agreement, the multilateral trade agreements and China’s Accession Protocol form a single package of rights and obligations that must be read together.

However, the question of whether there is an objective link between an individual provision in China’s Accession Protocol and existing obligations under the 1994 Marrakesh Agreement, which established the WTO, and the multilateral trade agreements or whether China may rely on an exception provided for in those agreements to justify a breach of such protocol provision must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute.

Second, China did not appeal the panel’s finding that China’s export quotas were inconsistent with Article XI:1 of the GATT 1994, barring prohibitions or restrictions other than duties, taxes or other charges. However, it 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 are not measures “relating to” the conservation of exhaustible natural resources and are not “made effective in conjunction with” restrictions on domestic production or consumption.

The Appellate Body found that the panel rightly considered that it should focus on the measures’ design and structure rather than on their effects in the market place. For this and several other reasons, 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.

## > Subsidies and countervailing duties

In 2014, the Appellate Body decided three appeals that involved the United States’ use of countervailing duties, which are duties used to counter the effects of subsidies. In addressing these three disputes, several issues of systemic significance were discussed, including the term “public body”, the calculation of benefit and the publication of measures.

### US – Carbon Steel (India)

Regarding the meaning of the term “public body” in Article 1.1(a)(1) of the Safeguards and Countervailing Measures (SCM) Agreement, the Appellate Body in “US – Carbon Steel (India)”, which concerned US countervailing duties on imports of certain hot-rolled carbon steel flat products from India, found that a public body is an entity that possesses, exercises or is vested with governmental authority. Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.

The Appellate Body further recalled that just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, state to state, and case

to case. An investigating authority must therefore evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.

In “US – Carbon Steel (India)”, the Appellate Body also set forth an interpretation of Article 14(d) of the SCM Agreement as it relates to the identification of an appropriate benchmark for calculating benefit to the recipient of a subsidy. The Appellate Body interpreted the terms “prevailing market conditions” in Article 14(d) of the SCM Agreement and considered that, taken together, these terms describe generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.

Furthermore, the Appellate Body emphasized that whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision.

In “US – Carbon Steel (India)”, the Appellate Body also addressed “cross-cumulation”, which gives the right to aggregate subsidy effects that might not on their own be enough to qualify as distortion and found that Article 15.3 and other provisions of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of nonsubsidized but dumped imports. Article 15.3 applies where imports of a product from more than one country are simultaneously subject to countervailing duty investigations.

#### **US – Countervailing Measures (China)**

In “US – Countervailing Measures (China)”, which concerned US countervailing measures on certain products from China, the Appellate Body clarified that because the issue of whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of incountry prices from any particular source, including government-related prices other than the financial contribution at issue.

With respect to the publication of measures, the Appellate Body in “US – Countervailing and Anti-Dumping Measures (China)” stated that whether a measure increases a duty or imposes a new or more burdensome requirement within the meaning of Article X:2 of the GATT 1994 – and must thus be published before it is enforced – requires a comparison between the new measure of general application in municipal law and the prior published measure that it replaced or modified.

Thus, Article X:2 requires the identification of a “baseline” of comparison in municipal law applicable prior to the new measure. Hence, the Appellate Body determined that the panel erred in finding that the phrase “under an established and uniform practice” in Article X:2 served to define the relevant prior rate that was to be used to establish whether or not an advance in a rate of duty had been effected.

For this and other reasons, the Appellate Body reversed the panel’s finding under Article X:2 of the GATT 1994 that the United States had not acted inconsistently with Article X:2 of the GATT 1994 because Section 1 of United States Public Law PL-112-99, which had been enforced before its publication, did not effect an advance in a rate of duty or other charge on imports under an established and uniform practice, or impose a new or more burdensome requirement, restriction or prohibition on imports.